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Legitimacy and Legality: Carl Schmitt and the Dialectic of Modernity

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Abstract of the Dissertation

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Recently, Carl Schmitt's critique of the modern liberal state has been deployed in an assessment of political modernity. One of the key ideas underlying this critique is the distinction between legitimacy and 'mere legality,' which he identifies with modernity. I begin to assess this distinction first from the point of view of Schmitt's theory of secularization, since his critique of legality is the result of a certain philosophy of history. Secondly, I set Schmitt's critique of legality against a critical theoretical account of law and modernity by means of a discussion of the work of Hans Blumenberg, Franz Neumann and Jürgen Habermas. While taking issue with these theorists, I find in this tradition an account of the modern rule of law as the basis for a normative account of democratic legitimacy.

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List of Abbreviations

Listed below are the abbreviations of the primary works most frequently cited in this study. The original publication dates appear in brackets.

Hans Blumenberg

LMA *The Legitimacy of the Modern Age*, trans. Robert M. Wallace ([1966] Cambridge, MA: MIT Press, 1983).¹

Jürgen Habermas

BFN *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg ([1992]Cambridge, MA: MIT Press, 1996).

TP *Theory and Practice*, trans. John Viertel. ([1971]Boston: Beacon press, 1974).²

TCA *The Theory of Communicative Action*, 2 vols., trans. Thomas McCarthy ([1981]Boston: Beacon Press, 1984).

Franz Neumann

RL *The Rule of Law: Political Theory and the Legal System in Modern Society*. ([1936]Dover, NH: Berg Publishers, 1986).³

¹ The 1983 translation is based on the revised edition which appeared in three paperback volumes in 1973, 1974, and 1976.

² This book has undergone several incarnations. The English version used here is an abridgement by the author of the fourth edition of *Theorie und Praxis* published in 1971. All chapters except chapter four have appeared in different German editions beginning in 1963.

Carl Schmitt

- CT* *Constitutional Theory*, trans. Jeffrey Seitzer ([1928] Durham, NC: Duke University Press, 2008).
- CP* *The Concept of the Political*, trans. George Schwab ([1928] Chicago: University of Chicago Press, 1996).
- L* *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. George Schwab and Erna Hilfstein ([1938] Westport: Greenwood Press, 1996).
- ND* “The Age of Neutralizations and Depoliticizations” [1929] in Carl Schmitt, *Concept of the Political*, trans. Matthias Konzett and John P. McCormick (Chicago: University of Chicago Press, 2007).
- OTT* *On the Three Types of Juristic Thought*, trans. Joseph Bendersky ([1934] Westport, CT: Greenwood Press, 2004).
- PT* *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab ([1922] Chicago: University of Chicago Press, 2005).
- PTII* *Political Theology II: The Myth of the Closure of Any Political Theory*, trans. Michael Hoelzl and Graham Ward ([1970] Malden, MA: Polity Press, 2008).

³ The original 1936 title was *The Governance of the Rule of Law: An Investigation into the Practical Theories, the Legal System, and the Social Background in the Competitive Society*.

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Introduction

The relationship between legitimacy and legality is one of the oldest problems in political philosophy. It extends back to Plato's dialogues where Socrates strives to show that justice cannot be reducible to the obedience to an extant code. In the *Euthyphro*, Socrates strives to show how justice cannot be reduced to an extant code. In the *Republic*, the dialectic between legitimacy and legality is further explored by means of Socrates' argument with Thracymachus, who reduced justice—supposedly a moral property of law—to the obedience to a group of laws that the ruling class establishes to benefit itself. Law under Thracymachus' view is a fiction that serves to disguise a particular power structure. Emptied of normative content, law is mere legality, or might.¹

The problem concerning the foundation of law gained urgency during the modern era when the effort was made to work out an alternative to morality and governance based on the obedience to God. The political project of the enlightenment sought to ground political association in coercive laws understood as the product of the legislator's own political will. Various types of social contract theories served to bring together legality and legitimacy. This project was possible only on the basis of a conception of persons as rational and autonomous beings capable of giving themselves law. This universalist foundation of law and morality is what came to be embodied in the idea of the constitutional state, individual rights, and in the various forms of democratic self-legislation.

Nowhere perhaps was this tradition put more into question than in Germany. It is no coincidence that Carl Schmitt, possibly the most incisive of the counter-Enlightenment critics, came out of a very German tradition that champions irrationality and denies reason the capacity

¹ See Plato, *Republic*, trans. by G.M.A. Grube (Indianapolis: Hackett, 1992), (338c-339b). The dialectic between legitimacy and legality in the *Republic* can be further explored by taking into consideration Cephalus' definition of justice (328b-331d). For him, justice is nothing other than acting according to the laws of the city and not offending the gods. Justice here is reduced to a particular *modus vivendi*, far from the inquiry into the normative sources of political power and law that Plato strove to ground.

for self-fulfillment.² This tradition, which extends back to Nietzsche, heavily influenced the “conservative revolutionary” movement of the early twentieth century. A “fellow traveler” in this movement, Schmitt rejected the entire belief structure of the Enlightenment.³ In particular, he rejected the idea of rule by law. The legitimacy of the sovereign’s will for him always asserts itself over the system of law; might rules over right. As Schmitt claims, “the authority to suspend valid law... is so much the concept of sovereignty” (*PT*, 9). What characterizes the Enlightenment in his view is an attempt to “repress” sovereignty together with its entire extra-legal conceptual framework: the exception, the political, absoluteness, the unbounded decision, concrete life, elements whose essence cannot be captured by abstract rules and laws. Indeed, the “state of exception” for him was the locus of deep theoretical inconsistencies for Enlightenment philosophy, in particular for liberalism as the reigning modern political theory and order. Schmitt maintained that these inconsistencies proved detrimental to the bourgeois state’s ability to confront political crises that result from the threat of internal and external enemies. Schmitt spent a considerable portion of his life testing what he took to be liberalism’s naive belief in the rule of law as the stabilizing and legitimate foundation of modern political orders.

By now, Schmitt’s resurgence within the last twenty years has been amply documented.⁴ Given Schmitt’s political leanings and his service to the Nazi regime, the appropriation of some of Schmitt’s criticisms of liberalism by the left has led to a dispute that has created a literature of its own.⁵ The dispute involves, among other issues, the left’s complicity in the demise of

² Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, (Cambridge, MA: The MIT Press, 1990), especially chapter four.

³ Richard Wolin, “Carl Schmitt: The Conservative Revolution and the Aesthetics of Horror,” in *Labyrinths: Explorations in the Critical History of Ideas*, (Amherst: University of Massachusetts Press, 1995), 106.

⁴ Here I will only mention a few articles that condense a lot of bibliographical material. Andreas Kalyvas reviews some of the first main approaches to Schmitt in his review essay “Who’s Afraid of Carl Schmitt?” in *Philosophy and Social Criticism* 25, No. 5 (1999): 87-125. See also Tracy B. Strong, “Forward: Dimensions of the New Debate around Carl Schmitt,” in Carl Schmitt, *Concept of the Political*, (Chicago: University of Chicago Press, 1996). The journal *Telos* often publishes articles on Schmitt as well as translations and commentaries of his works.

⁵ For recent overviews of Schmitt and his reception see Benno Teschke, “Decisions and Indecisions: Political and Intellectual Receptions of Carl Schmitt,” in *New Left Review* 67 (Jan Feb 2011): 61-95 and Peter C. Caldwell, “Controversies over Carl Schmitt: A Review of Recent Literature,” in *The Journal of Modern History* 77 (June 2005): 357-387. For negative reactions to Schmitt’s renaissance and adoption by political theorists see Jürgen Habermas, “The Horrors of Autonomy,” in *The New Conservatism: Cultural Criticism and the Historians’ Debate*, (Cambridge, MA: MIT Press, 1989); Richard Wolin, “Carl Schmitt, Political Existentialism and the Total State,” in *The Terms of Cultural Criticism: The Frankfurt School, Existentialism, Poststructuralism*, (New York: Columbia University Press, 1992).

Weimar as well as the socialist fiasco of the twentieth century. On the whole, the dispute concerns certain illiberal tendencies at the heart of leftwing politics.⁶

Indeed, for many twentieth century leftwing movements bourgeois formal law did nothing but uphold the social contradictions of capitalism. Legitimacy in their eyes depended on the transformation of the economic organization of society and the concomitant sublation of the entire liberal state. Generations of leftwing students, theorists, and politicians came to view democracy and legitimacy as being irreconcilable with bourgeois legality.⁷ As Georg Lukács, one of the founders of Western Marxism and a precursor of the Frankfurt School, succinctly put it, the state is nothing but “a real fact whose actual power must be reckoned with but which has no inherent right to determine our actions. The state and the laws shall be seen as having no more than an empirical validity.”⁸

While the socialist projects of the twentieth century have largely failed, the perceived breach between legitimacy and legality is alive and well. As is attested for by looking at the political theory literature of the past twenty years, Schmitt’s critique still resonates for many scholars who find that modern liberal institutions are not able to make good on their promise of legitimacy. On the one hand, Schmitt’s theory of sovereignty and the exception proved indispensable for describing the torture and indefinite detention policies of western liberal democracies in the wake of 9/11.⁹ The idea that the state of exception and rule by decree constitute the normal paradigm of government rang true again earlier this year when President Barack Obama ordered the killing without due process of Osama bin Laden. Here international law and the universal right to legal defense were dismissed for reasons of political expediency.

In another vein, liberalism and liberal societies have been criticized for lacking structures of transcendent meaning, for taking the individual as isolated and pre-social, and for advancing a

⁶ For a discussion of Schmitt and the left vis-à-vis the demise of see Stephen Turner, “Schmitt, *Telos*, the Collapse of Weimar, and the Bad Conscience of the Left,” in *Fast Capitalism* 5, No. 1 (2009).

⁷ For a view of how this played out in Germany see Matthew Specter, *Habermas: An Intellectual Biography*, (New York: Cambridge University Press, 2010). In France this tradition is best captured by Chantal Mouffe’s work, especially as it relates to Schmitt. See Chantal Mouffe, *The Return of the Political*, (London: Verso, 2005).

⁸ Georg Lukács, “Legality and Illegality,” in *History and Class Consciousness*, (Cambridge, MA: MIT Press, 1994), 262.

⁹ Giorgio Agamben’s *State of Exception*, (Chicago: University of Chicago Press, 2005) is the paradigmatic text of this wave of scholarship.

(neutral) conception of equality that excludes difference.¹⁰ This criticism results in the perception that liberal political institutions are not able to foster the necessary structures of solidarity or community for a proper allegiance to its laws. Schmitt's critique has thus also served to lend theoretical support for theories of agonistic democracy which seek to re-orient democratic struggles in the face of unbridgeable differences along gender, class, and ideological lines.¹¹ For these critics of liberalism, Schmitt's critique provides a fresh antidote to overly normativistic theories such as Rawls' political liberalism and Habermas' appeal to reasons and consensus. His work brings to light what many take as a fundamental tension between liberalism and democracy, arguing that the essence of any political order lies in the unified political will of a people and not on its legal structure. This political basis of the state is what gives its legal structure full meaning. Legitimacy, in short, is prior to legality.

This project is an attempt to outline and respond to Schmitt's critique of the rule of law ideal focusing on the distinction between legitimacy and legality. The standpoint and theoretical framework on which I will base my analysis and response throughout this project will be that of critical theory—in particular, the legal philosophy of Franz Neumann and Jürgen Habermas. I take the critical theory tradition to be particularly adequate for an analysis and critique of Schmitt because both Schmitt and the Frankfurt School tradition share a certain number of sensitivities that provide for a rich contrast and evaluation. These sensitivities, which are brought to light more fully in the dissertation, concern a strong anxiety over the negative effects of *instrumental rationality* on the cultural life of modern society; the idea that law needs to do more than merely enable the coordination of individual interest; the recognition of the *factual* nature of law and state power; and closely related to all of these, an awareness of the propensity, in modernity, for the law to become *reified*, or estranged, from social processes and meaning, that is, the propensity for law to appear as mere legality. Underlying these concerns for both Schmitt

¹⁰ Important as well, are the thorny issues Schmitt brings up concerning the indeterminacy of the liberal view of law (the “indeterminacy” thesis) and the prominence of discretionary moments in juridical decision-making. See John P. McCormick, “Three Ways of Thinking ‘Critically’ about the Law” in *American Political Science Review* 93, No. 2 (413-428).

¹¹ See Chantal Mouffe, *The Return of the Political* (London: Verso, 2006). Chapter two contains a review of the communitarian critique of liberalism by means of Schmitt's ideas. The rest of the chapters contain a strong critique of liberalism from the standpoint of an agonistic form of democracy borrowing from Schmitt's concept of the political. For a discussion of recent literature concerning the reconciliation of liberalism's promise of universal equality with democratic particularity, see Bonnie Honig, “Between Decision and Deliberation: Political Paradox in Democratic Theory,” in *American Political Science Review* 101, No. 1 (2007): 1-17.

and the Frankfurt School is a deep anxiety over the effects of technology on the cultural life of society—in Schmitt’s particular case, the effects of technological thinking, specifically in the form of positivism, on the political life of the state. Enlightenment thought, for Schmitt, had culminated in the “iron cage” of modernity.

Despite, however, their shared sensitivities concerning modernity’s propensity to embody forms of instrumental rationality and power, Schmitt and the Frankfurt School tradition hold fundamentally different assumptions about the nature and function of law in modern society as well as the legitimacy of the modern age at large. While these assumptions and sensitivities lead Schmitt to reject modern law and turn to fascism, Neumann and Habermas attempt to reconstruct—as an effort to rescue—the legitimacy of the rule of law ideal based on a concept of reason that transcends the dictates of sovereignty. As they both hold, the liberal idea of the rule of law is “double edged.” In addition to its sheer positive and coercive nature, law also possesses a form of legitimacy that transcends it. For both theorists, modern law has a “disintegrating effect” on the status quo and for this reason must be retained.¹² This view of law is grounded in a different, less pessimistic concept of reason, one linked to the universalist promise of modern law, for Neumann, and to the discursive rationality embedded in law, in Habermas’ case.

This is the clear *liberatory* project at the root of critical theory, a project that is entirely absent from Schmitt’s critique of modern law and state power.¹³ For Neumann what severed modern legality from its ethical dimension were changes in the social structure of modern societies—in particular, the move from early competitive capitalism to monopoly capitalism. In Habermas’ case, modernity displays a tendency that divorces positive law from its discursive, legitimating foundation, a foundation he seeks to reconstruct. For both, then, while modernity had strayed, so to speak, it still harbors its “secret utopia” in the concept of reason.¹⁴

¹² The nature of the “disintegrating effect” is different in both theorists, as we will explore in chapters two and three.

¹³ Following Axel Honneth, one could further characterize this liberatory project as rescuing the “cooperative” or “intersubjective” self-actualization that constitutes the normative ideal of modern institutions. See Honneth, *Pathologies of Reason*, (New York: Columbia University Press, 2009), 25-27.

¹⁴ Horkheimer and Adorno, *The Dialectic of Enlightenment: Philosophical Fragments*, (Stanford: Stanford University Press, 2002), 67.

In Schmitt we get no such liberatory theory. For Schmitt the liberal form of legality, with its insistence on neutrality, had hollowed the transcendent power of the state, which he identifies with legitimacy. The long march of modernization leading to the rise of positivism in the second half of the 19th century in Germany had effectively eradicated the substantive, extra-legal principles on the basis of which the state had once wielded its power. As he writes, “In contemporary language, legitimacy means *righteousness* and legality *lawfulness*. Legality is the logical result of the function of a state bureaucracy or of any other mathematically constructed apparatus; it is viewed as the predictable function of a sequential procedure compatible with what is taken as modern bureaucracy” (*PT II*, 119). Legal positivism for Schmitt was central to the liberal state’s rule through technology.¹⁵ Positivism, a legal theory whose project was to conceptually outline and understand law and the state as a neutral and self-sufficient system, was the reigning conception of law that Schmitt, among others in Weimar, began to find fault in. Not entirely unrelated to the philosophy of positivism, legal positivists viewed law as a functional system of rules divorced from moral, political, and traditional values.¹⁶ For these theorists, the legitimacy of law stemmed from the authority of the state to issue commands. To this end, legal positivism placed the state within the bounds of law subduing its conflictual, i.e., political, nature in the process. Schmitt’s relentless critique of positivism derived from what he saw as its reluctance to come to terms with 1) the importance of the state as the political unity of a people, and 2) the idea that law cannot be treated independently from the legitimating political unity, an idea that fits his conception of sovereignty and his decisionistic concept of law. Schmitt’s Weimar writings argued that sovereignty is thoroughly constitutive of law and remains latent in everyday state life, even in the liberal state: “But what they do will be politics nevertheless.”¹⁷

¹⁵ An important question that arises out of this discussion is the relationship between legal positivism and liberalism, since Schmitt leveled his critique at both. While Schmitt sometimes blurs the distinction between the two it is important to keep them separate since it is possible for a monarchical state to hold a positivist view of law. Indeed, legal positivism originated in the monarchical state, but came to its own and even flourished under the conditions of liberal democracy. The reasons for this surpass the aims of this project but one obvious source of harmony between liberalism and legal positivism, and the reason they can be confounded in the first place, is that positivism can easily accommodate the terms, or values, assigned to law by liberal regimes, the main one being impartiality, one of the main conditions for pluralism. This is obviously the significant link for Schmitt.

¹⁶ Stefan Koriath, “Prologue: The Shattering of Methods in Late Wilhelmine Germany,” in *Weimar a Jurisprudence of Crisis*, edited by A. J. Jacobsen and Bernard Schlink, (Berkeley: University of California Press, 2000), 43.

¹⁷ Carl Schmitt, *Roman Catholicism and Political Form*, (Westport, CT: Greenwood Press, 1996), 17.

For Schmitt there is no need to return to a theological or pre-modern past. Sovereignty needs only to be unearthed and revealed.¹⁸

It is important to note that the distinction between legitimacy and legality pervades Schmitt's critique of the modern age as a whole. For Schmitt legality is not only a juridical feature. Indeed, it constitutes the "metaphysical outlook" of the entire age. As he notes in *Political Theology*, "The metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization" (46). Given the centrality of the category of the political for Schmitt, I take this claim to mean that we cannot help but interpret the world with political categories, in accordance with our particular, concrete, political standpoint.

Central to this view is that the liberal age's view of the world and of itself does not accord with its true nature. Indeed, the modern age was constructed in an effort to conceal its true nature. For Schmitt the concepts of the modern state are nothing but secularized theological concepts, as is modernity's entire "metaphysical image." This is why modernity for him displayed a false understanding of itself. This aspect of Schmitt's critique comes out most clearly in his secularization thesis and concept of history which I analyze by means of his debate with Hans Blumenberg. Schmitt's conception of history and secularization is key to understanding his critique of liberalism and his espousal of decisionism. After all, it is Schmitt himself who claims that "all human beings who plan and attempt to unite the masses behind their plans engages in some form of philosophy of history," such that the attempt to make sense of his program remains incomplete without a serious treatment of his conception of history. Blumenberg does not belong to the critical theory tradition but he is nevertheless included here for his "unmasking" of Schmitt's secularization thesis. Blumenberg exposed Schmitt's "political theology" as a "sum of political metaphors" whose goal was to establish the absolute quality of political reality. Blumenberg, in other words, exposed Schmitt's philosophy of history as an ideology at the service of decisionism. I take it that exposing the particular power structure behind our understanding of the world is one of the central aims of critical theory.

¹⁸ This is why, contrary to Heinrich Meier, I take Schmitt as a thoroughly modern thinker. Meier takes Schmitt's political philosophy to be grounded in revelation. See, for example, his *The Lesson of Carl Schmitt: Four Chapters on the Distinction Between Political Theology and Political Philosophy*, (Chicago: University of Chicago Press, 1998).

Unlike Neumann and other of his leftwing counterparts in Weimar, for Schmitt the tension between legitimacy and legality had little to do with the capitalist mode of production—for him capitalism was just another symptom of a broader malaise. This malaise was the modern rationalization and secularization process, a process which resulted in the neutralization, depoliticization and weakening of the modern state. A particular conception of the secularization process and philosophy of history informed his critique of the liberal legal order. As I will outline below, Schmitt's theory of neutralization and depoliticization can be taken as a variant of Weber's theory of modernity and rationalization, a problematic lineage, as Habermas has pointed out in several occasions.¹⁹ After a quick outline of Schmitt's concept of the political and his take on the rationalization process, important frameworks for contextualizing his secularization thesis and his criticism of liberal legality, I will come back to the outline of my project.

Rationalization, Neutrality, and the Positive State

Weber's theory of rationalization concerns the scientific and economic transformation that ushered traditional Western societies into the modern age. This process began in the sixteenth century and was led by what Weber defined as *Zweckrationalität*—an instrumental or means/end form of rationality which looks upon action as a mere means to the fulfillment of human interests.²⁰ An important component of this process was the separation of science and technology, art and literature, and law and morality from their traditional embeddedness in religious-metaphysical worldviews. For Weber, modern purposive rationality developed into the central feature of all domains of modern social life, most significantly, modern economic life, bureaucratic administration, and, important to our concern here, legal systems.

¹⁹ Indeed, as Habermas once noted in the context of a discussion about Weimar, Schmitt was a "legitimate pupil" of Weber's. Jürgen Habermas in *Max Weber and Sociology Today*, O. Stammer, ed., (Oxford: Blackwell, 1971), cited in David Dyzenhaus, "The Legitimacy of Legality," *The University of Toronto Law Journal* 46, No. 1 (1996), 136. As Dyzenhaus notes here, Habermas has repeated this statement, for example, by alleging that Weber left a legitimacy gap that Schmitt filled with his concept of sovereignty. I talk about Habermas' paradoxical relationship to Weber in chapter three, section two.

²⁰ Max Weber, *Economy and Society*, ch.1, 26, 29. A *wertrational* action, on the other hand, is directed towards a value that is inherent in the action itself. For an excellent treatment of Weber's multifaceted conception of rationality see Rogers Brubaker, *The Limits of Rationality: An Essay on the Social and Moral Thought of Max Weber* (Boston: Allen and Unwyn, 1984).

According to Weber, a differentiated legal order arose out of a previously undifferentiated fusion of religious, conventional and ethical regulatory system.²¹ This was the result of the development of capitalism with its characteristic “coexistence and sequence of rational consociations.”²² Formal legality for Weber is particularly fit for regulating capitalism’s market ethic and, as he went on to claim, legitimate authority in modern societies is tantamount to “the compliance of enactments which are formally correct and which have been imposed by an accustomed procedure.”²³ In this way, the formal and abstract nature of modern law stands in sharp contrast to substantive principles of legitimacy. Using much of Weber’s conceptual framework, Schmitt maintains that modern rationality, as it is embodied in liberal political orders, tends to erode the substantive legitimacy of law and politics, a legitimacy that results from the friend-enemy distinction, the fundamental basis of all politics.

In a sense, Schmitt’s concept of the political can be defined negatively as that which “the empty husk of liberalism” (*CT*, 106), as he describes it, lacks. For Schmitt the friend-enemy distinction, the distinction that distinguishes the political from other life domains, is irrational, non-formalizable, non-justifiable and, moreover, latent in all forms of political community, even in putatively neutral orders like liberalism. For Schmitt, the distinction functions as a criterion for determining the “degree of intensity of a union or separation, of an association or disassociation” (*CP*, 26).²⁴ Without bringing in any moral, aesthetic or economic judgments the friend-enemy criterion discerns “the other,” “the stranger,” as something that in an extreme case may come in conflict with “us” (*CP*, 27).²⁵ It is important for Schmitt that we understand the political in its full “*concrete and existential sense*” (*CP*, 27, my italics). We can speak of the

²¹ Weber, *Economy and Society*, 880.

²² Weber, *Economy and Society*, 635.

²³ Max Weber, *Basic Concepts in Sociology*, (New York: Citadel, 1990), 82.

²⁴ As Schmitt argues, “the inherently objective nature and autonomy of the political becomes evident by virtue of its being able to treat, distinguish, and comprehend the friend-enemy antithesis independently of other antitheses” (*CP*, 27).

²⁵ Thus, unpolitical groupings such as religious or economic organizations can potentially transform themselves into political entities if the association is strong enough to draw such a distinction. As Schmitt points out, “a religious community that wages war against other members of other religious communities is already more than a religious community; it is a political entity” (*CP*, 37). If Schmitt ever had any sympathetic feelings towards Marxism, it was because he considered its conceptualization of class struggle as worthy of consideration.

friend-enemy distinction in a *concrete* sense if we take the possibility of this life-threatening conflict as an “inherent reality” (*CP*, 28). The *existential* aspect of the concept of the political is related to the concrete possibility of conflict since this possibility ignites a strong feeling of identification in a group of people based on a life preserving instinct. As such, the grouping based on the friend-enemy distinction cannot follow, nor be constrained by, any norms or procedures. To sum up, the enemy is “the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible. These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party” (*CP*, 27). The ubiquity of the political, together with its non-normative nature, lends this category its “autonomy.”

For Schmitt, even the state, as the highest organized form of political unity, is based on such existential concepts. The concept of the constitution for him presupposes an integrating force, a political unity based on “a fundamental or ultimately effective power and energy” (*CT*, 61). As he argued, however, modern bourgeois liberalism can be defined as an attempt to erase the fundamental political conditions of its existence. Schmitt’s 1929 “The Age of Neutralizations and Depoliticizations” traces the four hundred year long process by which the modern state came to lose its particular kind of legitimating authority. Schmitt’s reading of European history is based on the shifting of what he calls “central domains” of intellectual life.²⁶ In every age, concepts, theories and ideas, including that of the state, derive their meaning from their respective central domain. For Schmitt, what characterizes these domains and what drives their successive changes is an impulse towards neutrality. Each age places its hopes of neutrality and conflict free existence in a central domain which in the long run becomes politicized and instigates a new shift. “Europeans always have wandered from a conflictual to a neutral domain, and always the newly won neutral domain has become immediately another arena of struggle, once again necessitating the search for a new neutral domain” (*ND*, 90). This process began in the sixteenth century when, as a consequence of the religious wars, Europeans began to search for a neutral sphere free of theological disputes. Thus the age of theology (sixteenth century) gave way to the age of metaphysics in the seventeenth century. This was the age of Bacon,

²⁶ Schmitt does not want to present these shifts in any sort of progressive way. The central domains move according to a logic but “are conceived neither as a continuous line of ‘progress’ upwards nor the opposite” (*ND*, 82).

Galileo, Descartes, Hobbes, and Spinoza, thinkers who constructed grand natural systems of theology, morality, and law. In this case, the former central domain of theology was discarded in favor of a less “controversial” and more neutral domain. Schmitt takes this shift to be “the strongest and most consequential of all intellectual shifts of European history,” one that defined all subsequent shifts (*ND*, 89). In the eighteenth century the central domain shifted to Enlightenment ethical and moral humanitarianism and in the nineteenth century shifted once more to economics whose core categories of human existence lie in production and consumption.²⁷

From Schmitt’s standpoint in 1929, the twentieth century had its central domain in technology (a development that Marx’s economism had already predicted). Technology appeared as the most abstract and neutral ground. A mere technical means for advancing any content whatsoever, it was “the ground of a general equalization” that leveled cultural, national and social conflicts (*ND*, 91). In this sense, Schmitt’s critique of technology resembles Lukács’ and the early Frankfurt school’s depiction of technology as a leveling power that dominates nature and spirit.²⁸ “A marvelously rational mechanism serves one or another demand, always with the same earnestness and precision, be it for a silk blouse or poison gas or anything whatsoever.”²⁹ Like Horkheimer and Adorno, furthermore, Schmitt also believed technology set off the opposite effect, a “spirit of technicity,” defined as an almost religious, mythical belief in the power of technology (*ND*, 94).³⁰ More importantly, however, for Schmitt the age of technology and technicity provided a ripe opportunity for repoliticizing the central domain.³¹ Technology could be used to further war as much as to further neutral peace. The way we come to understand the twentieth century, Schmitt claimed, would ultimately depend on which political force was

²⁷ As Schmitt points out, the romanticism of the nineteenth century was an intermediary stage and, in a sense, made possible, the shift from moralism to economism.

²⁸ In Horkheimer and Adorno’s words, “Bourgeois society is ruled by equivalence... All gods and qualities must be destroyed,” *The Dialectic of Enlightenment*, (New York: Columbia University Press, 2002), 4-5.

²⁹ Carl Schmitt, *Roman Catholicism and Political Form*, trans. G. L. Ulmen, (Westport, CT: Greenwood Press, 1996), 14-15.

³⁰ For an extensive and illuminating examination of Schmitt’s understanding of technology including a comparison with Lukács, Nietzsche and the early Frankfurt School see John P. McCormick, *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997).

³¹ For Horkheimer and Adorno, the call is to go back to Hegelian project of critical self-reflection through “determinate negation.” See *Dialectic of Enlightenment*, 18, 20.

“strong enough to master the new technology” (ND, 95). As I will attempt to show throughout this project, one of Schmitt’s main goals, at least up to the publication of his book on Hobbes’ *Leviathan*, was to restore the mythical, transcendent element that had been neutralized, or eliminated, during the course of European history.

Under Schmitt’s “central domain” understanding of European history the transference of neutrality from the central domain to the domain of the state and jurisprudence is straightforward. Indeed, a “symptom” of the neutralizing tendency of Europe’s development in the last century, the European liberal state of the nineteenth century finds “its existential legitimation precisely in its neutrality” (ND, 88). Schmitt takes positivistic legality as an expression of this neutrality. His 1936 book *The Leviathan in the State Theory of Thomas Hobbes* is in this sense a good companion piece to the “Neutralizations” essay. Written shortly after his departure from a high ranking position in the Nazi regime Schmitt took up again the problem of the legalization and concomitant depoliticization of the state.

According to Schmitt’s reading of *Leviathan*, Hobbes’ total state was responsible for setting the stage for the liberalization of politics, i.e., the depoliticization of the state. Hobbes’ *Leviathan* was not a “total person” but a grand machine incapable of comprising any kind of totality. It thus represented a failure at restoring the totality characteristic of pre-existing natural orders (L, 33). Hobbes and Descartes are two of the culpable figures for Schmitt. Making use of the argument of the “Neutralization” essay Schmitt presents these figures as epitomes of the kind of seventeenth century scientism that replaced metaphysical and theological arguments for a natural metaphysics whose concepts and foundations can be made clear to everyone. This was initiated with Descartes’ conception of the human body as machine and was extended and transferred by Hobbes to the state understood as a “huge man” (L, 37). In Schmitt’s view, Hobbes’ theory of the state represents the beginning of the four-hundred-year-long process of mechanization.³² “With the aid of technical developments, this process brought about the general ‘neutralization’ and especially the transformation of the state into a technically neutral

³² There is a widely written about backdrop to Schmitt’s book on Hobbes which is Schmitt’s long debate with Leo Strauss. For an excellent overview of this see Miguel Vatter, “Strauss and Schmitt as readers of Hobbes and Spinoza: On the Relationship between Political Theology and Liberalism” in *The Centennial Review* 4 No 3, (2004): 161-214.

instrument” (L, 42).³³ This set the course for the development of the sort of peace and security that were unattainable in the previous century due to religious strife.

Auctoritas non veritas facit legem represents in Schmitt’s view the core of modern liberal neutrality.³⁴ *Auctoritas non veritas facit legem* is the “simple, objective expression of value-and-truth-neutral, positivist-technical thinking that separates the religious and metaphysical standards of truth from standards of command and function and renders them autonomous” (L, 45). Not only did the transformation of legitimacy into legality effectively destroy the “natural political unity” of persons while insisting on a view of the cosmos that is “dependent on the conscious work of men” (L, 85). Worse, for Schmitt, was that Hobbes’ theory of miracles inaugurated the liberal concern for private, inner beliefs. Hobbes underscored “the importance of absorbing the right of private freedom of thought and belief into the political system. This contained the seed of death that destroyed the mighty leviathan from within and brought about the end of the mortal god” (L, 57).³⁵ Hobbes’ *Leviathan*, thus, depoliticized the state from two different angles. It released the state from any sort of metaphysical determinations (the switch from legitimacy to positivism and legality) and it provided the initial spark that would later result in bourgeois ideals concerning “the private sphere of freedom of the free thinking, free feeling, and, in his [Hobbes’] disposition, absolutely free individual” (L, 60). Civil society was thus born as the sphere of private action and thought. With the distinction between inner and outer spheres of the individual, the state become hollowed, devoid of truth, and thus became vulnerable to the pluralism and factions of civil society. Hobbes’ *Auctoritas non veritas* was not able to faithfully restore “the original unity of life,” in other words, it could not attain “meaningful totality” (L, 11, 100).³⁶

³³ For Schmitt, Hobbes’ *Leviathan* was still infused with personalistic elements, but the opening for the liberalization of politics is nevertheless there. These elements were further actualized by subsequent treatments, for example, by Spinoza.

³⁴ This famous quote by Hobbes appears only in the Latin edition of *Leviathan*, chapter XXVI, published in 1668.

³⁵ In chapter 37 of *Leviathan* Hobbes argues that private individuals can chose to believe or not believe in miracles. When it comes to confession of faith, however, “Private Reason must submit to the Publique, that is to say, to Gods Lieutenant.” 306. This is Hobbes’ distinction between faith and confession. The sovereign cannot command that subjects take miracles as true. All the sovereign can ask for is that *external* actions conform to his commands. Thomas Hobbes, *Leviathan*, Revised Student Edition, Richard Tuck, ed. (Cambridge: Cambridge University Press, 1996).

³⁶This is why Hobbes’ image of the Leviathan could never live up to the mythical power of the biblical Leviathan. Again, in Schmitt’s view, Hobbes’ *Leviathan* was not completely depersonalized but did contain elements that led to

Central to the liberal state's rule through technology for Schmitt was positive law.³⁷ As I further outline in chapter two, the reigning conception of law that Schmitt, among others, began to find fault in, was positivism, a legal theory whose project was to conceptually outline and understand law and the state as a neutral and self-sufficient system. Not entirely unrelated to the philosophy of positivism, legal positivists viewed law as a functional system of rules divorced from moral, political, and traditional values.³⁸ The legitimacy of law stemmed for them from the authority of the state to issue commands. To this end, legal positivism placed the state within the bounds of law subduing its conflictual nature in the process. Schmitt's Weimar writings argued that sovereignty is thoroughly constitutive of law and remains latent in everyday state life, even in the liberal state: "But what they do will be politics nevertheless."³⁹ For Schmitt there is no need to return to a theological or pre-modern past. Sovereignty needs only to be unearthed and revealed.⁴⁰

Schmitt and the Frankfurt School

Thus, aside from the critique of rationality and positivism, and the distinction between legitimacy and legality, elements which connect him with the central concerns of the early

its neutralization. See John P. McCormick, "Fear, Technology, and the State: Carl Schmitt, Leo Strauss and the Revival of Hobbes in Weimar and National Socialist Germany," in *Political Theory* 22, (1994): 619-652.

³⁷ An important question that arises out of this discussion is the relationship between legal positivism and liberalism, since Schmitt leveled his critique at both. While Schmitt sometimes blurs the distinction between the two it is important to keep them separate since it is possible for a monarchical state to hold a positivist view of law. Indeed, legal positivism originated in the monarchical state, but came to its own and even flourished under the conditions of liberal democracy. The reasons for this surpass the aims of this project but one obvious source of harmony between liberalism and legal positivism, and the reason they can be confounded in the first place, is that positivism can easily accommodate the terms, or values, assigned to law by liberal regimes, the main one being impartiality, one of the main conditions for pluralism. This is obviously the significant link for Schmitt.

³⁸ Stefan Koriath, "Prologue: The Shattering of Methods in Late Wilhelmine Germany," in *Weimar a Jurisprudence of Crisis*, edited by A. J. Jacobsen and Bernard Schlink, (Berkeley: University of California Press, 2000), 43.

³⁹ Carl Schmitt, *Roman Catholicism and Political Form*, (Westport, CT: Greenwood Press, 1996), 17.

⁴⁰ This is why, contrary to Heinrich Meier, I take Schmitt as a thoroughly modern thinker. Meier takes Schmitt's political philosophy to be grounded in revelation. See, for example, his *The Lesson of Carl Schmitt: Four Chapters on the Distinction Between Political Theology and Political Philosophy*, (Chicago: University of Chicago Press, 1998).

Frankfurt School, Schmitt also advanced a kind of hermeneutics of suspicion. Schmitt claimed that the modern age was neither what it purported nor what it appeared to be. Behind the veneer of neutrality and formalism lingered for him a non-normative political sovereignty which conferred true legitimacy to the state. It is not difficult to see why some in the left have been able to find in Schmitt resources for a critique of liberalism. It is also not difficult to see, at first glance, why so many scholars have taken Schmitt as an almost honorary Frankfurt School theorist.⁴¹ Countering Schmitt's critique of law from a critical theoretical standpoint is important since the two share common presuppositions. But, as will be shown in subsequent chapters, a critique of rationality and legal positivism does not necessarily lead to an abandonment of law.

In the late eighties, the political theory journal *Telos* ran a tantalizing debate about Schmitt's relationship and general influence on thinkers associated with the Institute for Social Research, the Frankfurt School. Ellen Kennedy sparked the debate with an article about the intellectual— as opposed to political—affinity Marcuse, Kirchheimer, Neumann and Habermas (to a lesser extent) shared with Schmitt. Kennedy defined this intellectual affinity as a “particular logic,” one that addresses the gap between facticity and validity opened up by the collapse of the old God-centered metaphysics. This logic is the sovereign's monopoly over the decision, a sovereign decision that mediates between might and right and implements justice.⁴² As Kennedy argued, for Schmitt as well as these early Frankfurt School critics, liberalism constituted a bourgeois effort to destroy sovereignty, a claim that appealed to early twentieth century Marxists struggling to forge a state theory distinct from liberalism. Several prominent theorists attacked Kennedy's piece and for the most part knocked down her argument from different angles, the main criticism being that those Frankfurt School theorists that had been attracted by Schmitt were young and did not yet form part of the Institute.⁴³

⁴¹ Apart from Ellen Kennedy, mentioned and cited in this introduction, see Alain de Benoist, who claims that Schmitt is “one of the rare ‘right wing’ authors in Germany whose thought was taken seriously by authors on the Left and even far Left.” Benoist's article later goes on to mention Benjamin as well as close friends of Benjamin's, who were avid readers of Schmitt. See “Schmitt in France,” in *Telos* 126 (Winter 2003), 140. Along the same lines see Tracy B. Strong's forward to Carl Schmitt, *The Concept of the Political*, (Chicago: University of Chicago Press, 2007), x.

⁴² Ellen Kennedy, “Carl Schmitt and the Frankfurt School,” in *Telos* 71 (Spring 1987), 39.

⁴³ See Martin Jay, “Reconciling the Irreconcilable? Rejoinder to Kennedy,” in *Telos* 71 (Spring 1987): 67- 80; Alfons Söllner, “Beyond Carl Schmitt: Political Theory in the Frankfurt School,” in *Telos* 71 (Spring 1987): 81-96; Ulrich K. Preuss, “The Critique of German Liberalism: Reply to Kennedy,” in *Telos* 71 (Spring 1987): 97-109.

William Scheuerman's *Between the Norm and the Exception: the Frankfurt School and the Rule of Law* published in 1996 revisited this relationship without causing the same stir. The book is an effort to distinguish "the intimate and complicated intellectual ties" between Schmitt and two early Frankfurt School legal theorists, Franz Neumann and Otto Kirchheimer, who significantly borrowed from Schmitt's thinking.⁴⁴ As Scheuerman indicated, far from being a closed and finished topic, their relationship had gained new significance. While, indeed, Kirchheimer and Neumann were young and had yet to develop formal ties with the institute, as Kennedy's critics pointed out, the current fascination with Schmitt's intellectual corpus by so many leftwing theorists gave a new meaning to the fascination these first young "left Schmittians" felt towards Schmitt's work.⁴⁵ Scheuerman's book was the first to put these three theorists into dialogue. It highlighted the ways in which both Frankfurt School theorists sought to preserve the classical, ethical, demand for formal law while sometimes "relapsing" into problematic Schmittian categories of thought well into their later years. The importance of their insights, however, lied in that their analysis showed how some of the problematic features of modern, positive law had more to do with its being at odds with powerful economic and political interests than with its inherent features or with the tribulations of mass democracy.⁴⁶

While I also take up Neumann's dialogue with Schmitt, my use of Neumann in this project is more narrowly focused on his analysis and response to Schmitt's legality and legitimacy distinction. I also try to stress Neumann and Habermas' differing conceptions of the rationality of the rule of law project. The democratic deficit in Neumann's rendering of the rationality of the rule of law lead to my taking up Habermas' discursive theory and his argument concerning the co-originality of democracy and the rule of law, or between legitimacy and legality, in his book *Between Facts and Norms*. Habermas' claim is that law is an

⁴⁴ William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, (Cambridge, MA: MIT Press, 1994), 9.

⁴⁵ Scheuerman, *Between the Norm and the Exception*, 15.

⁴⁶ More precisely, the problematic feature the book analyzes is the deformalization of modern law, a tendency that was already evident to Weber who is present throughout the book, almost like a fourth interlocutor. I would like to stress how indebted I am to Scheuerman's work in general. The following, in particular, provided me with crucial insights: *Between the Norm and the Exception*; *Schmitt: The End of Law*, (Lanham, MD: Rowman and Littlefield, 1999); and "Neumann v. Habermas: The Frankfurt School and the Case of the Rule of Law," in *Praxis International* 13 (1993): 50-67.

institutionalization of communicative rationality. As such it absorbs the tension between facticity and validity. “With this risky decision it preserves the link with the classical conception of an internal connection, however mediated, between society and reason, and hence between the constraints and necessities under which the reproduction of social life is carried out, on the one hand, and the idea of a conscious conduct of life, on the other” (*BFN*, 8).

Habermas’ contribution to this debate cannot be underestimated, less so in the context of German social theory. One can view it as a response not only to Weber, Luhmann, and Schmitt but also by extension to Neumann, something that has not been sufficiently stressed. As of yet there is no literature that systematically analyzes Habermas’ reconstruction of the liberal rule of law in *Between Facts and Norms* as measured against Neumann’s. Nor do we find any comprehensive treatment that shows the ways in which Neumann’s contribution to this debate is a strong precursor to Habermas’ legal theory. For all of their differences both Neumann and Habermas offer important accounts of the role of factual power in the construction of a robust and legitimate rule of law regime, and of the normative foundations of reason. Before Habermas, Neumann had already begun to address Schmitt’s strongly Weberian view of instrumental reason and legal formalism, a view which Neumann strongly rejected.

As I hope to show, Schmitt’s decisionism as a critique of political modernity relies on some problematic presuppositions. These presuppositions—at times Platonic-absolutist, at times existentialist—serve more to urge us to fatalistically accept the exigency of the present situation than to clarify and solve legitimate political and philosophical problems by means of thoughtful reflection.

Following is a brief outline of the three chapters that make up this study.

Project outline

Chapter one presents an analysis of Schmitt’s philosophy of history by means of his debate with Blumenberg. Schmitt’s conception of history is key to understanding his critique of liberalism and his espousal of decisionism. After all, it is Schmitt himself who claims that “all human beings who plan and attempt to unite the masses behind their plans engage in some form of philosophy of history,” such that the attempt to make sense of his program remains incomplete

without a serious treatment of his philosophy of history. While Schmitt and Blumenberg's discussion is extensive and wide-ranging I focus here on their diverging philosophies of history, precisely that aspect that is more relevant to gaining a more expansive understanding of Schmitt's arguments, and indeed the relationship between political thought and historical thought.

Blumenberg argues that the "exigency of the moment" that Schmitt seeks is founded upon a historical substantialism that, in Schmitt's own words, "insert[s] the eternal into the course of time."⁴⁷ Blumenberg's project is to fend off this substantialism and the specter of decisionism it represents by appeal to a narrative of historical self-consciousness. While he concedes to Schmitt that there have been persistent attempts throughout modernity to reintroduce the absolute into the political order, he denies the necessity of the reoccupation of the void of religion by an immanent absolutism. Schmitt's political theological project is thus unmasked as an attempt to cover over its conscious and active efforts at re-theologizing history and politics with the cloak of necessity. I take this to be one of the valuable lessons of Blumenberg's critique because it undermines a lot of decisionism's foundations.

Chapters two and three focus on Schmitt's critique of the liberal rule of law, more specifically on the idea of liberal legality. Chapter two deals with Schmitt's critique of legal positivism and Neumann's response both to Schmitt's challenge and to the fall of Weimar. Schmitt claimed that legitimacy cannot result from the separation of the realm of law from the substantial political elements that are fundamental to it. The law as well as the state cannot come in to being nor maintain itself without extra-legal principles. These extra-legal principles can be non-formal practices of popular sovereignty that come to be embodied in a sovereign presidential figure or concrete orders that exist prior and independently of law. In both cases, laws are *derivative* of existential or non-formal expressions of legitimacy. Neumann's critique of Schmitt from a "sociologically informed" positivist standpoint becomes valuable for two reasons. Neumann's reconstruction of the liberal rule of law is acutely aware and concerned about the economic and political foundations of law without disregarding the idea that legitimacy in the age of modernity requires a system of norms. His conception of law is, like Schmitt's, privy to the contradictions of the liberal bourgeois state, contradictions that stem from the rule of law-

⁴⁷ Carl Schmitt, "Three Possibilities for a Christian Conception of History," in *Telos* 147 (2009), 170.

sovereignty distinction. Neumann, however, does not fall prey to an authoritarian remedy. He argued for predictable and accountable forms of state intervention in the economy that would level the playing field. Neumann's argument stems from his view that the sovereignty- rule of law contradiction, or the legitimacy-legality distinction, results from challenges that advanced capitalist societies pose for the ethical dimension of the rule of law. In this sense, Neumann presents an immanent critique of the rule of law ideal, one that is not external to its ideals and presuppositions. In other words, Neumann works within the rule of law ideal without presupposing the validity of its current institutions. Neumann's conception of legitimacy, however, leaves little room for any sort of opinion and will formation, the basis of democratic legitimacy.

This constitutes the core of the rule of law's legitimacy according to Habermas' argument, the focus of chapter three. *Between Facts and Norms* provides an account of modern law as the institutionalization of radical democracy and, as such, a response to Weber and Weberian approaches to law that, like Schmitt and Luhmann's, are either pessimistic or agnostic about the legitimating potential of modern political institutions. Habermas provides an account of how the coercive and freedom guaranteeing aspects of law are intertwined, not disjointed as Schmitt (and even Neumann) proclaimed. Indeed, in Habermas' view law is the medium through which communicative power is translated into administrative power, a power, in turn, necessary for the proper functioning of discursive will formation. Legality, in short, is the necessary form for the appearance of legitimacy.

While I find in Habermas' internal reconstruction of the relationship between legitimacy and legality a powerful argument, if it is to hold at an external level, at the level of society, it will require a critique of capitalism. This is why I claim that we shouldn't be too quick in dismissing Neumann's account of the rule of law-sovereignty distinction or, in Marsh's words, "the legitimacy- accumulation contradiction." Neumann's analysis of the change in function of law from competitive to monopoly capitalism, furthermore, would add an important historical component to Habermas' legal theory, one that is currently missing from his account. Neumann's salvaging of the liberal rule of law project, sensitive as it is to the historical transformation of capitalism and to the accumulation-legitimation contradiction, could be combined with the perspective of economic democracy so as to inject discursive practices of legitimation not only into legislative practices but the organization of labor as well. As Neumann

pointed out, the full realization of the promise of modernity, embodied in so many ways in the rule of law ideal, requires a sensitivity to factual equality and to the changed nature of law's social substratum. Habermas' discursive theory of law would only gain strength from this. Attention to these factors would not bring us back to "philosophies in a melancholic mood" nor to a surrendering of radical democratic ideals (*BFN*, xlii).

CHAPTER ONE

Secularization, History, and Political Theology: The Hans Blumenberg and Carl Schmitt Debate

1.1 Introduction

Considering the enormous outpouring of scholarly work on Schmitt over the last two decades, the absence of an adequate treatment in English of Schmitt's concept of history and the problem of secularization is quite surprising.⁴⁸ This is not to say that the importance of Schmitt's concept of history to his critique of liberalism has gone unnoticed; it is rather to claim that it has not received the systematic treatment demanded by its centrality. After all, it is Schmitt himself who claimed that "all human beings who plan and attempt to unite the masses behind their plans engage in some form of philosophy of history,"⁴⁹ such that the attempt to make sense of Schmitt's program remains incomplete without a serious treatment of his philosophy of history.

One way to approach Schmitt's conception of history is by considering his 'secularization thesis,' first laid out in *Political Theology*, a text which can be taken as an indictment of modernity as a whole. Here he proclaims:

All significant (*prägnanten*) concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries (*PT*, 36).

⁴⁸ Until Charles Taylor's *Our Secular Age* (Cambridge, Harvard UP, 2008), together with all the secondary literature it inspired, the problem of secularization from a philosophical perspective had been wanting in the Anglo-American literature. Perhaps it was the rise of fundamentalism, both in the East as in the West, that provoked philosophy, a traditionally secular discipline, at least since the Enlightenment, to revisit the concept of the secular and secularization theory.

⁴⁹ Carl Schmitt, "Three Possibilities for a Christian Conception of History," in *Telos* 147 (Summer 2009), 167.

For Schmitt the modern state, the fundamental institution of modernity, has its roots in theology on which it depends for its stability and foundation. The modern age is not legitimate in the sense that it is not an authentic period with its own authentic grounding principles.

Schmitt's secularization thesis, as a critique of the legitimacy of the modern age, is not entirely novel in the history of ideas. Taking into account the German tradition alone, since the second half of the nineteenth century we find a number of attempts to understand and contest the validity of modern concepts and culture on this basis. Reason, science, freedom and technology are all at stake in the works of Nietzsche, Dilthey, and Heidegger, to name a few. The cultural and political climate in Germany after the 1920s is perhaps responsible for the radicalization and urgency in tone of some of these approaches.⁵⁰ Karl Löwith's *The Meaning of History* (1949) arises out of this tradition of culture critique and was one of the main provocations behind Hans Blumenberg's defense of the modern age's claim to legitimacy in his monumental *The Legitimacy of the Modern Age* (1966).⁵¹ The publication of Blumenberg's book instigated an ardent response by Schmitt, one of the secularization theorists refuted in *Legitimacy of the Modern Age*. Schmitt's reply to Blumenberg in turn initiated what was to become one of the most unlikely philosophical debates in the twentieth century—that between a concentration camp survivor and “the crown jurist” for the National Socialist regime, as Schmitt is often referred to.

Readers of Schmitt limited to research in English have at their disposal some of the major works of Blumenberg who, more than any other critic of Schmitt, was privy to the political intentions behind Schmitt's metaphorical use of theology. Blumenberg's rich correspondence with Schmitt, however, remains untranslated—a fact which has delayed the long-overdue examination of his critique of Schmitt.⁵² While their discussion is extensive and wide-ranging, I focus here on their diverging philosophies of history, precisely that aspect that is most relevant to

⁵⁰ Douglas J. Cremer, “Protestant Theology in Early Weimar Germany: Barth, Tillich, and Bultmann,” in *Journal of the History of Ideas*, 56 (2): 289-90.

⁵¹ Karl Löwith, *Meaning and History: The Theological Implications of the Philosophy of History*, (Chicago: University of Chicago Press, 1949).

⁵² There are two exceptions to this. Hans-Werner Müller treated the Blumenberg-Schmitt debate hurriedly in *A Dangerous Mind: Carl Schmitt in Post-war European Thought* (New Haven: Yale University Press, 2003). See also Oliver Müller, “Beyond the Political: Hans Blumenberg's Criticism of Carl Schmitt” in Svetozar Minkov and Piotr Nowak (Hg.): *Man and his enemies. Essays on Carl Schmitt*, (Bialystok: University of Bialystok Press, 2008). This is the only article in English that makes reference to the *Briefwechsel*. While I was in the process of writing this dissertation a new article came out on the *Briefwechsel*: Pini Ifergan, “Cutting to the Chase: Carl Schmitt and Hans Blumenberg on Political Theology and Secularization,” in *New German Critique* 37, No. 3 (2010): 149-171.

gaining a more expansive understanding of Schmitt's arguments, and indeed the relationship between political thought and historical thought.

Blumenberg argues that the "exigency of the moment" that Schmitt seeks is founded upon a historical substantialism that, in Schmitt's own words, "insert[s] the eternal into the course of time."⁵³ Blumenberg's project is to fend off this substantialism and the specter of decisionism it represents by appeal to a narrative of historical self-consciousness. While he concedes to Schmitt that there have been persistent attempts throughout modernity to reintroduce the absolute into the political order, he denies the necessity of the reoccupation of the void left by religion by an immanent absolutism. Schmitt's political theological project is thus unmasked as an attempt to cover over its conscious and active efforts at re-theologizing history and politics with the cloak of necessity. This I take to be one of the valuable lessons of Blumenberg's critique.

I lay the groundwork for Blumenberg's critique in section two, where I focus on his account of modern historical self-consciousness. For Blumenberg, the modern age implies a complete break with the past in that it is an attempt to ground thought and culture in historical self-consciousness—the capacity to use theory as a continuous mode of self-regulation. In section three, I undertake a critical examination of the Gnostic conception of history Schmitt develops in his first response to Blumenberg. This proves fundamental to understanding Schmitt's concept of the political as a dualistic, ahistorical, and transcendent order. Schmitt's Gnostic interpretation of the Trinity can be taken to exemplify an odd form of personal mythology (at best) or a failure to ground the friend-enemy distinction on theological grounds. As I contend, Schmitt's friend-enemy distinction is a free floating concept that cannot be subsumed under the imperatives of any other sphere (economic, artistic, religious, etc). Blumenberg's rejection of political theology from an anthropological standpoint is based on an understanding of human essence as a continuous move away from transcendent, foreign, and uncontrollable powers (such as Schmitt's hidden Gnostic God) towards a capacity to metaphorize, here taken as a rational coping mechanism. If this is the case, what lies underneath Schmitt's political theology? I conclude this chapter with the question of Schmitt as a political actor, and the diagnosis of his intentions as presented by Blumenberg. As this chapter shows,

⁵³ Schmitt, "Three Possibilities," 170.

despite some deficits in his account of what makes the modern age legitimate, Blumenberg develops one of the strongest readings and refutations of Schmitt.

Revisiting and debunking Schmitt's secularization thesis—which Blumenberg called one of the strongest of its type—is important for the following reason. If modern political institutions and ideas are, at root, inauthentic replicas of theological ones—if, that is, absolute sovereignty is all that grounds modern political institutions—then there is little use in attempting to strengthen and reproduce the sorts of discursive and democratic practices that we take as being essential to the maintenance of freedom and equality and we should thus discard the modern rule of law idea altogether.

1.2 Historical Substantialism vs. the historicity of reason: two conceptions of history.

Löwith's critique of modernity in *Meaning and History* was carried out by means of a historiographical study of the modern idea of progress. The main thesis put forward in the book is that the modern idea of progress is nothing other than the transformation of Christian eschatology into worldly form. The philosophy of history, taken as “a systematic interpretation of universal history in accordance with a principle by which historical events and successions are unified and directed toward an ultimate meaning” is, in its modern incarnation, “entirely dependent on theology of history, in particular on the theological concept of history as a history of fulfillment and salvation.”⁵⁴ Through analyses of modernity's leading thinkers—Voltaire, Turgot, Condorcet, Comte, Proudhon, Hegel and Marx, among others—Löwith argues that substantial theological presuppositions lie hidden in the modern historical consciousness, in particular, modern philosophy of history's claim that progress is infinite and that such progress lends meaning to human history. Like modern concepts of the state for Schmitt, the modern notion of progress is also a secularized Christian concept, in this case, a secularized form of Christian eschatology.

⁵⁴ Löwith, *Meaning and History*, 1.

Like Schmitt, Löwith uses the secularization thesis as an attack. The eschatological narrative behind modern concepts of history and progress severely weakens modernity's claim to legitimacy since it casts doubt over modernity's claim to be grounded on reason alone.⁵⁵ Löwith never actually employs the concept of legitimacy or illegitimacy. Instead, modernity's historical consciousness is characterized as being a false consciousness, or inauthentic consciousness, a quality which results in an indictment of modernity as a whole.⁵⁶ As he argues,

In consequence of the Christian consciousness we have a historical consciousness which is as Christian by derivation as it is non-Christian by consequence, because it lacks the belief that Christ is the beginning of an end and his life and death the final answer to an otherwise insoluble question. If we understand, as we must, Christianity in the sense of the New Testament and history in our modern sense, i.e., as a continuous process of human action and secular developments, a 'Christian history' is non-sense... The impossibility of elaborating a progressive system of secular history on the religious basis of *faith* has its counterpart in the impossibility of establishing a meaningful plan of history by means of *reason*.⁵⁷

While modernity claims to be an expression of human rationality, modern historiography derives its pattern of interpretation (eschatology) from theology, a pattern decidedly intertwined with the concept of faith. For Löwith, that is, the modern historical mind, determined as it is on providing a scientific basis for the interpretation of history, still retains basic features of a futuristic faith.⁵⁸ Löwith's claim that modern historical consciousness is a secularization of Christian and Hebrew thinking was not unique in the 1940s and 50s. This thesis was widely held in Germany as an

⁵⁵ Schmitt's claim is not that the modern liberal state is not legitimate because philosophical modernity has Christian presuppositions. For Schmitt, the modern liberal state is not legitimate because it lacks political theological presuppositions which are the only basis of any form of legitimacy. Schmitt's is a positive reappropriation of the secularization thesis in order to argue against modern liberal conceptions of state rule based on a depoliticized legality.

⁵⁶ Of course, as Pippin points out, there are secularization theorists for whom demonstrating that a modern concept or idea is a secularized Christian one does not delegitimize modernity, e.g., Hegel. Robert Pippin, *Idealism as Modernism: Hegelian Variations*, (Cambridge: Cambridge University Press, 1997), 269-270. This is something that Blumenberg does not address.

⁵⁷ Löwith, *Meaning and History*, 197-198.

⁵⁸ Löwith takes the ancient cyclical conception of time and history as a superior, although he is only very explicit in his condemnation of modern philosophies of history.

interpretative model for modernity and for the most part went unchallenged.⁵⁹ Blumenberg's *The Legitimacy of the Modern Age*, first published in 1966, was the first systematic response to those who put into doubt the modern age's claim to make good on its ability to generate and guarantee its own legitimacy and is a defense of the modern age by tracing the development of its (legitimate) ideas out of a crisis of the late-medieval world. The modern age, as Blumenberg sets out to argue, developed as a response to the "disappearance of order" caused by theological absolutism, a "disappearance of order" which instigated a radical new view of the cosmos as an order existing *for us*.

In part one of *Legitimacy of the Modern Age* Blumenberg addresses first, in one general response, a variety of instantiations of the secularization thesis ranging from the claim that the modern work ethic is a secularized version of monastic asceticism, to the claim that the transcendental subject is a secularized version of the omnipotent god. The rest of the book provides an alternative account of the worldliness (and legitimacy) of the modern age while doing justice to both historical continuity and novelty. In his evaluation of the secularization thesis, Blumenberg devotes particular attention to Löwith's critique of the modern idea of progress due (probably) to the fact that this particular version of the secularization thesis was taken to be the last word on modern historical consciousness and probably seemed to Blumenberg to be the strongest account. It was only after Schmitt's response to the first edition of *Legitimacy of the Modern Age* that Blumenberg devoted a chapter to Schmitt's account in the subsequent revised edition. For the most part, the type of secularization thesis that Blumenberg attempts to show as inadequate for historical explanation is the diachronic type which concerns the historical transposition of medieval, religious concepts to the modern philosophical discourse. The rest of this section deals with Blumenberg's analysis and rejection of the secularization thesis and provide a short account of his alternative conception of the modern age as the conscious rejection of any kind of authoritarian, dogmatic, substantialist and absolutist form of thinking that undermine human knowledge.

As noted at the outset, Blumenberg does not intend to refute the "descriptive" use of secularization which merely posits a quantitative loss of religious ties, attitudes, and expectations

⁵⁹ Wallace, Introduction, *The Legitimacy of the Modern Age*, xi-xiv; Elizabeth Brient, *The Immanence of the Infinite: Hans Blumenberg and the Threshold to Modernity*, (Washington, DC: The Catholic University of America Press, 2002), 16.

without providing an explanation of the loss or any clear judgment of value. His analysis and refutation of the secularization thesis is geared towards its various “explicative” forms which attempt to clarify, or make evident how certain cultural formations, ideas, or concepts are an *alienation* from their *original* meaning and function (*LMA*, 10). Most commentators of *Legitimacy of the Modern Age* focus entirely on Blumenberg’s reoccupation thesis as the refutation of the secularization thesis. This misses out on Blumenberg’s more sophisticated analysis and argumentative strategy, a strategy which lays bare the contradiction that results from the use of the secularization thesis by modern age theorists.⁶⁰ As Blumenberg will make clear in the first chapters, the idea that the modern age’s fundamental concepts are illegitimate ‘copies’ of medieval, religious ones is fundamentally untenable since it becomes impossible to use the secularization thesis in a transparent way. As he puts it, “Does this concept [secularization] not introduce into our understanding of history the paradox that we can grasp the modern age’s basic characteristic of ‘worldliness’ only under conditions that, precisely on account of this quality, must be inaccessible to us?” (*LMA*, 10). For Blumenberg, as we shall see further along, the secularization thesis undermines the critical standpoint of the secularization theorists.

Blumenberg begins his analysis of the secularization thesis by taking its “explicative” sense (that the thesis is a hermeneutical tool of understanding) at face value. Gadamer’s review of the first edition of *Legitimacy of the Modern Age* had described (as well as somewhat defended) the secularization thesis as such.⁶¹ Blumenberg’s method is to challenge the thesis through its own self-presentation. How does the secularization thesis as hermeneutical tool work? In line with theories falling under the banner of “hermeneutics of suspicion,” the secularization thesis is supposed to uncover that which is hidden from the self-comprehension of the present. As such, it follows a long line of critiques which aim at pointing to modern consciousness as ‘forgetful’ (Heidegger), ‘repressed’ (Freud), or ‘reified’ (Lukács). In Blumenberg’s words,

⁶⁰ Wallace, for example, in his introduction to *Legitimacy of the Modern Age*, reduces Blumenberg’s critique of the secularization thesis to his reoccupation thesis as does Pippin in his chapter “Blumenberg and the Modernity Problem” in *Idealism as Modernism*.

⁶¹ Gadamer argued against Blumenberg’s critique of the secularization thesis claiming that the thesis performs “a legitimate hermeneutic function.” Hans-Georg Gadamer, review of *Die Legitimität der Neuzeit* in *Philosophische Rundschau* 15 (1968):201-202, cited in *LMA*, 16.

What is to be produced [by the secularization thesis] is described by Gadamer as something that is hidden from the self-comprehension of the present, and thus of the modern age—indeed as a whole dimension of hidden meaning ... [T]hat can only mean, in this context, that by the concept of secularization the self-comprehension of the modern age as worldliness has to be explained as a superficial, foreground appearance. It is revealed as a consciousness that is not transparent to itself in its substantial relations, a consciousness to which hermeneutics discloses its background (*LMA*, 17).

For Schmitt, the modern liberal state does not understand itself because it operates under concepts and ideas whose foundations remain hidden, as we will discuss further in chapter two. For these “theorists of suspicion,” our modern condition calls for a working through of past history (an “archeology”) aimed at recovering the “true” origins of modern thought (here in medieval/religious culture) in order to unmask ideology in any of its forms.⁶² The way in which the hermeneutical critique casts a doubt on the legitimacy of the modern age for someone like Schmitt or Löwith is by showing how the modern age does not hold a valid claim to the original ownership of its cultural content. “Everything turns on the question whether the worldly form of what was secularized is not a pseudomorph—in other words: an inauthentic manifestation—of its original reality” (*LMA*, 18). The claim here, that is, is that modern cultural concepts are inauthentic versions of an original true source and this challenges their legitimacy because the reappropriation is unaccounted for.⁶³

As Blumenberg argues, the concept of secularization *already* carries a certain historical “baggage,” having to do with its use in canon law. The term secularization originally referred to the political expropriation of church property and its development out of this legal context resulted in the concept acquiring, in the spread of the use of the term, a connotation of illicit expropriation so that secularization still implies in some sense the use of violence.⁶⁴ As

⁶² As Blumenberg states: “The category of secularization is meant to make it evident that the denial of historical dependence is motivated by an epochal self-interest; it presents the alleged break between modern rationality and its past as ideological. It makes conscious—and that is the inevitable consequence of the theoretical accomplishment to which it lays claim—an ‘objective cultural debt.’” (*LMA*, 25).

⁶³ For Schmitt, in particular, secularization is also extremely dangerous since at a time of a real emergency, the state, oblivious to its transcendent foundation, could crumble in the face of its enemy.

⁶⁴ Here Blumenberg is drawing from what he calls “background metaphors”—how the early use of a term lingers on in current usage. Background metaphors is, according to Blumenberg, “a process of reference to a model that is operative in the genesis of a concept but is no longer present in the concept itself, or may even have to be sacrificed to the need for definition, which according to firm tradition does not permit inclusion of metaphorical elements” (*LMA*, 23).

Blumenberg states, the connection to the juristic process in canon law in the use of this concept is still evident as is the sense of an “externally induced” process.⁶⁵ Three salient features can be gleaned from the use of the term secularization that are pivotal for the debunking of the thesis. The term secularization asserts “the identifiability of the expropriated property, the legitimacy of its initial ownership, and the unilateral nature of its removal” (*LMA*, 23-24).

The notion of illegitimate usurpation suggested by the term secularization brings us to Blumenberg’s two main arguments against the use of the secularization thesis as a tool for historical explanation. First, the thesis presupposes an ontology of substance at work in history. This is a residue of a Platonism committed to “the original property in ideas theory” which seeks to identify an originally sacred content or substance that is preserved (in its transfer) through history.

Just as the image not only represents the original but can also conceal it and allow it to be forgotten, so the secularized idea, if left to itself and not reminded of its origin, rather than causing one to remember its derivation can serve instead to make such remembrance superfluous. The work of the historian or philosopher of history in uncovering secularizations reestablishes anamnesis and leads to a kind of restitution through the recognition of the relation of debt (*LMA*, 72).

The claim to rightful ownership, Blumenberg notes, was also behind early Christianity’s knowledge through revelation, as was its indictment of the ancients over ideas they both shared or that Christianity had taken from them. This tactic is the oldest in the book: “To assert and defend the legitimacy of its ownership of ideas is the elementary endeavor of what is new, or claims to be new, in history; to dispute this legitimacy, or to prevent or at least shake the self-consciousness that goes with it, is the technique of defending the existing state of affairs” (*LMA*, 70). Blumenberg identifies the insistence on the “belatedness” of the modern age as a certain nostalgia towards the pre-Enlightenment past, a nostalgia, as Rorty notes, also evident in Heidegger’s return to the pre-Socratics.⁶⁶

⁶⁵ And yet there is a further layer of meaning to the term— the suggestion that the denial of historical dependence is self-interested. Under this understanding the break between the past and the modern present is ideological (*LMA*, 25).

⁶⁶ Richard Rorty, “Against Belatedness” Review of *The Legitimacy of the Modern Age* in *London Review of Books* (June 16, 1983):3-5. At least Heidegger, was careful in avoiding the reality/appearance distinction typical of what he identified as a “metaphysics of presence.”

Secondly, and closely related, the secularization thesis presupposes a theological conception of history which is not transparent to theory itself. Thus, as Blumenberg sees it, the secularization thesis carries with it a certain anachronistic quality. Contrary to Christian Platonism, the modern age “produced the axiom that the legitimate ownership of ideas can be derived only from their authentic production” (*LMA*, 29). Under the new self-assertion of reason, “the self-inherence of truth is guaranteed by its self-generation” which is available to all rational subjects by carrying out the work of knowledge (*LMA*, 73). What distinguishes the modern age is precisely the attempt to ground knowledge, not on a divine intervention, but on the basis of a self-assertion expressed in the idea of ‘method’ as potentially made available to everyone.

Secularization theorists claim to be able to unmask modernity as an imposter by tracing the alienated “pseudomorph” back to its original form. But there is no “original” source of ideas outside the knower and there is no act of bestowal by which ideas can be “rightfully” transferred. The concept of truth as linked to the idea of original ownership radically changed in the transition to the modern epoch. The new model of knowledge acquisition through immanent self-production by the subject is fundamentally at odds with the secularization thesis which supposes an original and divine property in ideas. As it has been noted, it is not the religious assumptions per se of the secularization thesis that bother Blumenberg, but the notion of a beginning which has no immanent preconditions, an external, transcendent element not available to theory itself.⁶⁷ But the religious character of the secularization thesis has to do with precisely this, the presupposition that something external can break into history from an absolute and original source. And here lies the paradox for Blumenberg. How can secularization theorists use the concept of secularization in a transparent way? How can they claim to be shedding light [*aufklaren*] when the concept of secularization introduces into our historical understanding “the paradox that we can grasp the modern age’s basic characteristic of ‘worldliness’ only under conditions that, precisely on account of this quality, must be inaccessible to us?” (*LMA*, 10) There is a theological element in the concept of secularization that is unavailable to our historical understanding, an element that furthermore undermines the critical standpoint of secularization theorists. “The sort of philosophy of history that makes use of secularization as an explanation of history involves itself in the contradiction that it excludes its own tool (the secularization thesis)

⁶⁷ Brient, *The Immanence of the Infinite*, 23.

from the rational criticism that it assigns to itself as the characteristic of its historical standpoint.”⁶⁸ Whether this is always the case—that adhering to a theory of knowledge which depends on an ideal of transcendental truth is in fact a form of anachronism—Blumenberg’s critique of the secularization thesis’ substantialism is sharp and compelling, to say the least.⁶⁹

If the modern epoch is not the transformation of Christian content into worldly form, did the modern epoch arise on its own? As the rest of *Legitimacy of the Modern Age* attempts to outline, the modern age arose both out of a continuity with the past but also out of a radical discontinuity which changed the way we ground knowledge. What the modern age inherited from the past is a system of “empty positions” which it had to fill with its own materials. Blumenberg’s “dialogical functionalism,” the way in which new concepts develop as responses to the inadequacies of an old framework, is able to do justice to both historical continuity as well as the radical novelty of modernity’s newness because both identity and discontinuity are necessary for the experience of history. Echoing Gadamer’s conceptualization of the hermeneutical circle, identity is necessary in order to experience historical continuity: “All change, all succession from the old to the new, is accessible to us only in that it can be related...to a constant frame of reference, by whose means the requirements can be defined that have been satisfied in an identical position” (*LMA*, 466). The minimal form of identity that must be present is experienced by means of what Blumenberg calls “reoccupations.” During periods of epochal change new ideas and concepts come to replace a previous configuration which has petered out due to its inability to orient human beings in the world. When new responses cater to old problems, these responses are said to “reoccupy” the old positions and attitudes—they serve the same function but provide a new answer, one that helps build the new orientation. The gravest mistake made by secularization theorists is to mistake the *alienation* and consequent *reoccupation* of Christian concepts and ideas for a *transformation* of them.⁷⁰

⁶⁸ Brient, *The Immanence of the Infinite*, 24.

⁶⁹ Towards the end of her book Brient begins to question Blumenberg’s assumption about the anachronism in adhering to a theory of knowledge which depends on the ideal of transcendent truth.

⁷⁰ As Blumenberg states, “What mainly occurred in the process that is interpreted as secularization, at least (so far) in all but a few recognizable and specific instances, should be described not as the transposition of authentically theological contents into secularized alienation from their origin but rather as the reoccupation of answer positions that had become vacant and whose corresponding questions could not be eliminated” (*LMA*, 65). For a critique of Blumenberg’s concept of reoccupation, one that spells out the problematic tensions between continuity and discontinuity, see Cyril O’Regan, *The Gnostic Return in Modernity*, (SUNY Press, 2001), 50-64.

Crucial to Blumenberg's concept of reoccupation is the distinction he makes between content and function. For him, what occurred in the process of secularization is the reoccupation of "answer positions" whose corresponding questions had not been eliminated. The identity of secularized ideas with Christian theology—such as the identity of the modern idea of progress and eschatological futurism—is then not an identity of content but one of function. To a large extent, the modern age—as well as other epochs—was bound to the structure of what it renounced. The problematic of "carry over questions" is a problem for every epochal threshold (*LMA*, 66).

Reoccupations, thus, make it possible for us to understand new statements as answers to identical questions. "The concept of 'reoccupation' designates ... the minimum of identity that it must be possible to discover, or at least to presuppose and to search for, in even the most agitated movement of history" (*LMA*, 466). At this point one could pose the question whether the "framework of positions" is not another form of substantialism characteristic of secularization accounts such as Schmitt's. After all, one could say that the modern concept of the state "reoccupied" the position of theologically conceived absolute sovereignty, this "answer position" of absoluteness being an eternal schema for human activity. Here is where Blumenberg breaks entirely with accounts of complete continuity (Löwith, Schmitt) as well as with accounts of radical newness (e.g., the Cartesian myth of modernity's foundation). If reoccupation is a constant in history, the modern epoch represented a break in the way reoccupations were carried forward. The modern age now puts historical self-consciousness in the place of metaphysics and substantialism. That is, instead of grounding itself by means of metaphysical truths or substantialistic ontologies, the modern age sought a new grounding by means of a continuous "self-interpretation" that rejects every kind of transcendent uncertainty (*LMA*, 468). The best way to illustrate this is to go to the account Blumenberg offers himself of the historical transition into the modern age. This transition was propelled by the uniquely modern attitude of "self-assertion" [*Selbstbehauptung*], a completely new and original disposition which is no longer bound to the ancient and medieval notion of cosmos and as such holds the natural world to be at our disposal.

As *The Legitimacy of the Modern Age* argues, the modern attitude of self-assertion was a response to questions posed by the late medieval period, in particular the problem of Gnostic dualism. Indeed, as Blumenberg argues in part II of the book, the modern age and Gnosticism are

related, since the modern age can be understood as the *second* overcoming of Gnosticism (*LMA*, 126). Blumenberg's outline begins with "the greatest and most fascinating of Gnostic thinkers," Marcion. Marcion was driven by the unresolved problem of the classical period—evil. His "radical incision" consisted in distancing the good from the material world by distinguishing the god of creation from the god of redemption. The price that came with Marcion's Gnostic dualism was "the attachment of a negative valuation to the Greek cosmic metaphysics and the destruction of the trust in the world that could have been sanctioned by the biblical conception of creation" (*LMA*, 130). The medieval period, according to Blumenberg could then be defined as a response to this challenge, as "an attempt at the definitive exclusion of the Gnostic syndrome" (*LMA*, 130).

Under Blumenberg's framework, the first overcoming of Gnosticism came from the pen of Augustine who displaced Marcion's Gnostic dualism onto the individual itself.⁷¹ The same question or "answer position" dealt with by early Christianity received a different content, this time it at the expense of the individual: "The gnostic dualism had been eliminated as far as the metaphysical world principle was concerned, but it lived on in the bosom of mankind and its history as the absolute separation of the elect from the rejected" (*LMA*, 133). As Blumenberg notes, God's responsibility for cosmic corruption was reintroduced, albeit indirectly, by means of the idea of predestination—the absolute separation of the elect from the rejected, an idea that reintroduced Gnostic dualism. The Scholasticism of the Middle Ages repeats this pattern all over again in the form of the "hidden God" and the "flight into transcendence." Essentially this was an effort to emphasize God's omnipotence and independence from all things worldly. Soon enough God in his inscrutability and divine omnipotence lost relevance for human affairs. This is where Ockham's nominalism makes its appearance with its thesis that given God's power to create or destroy at whim (*Quia voluit* [because he willed it]) the actual world is completely contingent (*LMA*, 151). The disappearance of order [*Ordnungschwund*] and with it the realization that the cosmos no longer binds us was a necessary precondition for the development of modern self-assertion. As Blumenberg notes, however, the disappearance of all bindingness to an order was not really overcome in the sense of an absolute break but only "translated" through

⁷¹ As Blumenberg argues, "It is easy to see that the eventual decision against Gnosticism was due not to the inner superiority of the dogmatic system of the Church but to the intolerability of the consciousness that this world is supposed to be the prison of the evil god and is nevertheless not destroyed by the power of the god who, according to his revelation, is determined to deliver mankind" (*LMA*, 131).

immanent guarantees put forward by the “self-assertion” of reason (LMA, 136). The new understanding of nature as mere *Stoff* to be mastered according to human needs was both the precondition and outcome of the alienation of nature. The world as indifferent to human wants and needs, a world which lacks any a priori intelligibility, was the jumping board for modern science (Bacon) as well as a new concept of human freedom through self-assertion.⁷² As Blumenberg defines it, self-assertion is

an existential program, according to which man posits his existence in a historical situation and indicates to himself how he is going to deal with the reality surrounding him and what use he will make of the possibilities that are open to him. In man’s understanding of the world, and in the expectations, assessments, and significations that are bound up with that understanding, a fundamental change takes place, which represents not a summation of facts of experience but rather a summary of things taken for granted in advance [*Präsumptionen*], which in their turn determine the horizon of possible experiences and their interpretation and embody the ‘a priori’ of the world’s significance for man (LMA, 138).

The shift in attitude from contemplation to self-assertion means that the ‘foundational’ question about the grounding of knowledge can be ignored because all that we have available to us are rhetorical transactions (in the vocabulary that Blumenberg picks up later) that help us come to terms with “the provisionality of reason.”⁷³ As Blumenberg notes, it is sufficient for the rhetorical transactions which assign “the functional framework to the reoccupations to have a durability that is very great in relation to both our capacity to perceive historical events and the rate of change involved in them” (LMA, 466).

We can thus see that the modern age did not arise, with one stroke, through its own powers. Neither does Descartes’ *cogito* replace theological absolutism, despite reason’s understanding of itself as an “internal necessity” that “forbids external necessities from playing any role (LMA, 145). The Modern Age’s legitimacy stems from a certain human epistemic posture vis-à-vis the world, one that broke with theological voluntarism by defining its own

⁷² The enterprise of self-assertion involved, at the same time, a rehabilitation of “theoretical curiosity,” which had been classified as a vice by Augustine remaining dormant throughout the middle ages. The rehabilitation of “theoretical curiosity” is traced in part III of *The Legitimacy of the Modern Age*.

⁷³ Blumenberg, “An Anthropological Approach to the Contemporary Significance of Rhetoric” in Ken Baynes, J. Bohman and T. McCarthy, (eds.) *After Philosophy: End or Transformation?* (Cambridge, MA: The MIT Press, 1987), 452.

criteria for reliable knowledge according to its own goals. Reason came to “reoccupy” the void left by “the hidden God” of late Scholasticism but it did so on its own terms.⁷⁴

Of course, the modern separation of natural facts and human values, to put it in Weberian terms, ushered in a political crisis of meaning and integration. The “disenchantment” of nature, the process by which the Christian integration of the spiritual domain with the material and worldly one becomes severed, inaugurated a new set of questions for political theory once it had to recreate the theoretical constitution of ethical-political commonality.⁷⁵ For Blumenberg, the order and coherence of human life and community was displaced from nature onto history as “the process and practice in which humanity rationally and freely constitutes itself, in opposition to a degenerate and mechanical nature.”⁷⁶

Blumenberg’s overall estimation and defense of philosophical enlightenment is far less zealous than one would expect by the title of the book. For him, the legitimacy of modern consciousness results from it being the best framework available to make sense of our lives, to orient ourselves in the world. The transition to the modern epoch was a rational rejection of the unsustainable framework that came before. It was a rational transition not in terms of an ahistorical notion of reason but in terms of what Blumenberg calls “sufficient rationality”: “It is just enough to accomplish the postmedieval self-assertion and to bear the consequences of this emergency self-consolidation. The concept of the legitimacy of the modern age,” he goes on to say, “is not derived from the accomplishments of reason but rather from the necessity of those accomplishments” (*LMA*, 99).

Needless to say, the functionalist account underlying Blumenberg’s account of rationality and legitimacy provides little in terms of a normative framework by which to choose or reject among a variety of cultural and political institutions. This is why to someone like Pippin Blumenberg’s defense of the modern age, as it is based on the “necessity” and not the

⁷⁴ As Blumenberg states, “The modern age began, not indeed as the epoch of the death of God, but as the epoch of the hidden God—the *deus absconditus*—and a hidden God is pragmatically as good as dead. The nominalist theology induces a human relation to the world whose implicit content could have been formulated in the postulate that man had to behave as though God were dead. This induces a restless taking stock of the world, which can be designated as the motive power of the age of science” (*LMA*, 346.)

⁷⁵ Majid Yar, “From Nature to History, and Back Again: Blumenberg, Strauss and the Hobbesian Community” in *History of the Human Sciences* 15, No. 3 (2002): 53-73.

⁷⁶ Yar, “From Nature to History and Back Again,” 58.

“accomplishments” of reason, falls short.⁷⁷ Pippin, as does Strauss on his account, expect a legitimation of modernity to legitimate “the kind of life promised by the modern project...that it is a good life, not just better than that implied by Nicholas of Cusa.”⁷⁸ Furthermore, as Pippin argues, because the legitimacy of the modern period must be judged by comparison of the preceding epoch, Blumenberg’s analysis results in a legitimation of the pre-modern period as well.⁷⁹ But as we have argued here, Blumenberg understands medieval, Christian concepts and culture as legitimate in terms of its own categories but certainly not in terms of our new criteria. Now “self-foundation” and “self-understanding,” through the constant evaluation and renewal of concepts are what legitimate our projects and institutions.

The goal of this section was to provide an outline of Blumenberg’s concept of historical self-consciousness and his characterization and critique of any kind of secularization that is based on an ontology of substance such as Löwith’s and Schmitt’s. The next section will follow more closely the criticisms leveled at Schmitt’s understanding of history, first in a short section in *Legitimacy of the Modern Age* and in later years through their correspondence.

1.3 Schmitt’s attempt at a theological grounding of the political: Gnosticism as absolute politics.

As in other fields, the new modern political theory not only wrestled with a “deficiency in language” and thus made use of the stockpile of medieval Christian means of expression in its transition into modernity (*LMA*, 78). It also bore the imprint of the preceding epoch by reoccupying a “pregiven system of positions”. For this reason it is not surprising, as Blumenberg suggests, that someone like Schmitt might understand modern concepts of the state as exhibiting

⁷⁷ Pippin, *Idealism as Modernism*, 271,

⁷⁸ Pippin, *Idealism as Modernism*, 284.

⁷⁹ Pippin, *Idealism as Modernism*, 283. As Pippin remarks, “If the book had been called ‘The Historical Appropriateness of some Elements of the Modern Enterprise,’ it would be hard to quarrel with what Blumenberg does here.” 284.

a continuity of substance, although, as we shall see, there is more to Schmitt's critique of the modern age's legitimacy than a different conception of historical transformation.

The intellectual exchange between Schmitt and Blumenberg is an unlikely one. Blumenberg was considered a "half Jew," according to Nazi terminology, and was arrested and taken to a labor camp in 1944.⁸⁰ By the time the first edition of *Legitimacy of the Modern Age* was published Schmitt had already been ostracized and jobless because of his cooperation with the Nazi regime. Since his release by American forces in 1946 he lived the life of a recluse in his home town of Pletternberg.⁸¹

Blumenberg first tackled Schmitt's secularization thesis in the first edition of *Legitimacy of the Modern Age*. Schmitt's secularization thesis was one of the various secularization theses that came under attack in the first section of the book and Blumenberg devoted no more than two or three pages to it.⁸² For the sake of argumentative clarity, I will present Blumenberg's first argument contra Schmitt in its revised form as it appeared in the 1974 revision of the text. Following the "dialogical functional" model of his historical account of conceptual change, Blumenberg interprets the rise of the modern absolute state as a distinctly modern response to the unbearable political situation under theological absolutism. Following Hobbes' narrative of the rise of the modern absolute state, Blumenberg gives an account of the unsustainable situation surrounding the factionalization of absolute positions within the theological state and how it was counteracted by the transfer of the friend/enemy distinction onto the international scene. To a certain extent, Blumenberg argues, the transfer of an internal crisis onto the international scene—a scene where nation states were in the process of integrating themselves—could be taken as a "special feature of the modern age." As Blumenberg sees it,

The process of overriding internal conflicts by external ones had had the consequence that the conflicts that had become absolute in the religious schisms could be subordinated to, and even made useful for, the primacy of interests that

⁸⁰ Elizabeth Brient, *The Immanence of the Infinite*, 4.

⁸¹ George Schwab, *The Challenge of the Exception: an Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Westport, CT: Greenwood Press, 1989), 18.

⁸² *Die Legitimität der Neuzeit* (Frankfurt: Suhrkamp Verlag, 1966), 58-61. This first edition was never translated into English. The translation published by MIT which came out in 1983 is based on revisions that were subsequently published in three volumes during the 1970s.

in their turn laid claim...to represent the absolute. *The symmetry of the development of internal conflicts between absolute positions and the setting up of an absolute agent may be describable as an “inducing” process but hardly as the transfer of specific attributes from the one realm to the other (LMA, 90, my italics).*

Hobbes figures prominently in Blumenberg’s writings. Hobbes is important for Blumenberg because he was the first political theorist to come up with a conception of political community that rejects substantialistic and teleological notions of nature and history. Hobbes’ *autoritas non veritas facit legem* tore down the edifice of the classical and medieval foundations of political community. The establishment of state sovereignty is part and parcel of the abandonment of nature as tied to a divine and absolute cosmological order and the rise of self-assertion. The “artifice” of the state is the product of a deficit of meaning in nature upon which a sense of order must be imposed for the production of ethical life.

Three centuries after the establishment of the absolute state, however, the projection of the friend/enemy distinction onto the relations between states intensified the “state of exception” to the point of making the international configuration of modern sovereign states an intolerable, if normal, state of affairs. The crisis-ridden nature of competing absolutisms within the state was projected on to an international sphere only to become equally unsustainable. The modern absolute state thus becomes “disqualified” in Blumenberg’s view as an alternative to the theological state. In his view, the absolute state displayed both, a “self-assertive” moment (it’s founding out of the rationality of a contract) while still containing pre-modern elements (remnants of theological absolutism). While Schmitt takes the state of the *ius publicum Europaeum* to be a finished product of Western rationalism—the neutrality of states in times of war is based on international law and a definition of war which makes the distinction between the enemy and the criminal— Blumenberg takes it to be an unfinished product of modernity, the absolute state being “a short-lived interlude” within history (*PTII*, 117-8; *LMA*, 91). The lethality of the internal crisis of the theological state (the religious wars) paled in comparison to the international scene in the 1960s and 70s. Indeed, Blumenberg and Schmitt’s exchange occurred during the cold war period, a time where the “East/West dualism” had taken on an all-encompassing intensification that appeared to point in the direction of total nuclear annihilation. Perhaps it was the bleakness of the times that led Blumenberg to the prediction that the Cold

War was the ultimate conflict of “the experiment of absolute authorities” (*LMA*, 91). In his view, the concept of the absolute state is a reoccupation of an answer position—absoluteness. The absolute state took on the function of theological absolutism and “served only to bring the cause of political absolutism into the sphere of what was familiar and sanctioned and hence to be accepted fatalistically” (*LMA*, 90). Perhaps, Blumenberg suggests, a new form of cosmopolitanism is in order, one which does away with the primacy of the political and the sense of peril to which states and citizens are constantly exposed (*LMA*, 91).

Schmitt’s first and most scathing response to *Legitimacy of the Modern Age* came in a postscript to his 1970 *Political Theology II*. Here he began by protesting Blumenberg’s “generalizing mixture” of his secularization thesis “with all sorts of confused parallels between religious, eschatological and political ideas” (*PTII*, 117).⁸³ Before getting to Schmitt’s postscript, however, I will contextualize it by giving a broad overview of *Political Theology II* since Schmitt’s accusation and ‘exposure’ of Blumenberg as a closet political theologian follows the same logic as his indictment of Erick Peterson. As Schmitt confesses, *Political Theology II* is, first and foremost, a reply to Peterson in an attempt to settle old scores.⁸⁴ Peterson’s 1935 *Monotheism as a Political Problem*, claimed to refute the possibility of a political theology based on two reasons. First, political theology is incapable of accounting for the Christian trinity—it has no corresponding example on earth.⁸⁵ Secondly, political theologies fail to properly understand the role of the church in the history of salvation. Here Peterson makes use of Augustine’s account of the two kingdoms and the discontinuity between the church and the Roman Empire. Underlying Peterson’s treatise is the idea of a “pure theology” based on an Augustinian eschatological orientation. The kingdom of god cannot be identified with any

⁸³ Blumenberg would later say that his ‘generalizing mixture’ has to do with the method by which he criticizes positions. Here, he makes use of “gewisse Formulierungshilfen,” the reduction of ideas or thesis to a formula, in order to pin down the general intention of the various positions on an issue. Letter to Carl Schmitt, 24/3/1971. *Briefwechsel*, 105-106.

⁸⁴ A comment made by Hans Barion in a study on the Second Vatican Council published in a Festschrift dedicated to Schmitt, provoked Schmitt “to recall an old challenge and to rip the Parthian arrow from the wound” (*PTII*, 32).

⁸⁵ Erik Peterson, *El monoteísmo como problema político*, Agustín Andreu (trans.), (Madrid: Editorial Trotta, 1999), 69, 71, 93. In Peterson’s view, the Gospels cannot be made into an instrument for the justification of any political order as was done with the Pax Romana, a political situation which was interpreted as the workings of the divine providence of God, 93-94.

secular empire.⁸⁶ Peterson's critique found widespread acceptance in the aftermath of the war since it ruptured the connection between religion and politics. During the Nazi regime many Catholic and Protestant theologians had attempted to legitimize the party's power in the name of Christ.⁸⁷ At the same time, Schmitt was intervening in the aftermath discussion of Vatican II where a new wave of political theology from the left pushed for more progressive involvement of theology in social issues. Schmitt did not question the ability of theology to intervene in social and political issues. At question for Schmitt were the political goals of such intervention; whether they were progressive or conservative, whether they fostered liberal democracy or sovereign authority.⁸⁸

One of the ways in which *Political Theology II* differs from *Political Theology* is that here Schmitt attempts to theologically ground the friend-enemy distinction. For many, this provides Schmitt's concept of the political with a theological grounding missing in his early Weimar period writings and proves that Schmitt's theological claims have to be taken seriously.⁸⁹ Taking a closer look, however, it becomes evident that in *Political Theology II* Schmitt makes use of theological vocabulary as a tool for the grounding of the political and that little of his concept of the political derives from theological concepts, much less theological dogma. As we will examine in section four of this chapter, Blumenberg attacks Schmitt precisely along these lines. How does Schmitt argue for a theological grounding of political theology?

Schmitt's belated response to Peterson raises two points which, despite their being cloaked in theological language, bring us back, full circle, to his concept of the political as outlined in his earlier Weimar period writings. First he reaffirms the historic and political

⁸⁶ Peterson, *El monoteísmo*, 93-95.

⁸⁷ M. Hoelzl and G. Ward, Editor's Introduction to *Political Theology II*, 9; Peter Hohendal, "Political Theology Revisited: Carl Schmitt's Postwar Reassessment," in *Konturen* 1 (2008), 3.

⁸⁸ Hohendal, "Political Theology Revisited," 4, 8, 11.

⁸⁹ See M. Hoelzl and G. Ward in the Editor's Introduction to *Political Theology II*; Alfonso Galindo Hervás, "¿Autonomía o secularización? Un falso dilema sobre la política moderna" in Reyes Mate, (ed.) *Nuevas teologías políticas: Pablo de Tarso en la construcción del Occidente*, (Barcelona: Anthropos, 2006). Hohendal waivers between interpreting Schmitt's concept of the political as theologically grounded and understanding his use of theology as being in the service of the friend-enemy distinction. See Hohendal, "Political Theology Revisited."

mission of the Church first broached in *Roman Catholicism and Political Form*.⁹⁰ Against Augustine's distinction of the two cities Schmitt evaluates the role of the Holy Roman Empire in light of the eschatological expectations of the early Church. In Schmitt's eschatological view of history, the Roman Empire is a power which delays the coming of the Antichrist at the end of history. Throughout *Political Theology II* as well as in his correspondence with Blumenberg, Schmitt relies on the figure of the *Katechon* as that person or power which delays, or restrains history.⁹¹ While Peterson's strict eschatological interpretation of history devalues history, the work of the *Katechon*, in this case the Roman Empire, gives history meaning by establishing a political order. The theological immerses itself in the political once it begins to occupy the public space of the church. As Schmitt argues, "The church of Christ is not of this world and its history, but it is in this world. That means: it is localised and opens up a space; and space here means impermeability, visibility and the public sphere" (*PTII*, 65).⁹² Here, political theology is not derived from theological dogma. On the contrary, for Schmitt anything that is engaged with human affairs, in this world, regardless of its self-conception must necessarily be political: "[t]he mere fact that a theological argument extends into the realm of praxis makes it political."⁹³ Here the concept of the political as an *autonomous* sphere of action, as postulated in *The Concept of the Political*, is reaffirmed (introduction).

Schmitt's second objection towards Peterson also takes us back to his formulation of the concept of the political outlined in 1928. Against Peterson's argument that a political theology is impossible since the Christian trinity cannot be translated into "rule by one Monarch" Schmitt reaffirms the friend-enemy distinction as the essence of the political when he provides a Gnostic interpretation to the trinity. Schmitt's Gnostic interpretation results in a dualism which pits a

⁹⁰ Against private forms of spirituality and the abandonment of the world, *Roman Catholicism and Political Form* (Westport, CT: Greenwood Press, 1996) calls for an embrace of the representational role of the church, a role which it achieves through a series of hierarchical mediations).

⁹¹ *Katechon* is a biblical concept/figure which appears in Paul (2 Thessalonians 2: 6-7). According to one letter, the question of the *Katechon* is the ultimate problem (*Kernfrage*) of his political theology. Letter to Blumenberg, 10/20/1974, *Briefwechsel*, 120.

⁹² While Peterson wanted to restrict the influence of the church, Schmitt endeavored to extend it. This is Schmitt's interpretation of Peterson's text. For a reading of Schmitt's misinterpretation of Peterson's account of the proper role of the church see Gyorgy Geréby, "Political Theology versus Theological Politics: Erik Peterson and Carl Schmitt" in *New German Critique* 35, No. 3 (2008), 26.

⁹³ Hohendal, "Political Theology Revisited," 10.

godly Christ against a human Christ. “The doctrine of the Trinity accommodates the identity of the God of creation as the God of salvation through the unity between Father and Son... Thereby a dualism of two natures, God-human, becomes a unity in the second person” (*PTII*, 124). The unity of God thus includes the hostility between God the father and God the son and thus, the possibility of conflict. It is the state’s function, as *Katechon*, to contain the implications of this continuous *stasis* (civil war, political unrest) (*PTII*, 123).

Schmitt’s Gnostic interpretation of the trinity serves to theologially ground his belief in the fundamental enmity between humans so as to legitimate the function of the political sovereign. Although some interpret Schmitt’s Gnosticism as deviating from orthodox Catholic dogma into a private form of mythology or Gnosticism,⁹⁴ I would argue that Schmitt is still working here with his early Weimar concept of the political which is “grounded” in an existential and ontological conception of the friend-enemy distinction. Schmitt’s concept of the political here is “this-worldly” as it concerns our existence in this world, —an attitude, as we’ll see below, that runs contrary to the spirit of Gnosticism. Blumenberg raises this issue but still takes Schmitt on his own terms during their epistolary exchange. How does this play out?

As Schmitt suggests, the trinity can be understood as partaking in the structure of the political, a structure which can *also* be detected in modern concepts and institutions, that is, in “in its entirely de-theologized counter-image.” The “reality of the enemy,” he argues, is present in “the old political theology” as much as in the “totally new, purely secular and humane humanity” (*PTII*, 123). Enmity “exists inescapably in every world in need of renewal, and it is both immanent and ineradicable. One cannot get rid of the enmity between human beings by prohibiting wars between states...”(*PTII*, 125). Modernity, in sum, never overcame Gnosticism. Schmitt’s draws on the motto that prefaces Goethe’s fourth book of *Dichtung und Wahrheit*, *nemo contra deum nisi deus ipse* [no one is/can do anything against God except God himself] in order to highlight and reinforce the discord inherent in every unity. Much of Schmitt’s assessment of Blumenbergian concepts such as “self-assertion” and “self-empowerment” arise out of what he thinks to be the modern age’s blindness towards its inbuilt political theological constitution, an issue which we will discuss in the next section.

⁹⁴ Ruth Groh, *Arbeit an der Heillosigkeit der Welt. Zur politisch-theologischen Mythologie Carl Schmitts*, (Frankfurt: Suhrkamp, 1998), cited in Hohendal, “Political Theology Revisited,” 19. For Hohendal, however, Schmitt for the most part displays Gnostic ideas. See Hohendal, “Political Theology Revisited,” 19-20.

Much of the debate surrounding Schmitt's Gnostic interpretation of the trinity came through in his correspondence with Blumenberg. The "Extraordinary Saying," as Goethe's motto is oftentimes called, is of central concern beginning with their first epistolary contact which was initiated by Blumenberg. In his first letter Blumenberg lends the motto a polytheistic interpretation linking it to the figure of Prometheus.⁹⁵ "Goethe's motto captures the general meaning of Polytheism as the separation of powers, its hindering of absolute power, and every religion as the feeling of the absolute impossibility of becoming independent of it."⁹⁶ With this strategy, Blumenberg's critical analysis of myth from the anthropological standpoint in his *Work on Myth* is already foreshadowed.⁹⁷ Blumenberg's anthropological turn can be taken as a programmatic rejection of political theology. At the heart of this project is Blumenberg's "anthropogenesis," a story about how our primitive human ancestors were able to reduce the *Angst* provoked by the "absolutism of reality" by means of cultural symbolization, the paradigmatic form being myth. Polytheistic mythology succeeds in reducing *Angst* because each power works within a limited domain. Competing powers are balanced out resulting in a "separation of powers," a restraint on absoluteness, the elimination of arbitrariness, and finally, to an overall mastery of the environment.⁹⁸ As Blumenberg argues, myth rationalizes general, undefined *Angst* into fear of specific and separate agencies that can be named and accounted for.⁹⁹ Blumenberg extended his account of myth to include other forms of rationality that serve as a devices for coping in a world which for us lacks coherence, harmony and a unified conception of the good. Blumenberg labeled all those all those forms of rationality whose ideal is consensus "rhetoric."¹⁰⁰ The ideal of consensus is important since consensus serves as a

⁹⁵ Letter to Schmitt, 24/3/1971 in *Briefwechsel*, 105. See also letter to Schmitt, 7/8/1975, 133.

⁹⁶ Letter to Schmitt, 7/8/1975, in *Briefwechsel*, 133, my translation.

⁹⁷ Hans Blumenberg, *Work on Myth*, Robert M. Wallace, trans. (Cambridge, MA: MIT Press, 1985).

⁹⁸ "Myth is a way of expressing the fact that the world and the powers that hold sway in it are not abandoned to pure arbitrariness. However this may be signified, whether by a separation of powers or through a codification of competences or through a 'legalization' of relationships, it is a system of the elimination of arbitrariness." *Work On Myth*, 42-43.

⁹⁹ This is not too different from Horkheimer and Adorno's account of Enlightenment as myth, although for them, this characteristic of the Enlightenment is negatively valued. See chapter one, "The Concept of Enlightenment" in Horkheimer and Adorno, *Dialectic of Enlightenment*.

¹⁰⁰ Blumenberg, "An Anthropological Approach."

substitute for our fundamental biological ineptitude in coping with the natural environment. Rhetoric is an umbrella term for all those activities that assist in this endeavor (myth, science, parliamentary democracy, etc.) “Lacking definitive evidence and being compelled to act are the prerequisites of the rhetorical situation.”¹⁰¹ The opposite of this results in a potentially violent decisionism. Consensus via rhetoric, in opposition to absolute truths, “becomes an alternative to terror”: “To see oneself in the perspective of rhetoric means to be conscious both of being compelled to act and of the lack of norms in a finite situation. Everything that is not force here goes over to the side of rhetoric, and rhetoric implies the renunciation of force.”¹⁰²

One could say that the necessity of familiarizing oneself with the uncanny (as myth does) is at the bottom of Blumenberg’s notion of self-assertion and his account of secularization in *Legitimacy of the Modern Age*. God’s absolute sovereignty grew more and more unwieldy throughout the advancement of the Middle Ages until it reached a stage where any salvageable notion of divine order was out of question—a situation that left humans in the dark with respect to issues that had had a religious foundation and justification. The idea of God’s absoluteness “run wild” gave way to the modern age’s self-assertion with its inbuilt disposition towards self-preservation.¹⁰³ The guiding principle of Gnosticism is the notion of *das Fremde*—the strange, the foreign, the other, the uncanny.¹⁰⁴ As such, the secularizing impulse could be understood as the opposite of the Gnostic. “Gnosticism privileged *Entweltlichung*, literally a

¹⁰¹ Blumenberg, “An Anthropological Approach,” 441.

¹⁰² Blumenberg, “An Anthropological Approach,” 437.

¹⁰³ In his typically functionalist approach, Blumenberg notes that what he then described as reoccupation is nothing other than a rhetorical transaction: “In our tradition’s system of the explanation of reality there is a ‘position’ for this historical subject, a position to which vacancy and occupation refer. The accomplishment and establishment of the reoccupation are rhetorical acts.” “An Anthropological Approach to Rhetoric,” 451. Blumenberg recalls the old rhetorical figure of *translatio imperii* [the transfer of power] as the act by which the historical subject is determined and legitimized. What goes on under reoccupation is the *Übertragung*, the “carrying over” of metaphorical functions. The link between *The Legitimacy of the Modern Age* and his work on myth can be further extended in that myth, in contrast to someone like Cassirer who understood human essence in relation to the production of myths, is treated as something fully and radically historical. (See Cassirer’s series of volumes *The Philosophy of Symbolic Forms* published by Yale University Press). For Blumenberg, there are no archetypal images, figures or species-specific rhetorical devices: “What we take up, use, alter, and expand in some standard narrative always represents a ‘working out’ of a historically particular version of the fears and anxieties Blumenberg has identified as unavoidable in human experience.” Pippin, *Idealism as Modernism*, 291.

¹⁰⁴ Benjamin Lazier, “Overcoming Gnosticism: Hans Jonas, Hans Blumenberg and the Legitimacy of the Natural World” in *Journal of the History of Ideas*, 619

‘deworldlification,’ an evacuation or making-absent from the world... Against Gnostic *Entweltlichung*, to secularize involves a *Verweltlichung*, a making-of-this-world.”¹⁰⁵

As has been acutely noted, Blumenberg’s *Legitimacy of the Modern Age* could be seen as the attempt at a “third overcoming of Gnosticism.”¹⁰⁶ Indeed, Gnostic thought had made a return in early Weimar culture; in particular it had made a strong resurgence in theology. Barth’s theology of *Krisis*, for example, centered around the rejection of human centered solutions to the historical situation of post World War I Europe establishing an absolute dichotomy between the divine and the profane.¹⁰⁷ Needless to say, gnosis, as a type of knowledge dependent on revelation issued from a transcendent source posed a threat to the system of knowledge particular to the modern age as defended by Blumenberg. As I argued in 1.2, Blumenberg’s critique of the secularization thesis focuses on a critique of historical explanations predicated on a continuity of substance. For Blumenberg, the modern age derives its radicalness by divorcing human existence from nature and the cosmos, or in Blumenberg’s anthropological term “the absoluteness of reality” (realms to which we have no natural connection) and ties it to the capacity to create a life world (as our brief description of myth shows). One could say that the rejection of absolutism is Blumenberg’s *Lebensthema*.¹⁰⁸ A quote from his essay “Political Theology III” neatly summarizes this position:

If anthropogenesis has already become itself the crisis of all crises, because it made the non-extinction of humans into a biological inconsequence of evolution,

¹⁰⁵ Benjamin Lazier, “Overcoming Gnosticism,” 623.

¹⁰⁶ Benjamin Lazier, “Overcoming Gnosticism,” 620. “It seems more plausible to think of Legitimacy as a monumental but occulted response to the crisis theologians of the 1920s, and to eschatological crisis though more generally.” 624. Lazier goes on to note an addition Blumenberg made in the second edition of *LMA* in which he implicitly makes reference to crisis theologians such as Barth. See *LMA*, 5, cited in Lazier, 624.

¹⁰⁷ Douglas J. Cremer, “Protestant Theology in Early Weimar Theology: Barth, Tillich, and Bultmann” in *Journal of the History of Ideas*, 56, No.2 (1995), 294. Hans Jonas, a student of Heidegger’s, sought in Gnosticism a key to understanding the theme of alienation central to existentialism and nihilism. Jonas’ existentialist understanding of Gnosticism was the first treatise in English geared to a Western audience and was thus (and still is) highly influential. See Hans Jonas, *The Gnostic Religion: The Message of the Alien God and the Beginnings of Christianity*, (Boston: Beacon Press, 2001).

¹⁰⁸ Alexander Schmitz und Marcel Lepper, “Nachwort” in *Briefwechsel*, 305. In this context one could also bring up Hannah Arendt’s view of the nature of the political as being, in a sense, in opposition to absoluteness. Or, another way of putting it is that to the political belongs opinion for her, not truth. “Seen from the viewpoint of politics, truth has a despotic character... [Truth] peremptorily claims to be acknowledged and precludes debate.” “Truth and Politics,” in *Between the Past and the Future*, (New York: Penguin, 2006), 236-237. Opinion for Arendt would be a better “coping mechanism,” to use Blumenberg’s framework, than the search for absolute truth.

then it is at the same time the cultivation of the conditions of life which earns the title of an absolutism, and this in the most general and theologically unspecified sense: that of an absolutism of reality itself. Humans, escaped from a situation of the near impossibility of life, had the absolute animosity of nature directly behind them, but so close behind them that they always had to survive under actually inhospitable, or selectively hospitable conditions. Whichever absolutisms humans might have created over the course of their history, this at their origin was not to be overcome. All others [absolutisms] stand rather in the service of its overcoming. *The creature that came into being was a master in dealing with the absolute in its always already depotentiated forms.*¹⁰⁹

This is why Blumenberg had such a strong reaction to Schmitt's attempt to ground the political in a theological account. More importantly, Blumenberg reacted harshly to an interpretation of the modern world as a derivation of theological absoluteness. Defined by the friend-enemy distinction, political theology deals in immediate absolutes and thus cannot afford consensus or the "endlessness" of the type of rationality characteristic of the modern age—hence Schmitt's distaste for Parliamentarism, the institutional form of rhetoric *par excellence*.¹¹⁰

1.4 The political as the total: Schmitt's metaphorical use of theology.

But perhaps more important for Schmitt is that Peterson, insofar as he claimed to bring to an end a political question (the possibility of political theology), was intervening in a political issue. For Schmitt, a theology which takes itself to be separate from politics (such as Peterson's) is in itself nothing other than a political intervention. Here we can detect the basis of Reinhart Koselleck's critique of the Enlightenment bourgeoisie as "hypocritical" in that this class either refused or did

¹⁰⁹ "Politische Theologie III" in *Hans Blumenberg/Carl Schmitt, Briefwechsel*, 171. My translation, my italics.

¹¹⁰ For a twenty-first century account of the relationship between liberal democracy and time see William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, (Johns Hopkins University Press, 2004). As Scheuerman points out in this interesting study, the idea of liberal democracy rests on certain assumptions about temporality that our high speed society—or crises that require high speed decision-making—clash against. "Slow-going deliberative legislatures, as well as normatively admirable visions of constitutionalism and the rule of law predicated on the quest to ensure legal stability and continuity with the past, mesh poorly with the imperatives of social speed, whereas a host of antiliberal and antidemocratic institutional trends benefit from it." xiv.

not recognize their quest for political power at the same time that they were engaged in ‘repressing’ the political realm.¹¹¹ The Bourgeoisie’s positioning of itself within the moral realm as against the political realm served, Koselleck argues, to enhance their “claim to domination.”¹¹² Similarly as regards Peterson’s thesis,

The theologian can reasonably declare the closure of issues of political significance only by establishing himself as a political voice which makes political claims... The statement ‘political monotheism is theologically brought to an end’ [Peterson’s thesis] implies the theologian’s claim to the right of making decisions in the political sphere too, and his demand for authority over the political power. This claim becomes politically more intense along with the degree to which theological authority claims to supersede political power (*PTII*, 113).¹¹³

Of course, this seems to be one of Schmitt’s favorite tactics—to accuse his opponent of being a political theologian in disguise. Schmitt even ends his *Political Theology* by accusing Bakunin of being “the theologian of the anti-theological” and “the dictator of an anti-dictatorship” (66). Bakunin’s anarchy faces authority as its negation. Schmitt sees both positions as absolutes—one decides for the decision, the other decides against the decision; hence, for Schmitt, Bakunin’s decisionism. In *Political Theology II*, Schmitt extends the same kind of accusation towards Blumenberg. After having shown Peterson’s *theological* closure of political theology to be incorrect, Schmitt directs his efforts at Blumenberg’s *scientific* closure of political theology. Blumenberg’s was the latest and most recognized account of all matters pertaining to the historical development of modernity. While Schmitt’s attempt to refute Peterson remained within the “horizon” of Hellenistic philosophy, Schmitt would confront the closure of political theology in the contemporary, secular horizon by means of a critique of Blumenberg.

Schmitt’s tactic here is to expose the modern phenomenon of “self-assertion” outlined in *Legitimacy of the Modern Age* as a decisionistic force of creation *ex nihilo*—“it is the creation of

¹¹¹ Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society*, (Cambridge, MA: MIT Press, 1988), 12. Koselleck was a student of Schmitt’s after the war and was very much influenced by him.

¹¹² Koselleck, *Critique and Crisis*, 61.

¹¹³ This is identical to Schmitt’s claim in *Political Theology*, that those who claim they are unpolitical are being political because “the political is the total” 2.

nothingness as the condition for the possibility of the self-creation of an ever new worldliness” (*PTII*, 129)—and what’s more as “a vehicle for that which is radically aggressive” (*PTII*, 120). The modern age is nothing but a *theology turned inwards*. The modern age’s foundation, as well as its practices, presuppose a form of sovereign decision-making since by its nature “Knowledge does not need any justification, it justifies itself...Its immanence, directed polemically against a theological transcendence, is nothing but self-empowerment” (*PTII*, 120).

Political Theology II reaffirms Schmitt’s illiberal and anti-modern reaction towards the Western process of secularization and its claim to produce legitimacy through the generation of its own epistemic standards. He condemns the modern age’s mechanistic nature while exposing, at the same time, the political (i.e. sovereign and absolute) element underlying it. If one were to narrow down on Schmitt’s conception of secularization, one would have to say that secularization is for him the *transfiguration* of divine power into the immanent transcendental subject.

When a god creates the world from nothing, he then transforms nothingness into something utterly astonishing, namely something out of which a world can be created. Today, we don’t even need a god for this any longer. Self-expression, self-affirmation and self-empowerment—one of the many phrases prefixed by ‘self’, a so-called auto-composition—are enough to allow a new and unforeseen world to emerge. These new worlds produce themselves and, moreover, they produce the conditions for their own possibility—at least those artificial laboratory conditions (*PTII*, 34).

Secularization did not change the (politico-theological) structure of the world, it only made it less visible. For Schmitt, however, this new transfigured subject is an aggressive negation of what precedes it. In a highly sarcastic passage towards the end, Schmitt portrays Blumenberg’s self-assertive modern subject as an aggressive, divinely self-produced God whose new “science” (which is really a new theology) expresses human freedom as a product of neutrality, use-value, and objectivity. As Schmitt warns us, the new, secular world originated through an aggressive negation of the old. Thus, the reality of the enemy is still present in the secular, de-theologized world. The transposition of the enemy “from the old political theology into a pretentious and totally new, purely secular and humane humanity needs to be watched closely and critically, for

it remains indeed the permanent function [*Officium*] of any scientific struggle for knowledge” (*PTII*, 128).¹¹⁴

For Schmitt, however, almost any kind of epistemic stance or attitude is considered to be a form of decision and a decision, furthermore, is always raised against some other decision. Schmitt’s use of the concept of political theology is not used to expose political theories that are anchored in theology. His targets, for the most part, are theories which make no use of theology or where theology, in the case of Bakunin, is expressly rejected. Under Schmitt’s concept of the political as “the total,” one cannot decline to take a side. Neutrality is impossible and whoever disagrees with this claim only attempts to disguise their decision.

The revision of *Legitimacy of the Modern Age* appeared in three volumes in 1973, 1974, and 1976.¹¹⁵ For Blumenberg this was an attempt to answer criticisms expressed in the substantial number of reviews the book received. Despite what may seem as a harsh and uncharitable criticism on Schmitt’s part, Blumenberg took his criticisms seriously and even initiated what would turn out to be a seven-year intellectual exchange via letter. As Blumenberg notes in one letter, Schmitt’s was the only response that bothered (*innerviert*) him. Those few pages in *Political Theology II* impelled Blumenberg to substantively revise his understanding of Schmitt’s secularization thesis as well as sharpen his concept of self-assertion.¹¹⁶

Blumenberg’s re-evaluation of Schmitt’s secularization thesis first raises the issue of the “autonomy” of the political. Blumenberg wonders why Schmitt made use of the ‘secularization nexus’ at all, since, in view of the intention behind his political theology, his thesis establishes the reverse relation of derivation. Schmitt’s is a theological form of politics in that his conceptualization of the political results in the primacy of politics over other spheres of life, including theology. As Blumenberg rightly notes, what Schmitt’s thesis establishes is “the absolute quality of political realities,” not a theological derivation of political concepts in the process of history. In order to underscore the primacy of politics, Schmitt makes recourse to the

¹¹⁴ For Blumenberg, self-assertion is tied to the human capacity to reduce absolutism, to reduce uncertainty. This is done by means of discourse, metaphor and other forms of rhetoric and narrative. Self-assertion thus should not be thought of in relation to organicist or will to power conceptions. Lazier has an interesting analysis of this in “Overcoming Gnosticism,” 636.

¹¹⁵ See note 82.

¹¹⁶ Blumenberg to Schmitt. 9/10/1974, *Briefwechsel*, 105. In *Legitimacy of the Modern Age*, Blumenberg calls Schmitt’s version of the secularization thesis the strongest version (92).

“sanctioned vocabulary of theology” making of the sacred vocabulary a mere *means* to underscore and clarify the exigencies that the idea of the political is meant to conjure (*LMA*, 92).

Yet, for Blumenberg, the fact that the modern constitutional state displays moments of sovereignty—moments where political exigency indeed obscures the normal functioning of the law—does not mean that we are forced to go back to the medieval Christian political constellation and repeat its concepts and ideas in secularized form in order to give an account of it. Just because the absolute state shares the attribute of omnipotence with God, it cannot be implied that one is derived from the other. What Schmitt’s secularization thesis does is “make something visible”—the structural analogy between god and sovereignty—but it does not entail that one structure is derived from the other or that they both are derived from a third prototype. For Blumenberg, what really lies behind Schmitt’s secularization thesis is a “dualistic typology of situations.” Here two concepts such as political authority and the omnipotence of God are structurally comparable only in terms of a coordination of positions within a systematic context. This is not, he argues, enough to warrant the characterization of political theory as political theology (*PTII*, 94).

So what is at bottom of Schmitt’s secularization thesis? As Blumenberg suggests, Schmitt’s decisionistic conception of the state is not the secularization of a theological creation *ex nihilo* but a skillful metaphorical interpretation of revolutionary starting points. Much like the revolutions of 1848, which made their historical appearance in disguise, as Marx informed us in his *Eighteenth Brumaire*, Schmitt’s approach consists in employing the old language, rhetoric and costume in order to establish historical continuity. According to Blumenberg, “the choice of linguistic means is not determined by the system of what is available for borrowing but rather by the requirements of the situation in which the choice is being made” (*LMA*, 93). As a result, “what underlies the phenomena of linguistic secularization cannot be an extensively demonstrable recourse to theology as such; rather it is a choice of elements from the selective point of view of the immediate need, in each case, for background and pathos” (*LMA*, 94). As Blumenberg sees it, Schmitt’s political theology could be understood as a set of metaphors, as a particular rhetoric, which says more about the immediate present than about the origins of these metaphors and rhetoric.

But the use of old ideas and metaphors for the purposes of increasing legitimacy is not the only explanation behind their recurrence. As Blumenberg attempts to highlight throughout

Part I, the persistence of theological language in the modern age can also be interpretable within the same framework of functions and reoccupations. Linguistic constancy goes hand in hand with the reoccupation of systematic functions. When an interpretive framework loses its ability to orient human beings in a meaningful way a new context of meaning comes into play which, in the process, utilizes for its own purposes the old framework's "sanctioned status" as "something that is beyond questioning" (*LMA*, 78). For Blumenberg, this is particularly evident for the new political theory. At yet other times the appropriation of old language and expressions for a new form of thinking is due simply to a deficiency in language and the difficulty, for lack of new concepts, of constructing a new secular terminology (*LMA*, 78). Evidence for this sort of difficulty can be found in Cicero's plight to translate Greek philosophy into Latin. At the modern threshold, persistence of the old language "creates the appearance of secularization" but it is, nevertheless, the result of the reoccupation of answer positions (*LMA*, 86). As Blumenberg states, "there is nothing in which language is more productive than in the formulation of claims in the realm of the intangible" (*LMA*, 86). The use of religious language thus cannot be mechanically ascribed to a transfiguration of sacred concepts. This is the case, especially for Schmitt's critique which, as Blumenberg insists, is a critique of modernity which selectively makes use of charged language in order to conjure an exigency that would otherwise be hard to convey.

Ultimately, for Blumenberg, Schmitt's secularization thesis is a means to find legitimacy for a sovereign dictator. In a move reminiscent of Hegel, Schmitt deduces the necessary existence of an absolute willing person (or sovereign) from the necessary existence of an absolute will, although for Hegel, legitimacy does not come by means of an "implant" from the Christian tradition but rather from a rational "consolidation that fills the abstract with concrete contents" (*LMA*, 100). Without "the ontological deduction of the existence of the sovereign" Schmitt would have to find legitimacy elsewhere (*LMA*, 100).¹¹⁷ Thus arises Schmitt's need for the kind of secularization spelled out in *Political Theology*. Particularly, Blumenberg notes, Schmitt's secularization thesis requires a special concept of the person in order to fill the position of the highest decision-maker. This person can only be thought of in a metaphorical sense

¹¹⁷Obviously, as Blumenberg rightly notes, this is not a form of argument that Schmitt attempts to imitate "if only because absolutism of sovereignty prohibits arguments even about its concept..." Quoting Schmitt: "About a concept as such there will in general be no dispute, least of all in the history of sovereignty" (*LMA*, 100-101).

because the “person” of the sovereign needs to be vested with legitimacy. A person in the literal sense will not do. Blumenberg’s writes:

‘Political theology’ is a metaphorical theology: the quasi-divine person of the sovereign possesses legitimacy, and has to possess it, because for him there is no longer legality, or not yet, since he has first to constitute or to reconstitute it. The enviable position in which the ‘political theologian’ places himself by means of his assertion of secularization consists in the fact that he finds his stock of images ready to hand and thus avoids the cynicism of an open ‘theological politics’... The assumption of secularization allows the ‘political theologian’ to find ready for use what he would otherwise have had to invent, once it turned out after all not to be something whose existence could be deduced (*LMA*, 101).

For Blumenberg, in short, political theology is a masked theology employed at the service of legitimizing decisionism. The absoluteness of theological concepts serves to express the exigency of the situation. Reading through Blumenberg and Schmitt’s correspondence it becomes clear that Blumenberg struggled from the outset to find a common vocabulary in order to deepen and enrich his intellectual exchange with Schmitt. In his first letter he states that if he had to formulate the difference in their position on the question of the legitimacy of the modern age in a simple way it would be that his position is an answer to the question “how can this maintain itself?” [*Wie kann dies sich erhalten?*]. For Schmitt on the other hand, the question is “where can we find the extreme condition?” [*Wo liegt der extreme Zustand?*]¹¹⁸

We will come back to the question of the self-understanding of modernity in the following chapters. As I’d like to argue, Blumenberg’s understanding of the self-grounding of modernity is reduced to what Habermas would claim is only one of its aspects, the non-normative and functionalist mode by which modern society can be integrated and stabilized (chapter three). In other words, Blumenberg’s position, articulated by himself as answering the question “how can this maintain itself?” is comparable to Habermas’ understanding of functional spheres which have been relieved of demands for justification—what he calls “relief mechanisms.” Countering Schmitt’s critique of the rule of law and his claim that law is at bottom decisionistic will require a different conception of legitimacy and a different defense of modern institutions. However, I take Blumenberg’s articulation and criticism of Schmitt’s secularization

¹¹⁸ Letter to Schmitt, 3/24/1071, *Briefwechsel*, 105.

thesis and conception of history as a strong refutation of the historical and temporal conditions underlying Schmitt's justification of decisionism.

The next chapter will focus on how Schmitt conceived of sovereignty specifically within the modern rule of law ideal, how, that is, his critique of the modern age plays out with respect to law.

CHAPTER TWO

Capitalism, Liberalism, Fascism: Carl Schmitt and Franz Neumann on the Source and Function of Law.

2.1 Introduction

The problem of securing a foundation for law in the aftermath of the collapse of religious and metaphysical foundations is central to Schmitt's overall intellectual agenda. In the last chapter, we showed how Schmitt's argument for the political and decisionistic nature of the state is grounded in the idea of sovereignty, a timeless structure it also shares with theology, according to his view. In this chapter we narrow our focus on Schmitt's critique of modern law. Schmitt's claim is that the modern rule of law is not able to secure the legitimacy the state once carried in its theological and then absolutist incarnations.

One of the most important results of the process of secularization, as Schmitt outlined in "The Age of Neutralization and Depoliticization," was the loss of the element of transcendence once lodged in state power (see introduction). The long march of modernization leading to the rise of positivism in the second half of the 19th century in Germany had effectively eradicated the extra-legal principles on the basis of which the state had once wielded its power. In particular, it was the German Revolution of 1918-1919 that Schmitt's writings responded to. The constitution of 1919 replaced the German statist conception of political order, an order based on the state's "mystical existence as a factual power prior to the legal system itself," with a constitution based on the principle of popular sovereignty.¹¹⁹ Contrary to the rule under constitutional monarchy, the new democratic state called for the popular election of the president whose mandate was subject to the rule of law. One could say that Schmitt's project throughout the Weimar period was to find a way to restore the now eliminated element of transcendence to the state executive.

¹¹⁹ Peter Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreuter, and the Debate over the Nature of the Nazi State, 1933-1937" in *Cardozo Law Review* 16 (1994), 400. Renato Cristi argues that Schmitt's entire *oeuvre* can be read as a reaction against the German Revolution, specifically, the state's loss of authority and independence vis-à-vis other spheres. See Renato Christi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, (University of Wales Press, 1998).

The philosophy of legal positivism was one of the fronts from which Schmitt waged his fight. There is no easy way to characterize legal positivism since one can find a great variation in theses and interpretations. Yet what unites virtually every positivist theory of law is that all take law to be a matter of social fact, “posited” by human beings, without reference to any extra-mundane legitimating power. This raises a whole host of questions regarding the moral content of law. Most specifically, however, the question of law’s relation to morality is foregrounded. The moral merit of law is taken by positivists to be contingent upon the particular circumstances of its creation and application.¹²⁰ This means that law and legal systems do not necessarily conform to moral values or ideals and it means that validity or legitimacy issues from within the legal system itself. Law, in short, is uncoupled from morality and in this way, its universality and normativity is left to be secured on merely formal or contingent grounds.

As it took shape during the disputes surrounding the new Weimar constitution, positivism was heavily influenced by neo-Kantianism and represented an attempt to construct an ideologically neutral system for the production and interpretation of law. This neutral and self-sufficient system was conceived as being an expression of an enlightened reason dismissive of all forms of particularistic sovereignty. Schmitt’s critique of the positivist paradigm of law, the focus of the first two sections, argues that sovereignty is thoroughly constitutive of law and as such always remains external to it. Schmitt argued that positivism yielded a mere form of legality which not only misunderstood the true source of legitimacy but also dangerously undermined the state’s ability to effectively deal with a situation of crisis.

As for the first issue, Schmitt’s writings attempted to show how legitimacy arises out of the substantial political will of a people represented in the figure of the sovereign or *Rechtspräsident*, not from a set of alterable constitutional laws. Positivism’s separation of the realm of law from substantial social and political elements furthermore endangered the true legitimacy and stability of liberal democracies such as Weimar. Formal rules and procedures cannot provide legitimacy since they cannot provide a clear distinction of the enemy. The reason that legal positivism cannot draw a distinction between friend and enemy is because of its belief in the separation between normativity and reality. Positivism’s abstractness from social reality

¹²⁰ Joseph Raz, *The Authority of Law*, Second Edition (Oxford: Oxford University Press, 2009), 38. As Raz argues, the statement that law is a social fact doesn’t necessarily entail the view that it does not contain moral claims. Neumann and Habermas would be in agreement with Raz’ position, as we’ll see below.

can, in the end, benefit any individual or social group. It is thus unable to provide a decision along identitarian political lines that stabilizes the social order. In the next section we will discuss Schmitt's decisionistic theory of constitutional legitimacy and in section three his endorsement of the concrete order thinking paradigm. As I will argue, concrete order theory provides a firmer ground for Schmitt's decisionistic theory of law. That is, concrete order thinking is yet another justification for decisionism. Under both paradigms, decisionism and concrete order thinking, laws are non-normative in nature and can be said to be *instrumental* to a sovereign executive, *Reichspräsident*, or leader.

In section four we take on Franz Neumann's response to Schmitt. Neumann's post 1933 texts represent a serious reflection on and coming to terms with National Socialism's abandonment of what he saw as political modernity's paramount achievement—the rule of law. A critical analysis of Neumann's theory of law is important for two reasons. First, Neumann's theory of law can be described as a “sociologically informed legal positivism.”¹²¹ As such, Neumann's reconstruction of the liberal rule of law is much more aware and concerned about the economic and political foundations of law without disregarding the idea that legitimacy in the age of modernity requires a system of norms. In other words, Neumann is aware of many of the contradictions of the liberal rule of law state, contradictions stemming from the rule of law-sovereignty distinction, but does not fall prey to an authoritarian remedy. In this sense, Neumann presents an *immanent* form of critique, one that is not external to the ideals and presuppositions of the rule of law. That is to say, Neumann works within the rule of law *ideal* without presupposing the validity of its current institutions. Secondly, Neumann's diagnosis of Weimar's legal woes results from his analysis of the challenges that advanced capitalist societies pose for the ethical dimension of the rule of law. His legal theory offers an important historical materialist understanding of the function and disfunction of law, an approach, as I argue in the conclusion to this project, that can still offer valuable insights. Neumann's legal theory, however, proves to be limited. I will point to some of these limitations at the end of this chapter but they will be further developed in chapter three where Habermas' theory of democratic legitimacy is analyzed.

Before moving on to the next section it is worth making a few brief comments on the German word *Recht*, since this is the concept used by Schmitt, Neumann and Habermas (chapter

¹²¹ Matthias Ruete, “Introduction,” Franz Neumann, *The Rule of Law*, xix.

3). The term *Recht* is sometimes translated as ‘right’ and sometimes as ‘law’ although these terms do not fully capture the idea of *Recht* as “the law as principle” or the system of law as opposed to particular laws (*Gesetze*).¹²² The *Recht*-*Gesetz* distinction is reflected in other languages (*ius, lex* in Latin; *droit, loi* in French, *derecho, ley* in Spanish and *diritto, legge* in Italian). In the German tradition *Recht* is commonly used for the discussion of legal norms and institutions in contrast to morality (*Moralität*) and ethical life (*Sittlichkeit*) although the boundaries of these spheres oftentimes becomes blurred.¹²³ I will stick to the English word law in the course of these two chapters.

2.2 Schmitt’s critique of legal positivism and the antinomy between law and constitutional legitimacy.

As a result of the revolution and the establishment of Weimar as a parliamentary republic, constitutional law in Germany entered a tumultuous but productive period in which scholars debated not only the theory and practice of Weimar’s new constitution but also questions and assumptions concerning the nature and relationship between law, sovereignty, and the state.¹²⁴ The question concerning the connection between the political and the legal nature of the state was the focus of intense debates between legal positivists and anti-positivists. Legal positivism, which arose and gained dominance throughout the second half of the nineteenth century, represents a variety of very different ideas.¹²⁵ In the German context of the period between late

¹²² “Recht,” in *A Hegel Dictionary* by Michael Inwood (Cambridge, MA: Blackwell Publishers), 259.

¹²³ “Recht,” *A Hegel Dictionary*, 259-261.

¹²⁴ Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, (Durham, NC: Duke University Press, 1997), 80-81.

¹²⁵ Following H. L. A Hart, Caldwell and Scheuerman neatly summarize the main senses of positivism as follows: “1) the view that law consists of human commands; 2) the claim that there is no essential connection or tie between law and morals; 3) the idea that the analysis of legal concepts is worth pursuing, and that this inquiry can be distinguished from historical and sociological inquiries into the origins, moral background, and social ‘function’ of law; 4) the contention that law consists of a relatively closed logical system in which reference to social aims, policies, and moral standards should be minimized in judicial and administrative application of law; 5) the view that

19th century and the fall of Weimar, legal positivism can be tentatively defined as a theory of law whose aim was to produce a state theory of law that was systematized, closed, and which excluded “sociological” or “extra-legal” aspects. The idea was to create a theoretical system through formalized legal constructions “that would learn from and match the conceptual clarity achieved in private law” as well as in the natural sciences.¹²⁶ Dependent solely on a system of pure legal rules, the validity of state law and power came to be understood as existing independently of moral, anthropological, or political prescriptions. Paul Laband took this idea to an extreme, one could say, when he defined the state, once considered to be imbued with metaphysical properties, as a ‘legal person.’ This effectively placed the state under the rule of law.¹²⁷

Anti-positivist lawyers, like Carl Schmitt, rejected the formal methodology of positivism as well as its closed, anti-political conception of law. Like positivism, anti-positivism came in many shapes and sizes. What they all shared, however, was the idea that law needs to be understood on the basis of a larger social, historical, political, and cultural context.¹²⁸ Schmitt’s stark antipathy towards legal positivism surfaced in nearly all of his writings. Kelsen’s normativism and *reine Rechtslehre* (pure theory of law) bore the brunt of representing for Schmitt all that was wrong and weak about this system of legal analysis, in particular, its inability to come to terms with state power.

Kelsen’s particular brand of legal positivism was based on a formal and “epistemological definition of law.” Kelsen, who was heavily influence by neo-Kantianism, identified the legal

moral judgments cannot be defended by the methods of science or rational argumentation, that is, a non-cognitivist view of ethics.” Peter Caldwell and W. E. Scheuerman, *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic*, (Boston, MA: Brill Academic Publishers, 2000), 9.

¹²⁶ Arthur J. Jacobson and B. Schlink, eds., *Weimar: A Jurisprudence of Crisis*, (Berkeley: University of California Press, 2002), prologue, 42.

¹²⁷ Seitzer, “Introduction” to Carl Schmitt, *Constitutional Theory*, (Durham, NC: Duke University Press, 2008), 11. The Laband school of legal thought was the dominant legal method of the Bismarkian Constitutional Monarchy. Laband’s form of ‘statutory positivism’ remained influential until the collapse of constitutional monarchy in 1918. Peter Caldwell, *Popular Sovereignty*, chapter one.

¹²⁸ Thus, anti-positivists like Schmitt, Erich Kaufmann, and Rudolph Smend, came from an anti-modernist tradition that rejected mechanization, individualism, political pluralism and which, in general, exalted “life” over “form.” See Jacobsen and Schlink, *Weimar*, 47. Herman Heller, on the other hand, also an anti-positivist, did not reject the basic modern institutions such as democracy, the liberty of the individual and the idea of social equality. For this see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Herman Heller in Weimar* (Oxford University Press, 1997).

norm as the *a priori* category that provided the conditions for the perception of law as an *ought* and not an *is*.¹²⁹ The legal system's "positivity" refers to the normative as well as objective character of the system of norms, a system that excludes any form of subjective ethics or 'factual,' 'real-world,' causal relations.¹³⁰ Attempts to impute causal, psychological or teleological motives to state action impaired the understanding of the legal system as "a formal universe of norms."¹³¹ "Relations of domination and power," Kelsen noted, "are factual connections, belonging to the world of the 'is,' standing in the causal relationship of psychical motivation, but never juristic relations, not *legal* relations."¹³² Statist views which seek to imbue the state with a psychological or metaphysical notion of the will constitute an ideological fiction in that they attempt to impart the state with a causal effectiveness and ethical autonomy that do not correspond to a normative and objective system of norms. For Kelsen, again, the state's will could only be understood as a legal construction. In fact, the state could be identified as a set of legal norms that "enabled, permitted, ordered, or denied certain persons to carry out certain coercive acts."¹³³ Kelsen's pure theory of law equated the law with the state and located sovereignty in the legal system. The legal system was in turn comprised of hierarchically ordered stages of authority whereby lower level norms derived their authority from higher level norms and so on until reaching the "originary norm" (*Ursprungnorm*) of the entire legal system. The originary or groundnorm gives objective validity to the system of norms and statutes in its totality. As Kelsen argues, "When it was maintained...that the whole legal order is 'derived' from it [the originary norm], this naturally cannot be so understood as though all positive statements of law were presupposed to be *a priori already* determined *in content*. The hypothetical originary norm is only the highest *rule for production*."¹³⁴

¹²⁹ Caldwell, *Popular Sovereignty*, 45-46.

¹³⁰ Caldwell, *Popular Sovereignty*, 88.

¹³¹ Caldwell, *Popular Sovereignty*, 48.

¹³² Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. First Edition. (Tübingen: J. C. B. Mohr (Paul Siebeck), 1911), 396-397 in Caldwell, *Popular Sovereignty*, 49. Author's italics.

¹³³ Caldwell, *Popular Sovereignty*, 90.

¹³⁴ Kelsen, *Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einr reinen Rechtslehre*. (Tübingen: J.C.B. Mohr (Paul Siebeck), 1920), 97-98, n.1 in Caldwell, *Popular Sovereignty*, 93.

As Schmitt argued in many of his Weimar period writings, Kelsen's normative and objective conception of the law and state proved paradoxical in more ways than one. While Kelsen understood law as an objective, i.e., factual and coercive, system, he also denied that law was on a par with state power (Kelsen's separation of *is* and *ought*). Schmitt's relentless critique of Kelsen derived from what he saw as legal positivism's reluctance to come to terms with 1) the importance of the state as the political *unity* of a people and 2) the idea that law cannot be treated independently from this legitimating political unity, an idea, as we'll see below, that fits his conception of sovereignty and decisionistic concept of law. As Schmitt argued in *Constitutional Theory* (1928), the constitution is ultimately a reflection of the will of a political unity which is derived from the constitution-making capacity of a people, not an ordinary norm (*CT*, 64). Constitution, for Schmitt, is a "status of unity and order" (*CT*, 60). It designates the concrete, individual state in its concrete political existence. Legal norms and statutes *presuppose* an already existing political will and unity embodied in a sovereign. In other words, "the concept of the state *presupposes* the concept of the political."¹³⁵ One of the main objectives of *Constitutional Theory* is thus to distinguish the logically prior and more essential idea of constitution, the "absolute concept of the constitution" from the constitution as a series of legal principles and norms, the "relative concept of the constitution" (*CT*, chapters 1 and 2, respectively). In Schmitt's view positivist scholars miss the dual sense of constitution:

A special difficulty for the constitutional theory of bourgeois Rechtsstaat lies in the fact that even today the bourgeois Rechtsstaat component of the constitution is still confused with the entire constitution, although it cannot actually stand on its own. It serves, rather, only as a supplement to the political component... The treatment of the concept of sovereignty has suffered the most under this method of fiction and of disregarding specific circumstances. In practice, then, the habit of apocryphal acts of sovereignty develops (*CT*, preface, 55).

In Schmitt's understanding the legal order cannot stand on its own but is at the service of the political foundation of the constitution.¹³⁶ Law in this sense has its source in the sovereign will,

¹³⁵ Schmitt, *Concept of the Political*, 19. My italics.

¹³⁶ In the next section I will concentrate on the second aspect of Schmitt's critique of positivism, mainly, that Kelsen's form of positivism must ultimately lead to a form of decisionism, since it does not give an account of the relationship between law and the coercive force of the state.

in a decision that constitutes unity. The legitimacy of the constitution rests on this voluntaristic principle. “The constitution is valid by virtue of the existing political will of that which establishes it. Every type of legal norm, even constitutional law, presupposes that such a *will* already exists (CT, 76). For Schmitt law cannot constitute legitimacy on its own—its relative character, the fact that it can be altered, needs to rest upon a concrete political decision that gives form to a people’s existence. “Everything regarding legality and the normative order inside the German Reich is valid only on the basis and only in the context of these decisions. They constitute the substance of the constitution” (CT, 78). Positivism’s reluctance to understand law as grounded in what is ultimately a political *decision* that gives unity and order to a people is the source on the one hand, of the *Rechtsstaat*’s “apocryphal acts of sovereignty.” On the other hand, constitutions that operate on the basis of “mere legality” are fragile because they lack a certain kind of resoluteness for dealing with political conflicts and crises. Deference to mere legality may result in either constitutional stalemate or political paralysis. These extreme situations, in turn, reveal the ultimate primacy of a political will.

The distinction Schmitt makes the between absolute and relative senses of constitution somewhat mirrors his partition of the Weimar constitution into democratic and liberal components. The liberal or *Rechtsstaat* principles of the constitution are an expression of “the constitutional ideal of bourgeois individualism,” which is “personal freedom, private property, contractual liberty, and freedom of commerce and profession” (CT, 169). These rights are realized by means of general and formal law, constitutional provisions for basic rights, the separation of powers, and parliamentary representation.¹³⁷ The overarching goal of bourgeois rights is to render public law non-political, that is, to deprive law with its connections to the state (CT, 169-172). The (political) executive power is limited and calculable and its function is to remain the servant of civil society. “All state activities, even legislation and government, end in an operation that is ongoing and calculable in terms of a previously defined norm. Everything is caught up in a network of competencies. The most extreme competencies, even a ‘competence to define competence,’ are never in principle unlimited, never ‘the plentitude of state power’” (CT, 174). What is of importance to Schmitt here is that the fundamental idea of the *Rechtsstaat* understood as a closed system of predefined norms allows for no decisive political will, a will

¹³⁷ CT, see ch. 13 (general laws), ch.14 (basic rights), ch.15 (separation of powers), ch. 16 (representation).

that can without delay and confusion, restore the social order. But the fundamental idea behind the liberal state form “contains, historically as well as intellectually, the rejection of the rule of persons, whether it is an individual person, an assembly, or body whose will takes the place of a general norm that is equal for all and is determined in advance” (CT, 181). It is precisely this characteristic which is dangerous to the political order in times of crisis, a reason that made Schmitt advocate for a strict reading of Article 48 of the Weimar Constitution, a measure that authorized the president special powers (force) in cases where “public security and order are seriously disturbed or endangered.”¹³⁸

The democratic component of the constitution is associated with the concept of the political and the capacity for an association of friends to lend legitimacy to the sovereign. The democratic component of the constitution accounts for the provisions that sustain the “constitution,” understood as the existential unity of a people. This existential unity, following Schmitt’s concept of the political, is defined by the distinction between friend and enemy, a distinction which demands a substantive notion of equality, or identity.¹³⁹ Contrary to the parliamentary form of representation where representatives are really “advocates” for individual interests, under true representation the people are represented by the president by means of an “existential” “enhancement” of their unity (CT, 243).¹⁴⁰ For Schmitt thus, the democratic principle, the essence of the constitution, was identified with the executive, the *Reichspräsident*. The special powers granted by Article 48 were intended to secure precisely this principle of unity in the case of a threat. Most of Schmitt’s writings during the Weimar period privileged the executive over the parliament and the absolute over the relative concept of constitution.

This is clearly the case in *The Crisis of Parliamentary Democracy* (1928). Here Schmitt argues that law carries little if any force under parliamentary institutions, especially in the age of mass democracy, where deliberation becomes an “empty formality.” Parliament is a collection of

¹³⁸ Article 48, *The Weimar Constitution* in Schmitt, CT, Appendix, 417.

¹³⁹ Carl Schmitt, *The Crisis of Parliamentary Democracy*, (Cambridge, MA: The MIT Press, 1988), 9.

¹⁴⁰ Clearly, Schmitt wants to distinguish his concept of representation from the liberal concept of representation based on interest. He says: “What serves only private affairs and only private interests can certainly be advocated. It can find its agents, attorneys, and exponents... In representation, by contrast, a higher type of being comes into concrete appearance. The idea of representation rests on a people existing as a political unity, as having a type of being that is higher, further enhanced, and more intense in comparison to the natural existence of some human group living together.” CT, 243.

varied parties, all of them catering to particular interests. Among such varied and firm party interests stalemate becomes habitual and expected. Worse, it results in backroom deals as the only way out of these stalemates. For Schmitt, twentieth century parliamentarism is not an institution that “guarantees the education of a political elite” but an institution that runs on the basis of a “propaganda apparatus whose maximum effect relies on an appeal to immediate interests and passions.”¹⁴¹ The continuous discussion, stalemate and demagoguery of parliamentarism were a few of the ways in which the state becomes neutralized and depoliticized. Deliberative bodies, for Schmitt, especially in the age of mass democracy, cannot guarantee the force and legitimacy of law.¹⁴² Schmitt’s solution in this book relies on a strong notion of identitarian democracy, a form of democracy that serves to justify the executive at the expense of legislative bodies. Restoring the political, for Schmitt, means relegating the will of the people to acclamation, to yea or nay-saying.¹⁴³

For Schmitt most importantly, the non-political, value-neutral, perspective of legal positivism was the product of the four hundred year long process of neutralization and depoliticization. Positivism, in his view, aimed to provide a theory of law that contained and restricted the political nature of the state, in particular, its ability to impose its will on the basis of substantialistic values. Schmitt devoted much of the Weimar years to the construction of a critique of the over formalization of positivist law based on his theory of sovereignty.¹⁴⁴ This

¹⁴¹ Schmitt, *Crisis of Parliamentary Democracy*, 7 and 6 respectively.

¹⁴² “The situation of parliamentarism is critical today because the development of modern mass democracy has made argumentative public discussion and empty formality... Argument in the real sense that is characteristic for genuine discussion ceases. In its place there appears a conscious reckoning of interests and chances for power in the parties’ negotiation... Today parliament itself appears a gigantic antechamber in front of the bureaus or committees of invisible rulers.” *Crisis of Parliamentary Democracy*, Preface to the 1926 edition, 6-7.

¹⁴³ In his words, “The stronger the power of democratic feeling, the more certain is the awareness that democracy is something other than a registration system for secret ballots. Compared to a democracy that is direct, not only in the technical sense but also in a vital sense, parliament appears an artificial machinery...” *Crisis of Parliamentary Democracy*, 16-17.

¹⁴⁴ Schmitt has oftentimes been labeled a legal positivist for arguing that legitimacy lies in the command of the state (as opposed to some other normative source). See for example, Bernard Schlink, “Why Carl Schmitt?” *Constellations* 2, no. 3 (1996), 434. While this is true, Schmitt imbued his theory of state sovereignty with an existential, sometimes mythical, sometimes personalistic, substance. I take it that this feature disqualifies Schmitt’s conception of law as positivistic. When positivism claims that legitimacy lies in the legal statutes acknowledged and enforced by the state usually this bars all extra-legal qualities such as those contained in substantialistic notions of sovereignty. Schmitt’s concept of law and positivism converge in that both can be instrumentalizable and lacking in normative content. It is true, however, that these qualities put positivism in the dangerous vicinity of decisionism, as we shall discuss in chapter three.

critique emphasized the gaps between law and “concrete life” as well as positivism’s difficulty in accounting for the groundless political decision that lies at the source of law. In Schmitt’s view the will of the people or the sovereign cannot be formalized or limited in any way. Schmitt oftentimes referred to his “political theological” project (chapter one) as a “juridical project” stressing the structural compatibility between theology and law. He thought this structural compatibility could be revealed by tying the two lines of questioning together. Schmitt’s Weimar period writings can thus be read as being fundamentally concerned with the degree to which the state can *actually* enforce the law—the degree to which it displays sovereignty—as opposed to existing only as another subject within it.

Political Theology begins with a definition of the sovereign as “he who decides on the exception” (*PT*, 5). This is a shrewdly constructed sentence which brings to light much of the ambiguity of the concept, an ambiguity which I take as being constitutive of the exceptional nature of the sovereign. The definition does not indicate that the sovereign is he who decides what to do in case of an emergency. It indicates that the sovereign decides *whether* there is an exception (as well as what to do in such a case).¹⁴⁵ This standpoint clearly positions the sovereign outside the legal order. While a liberal and positivist account of sovereignty would recognize that the sovereign stands in some way above the legal order it insists on defining certain jurisdictions and a range of guided means for resolving the emergency. To say that the sovereign is the person who decides in a time of crisis is to position the sovereign within the legal order and to claim that a crisis situation and its solution can be specified in advance. Concrete life for Schmitt is irreducible to a stipulated system of norms and procedures.¹⁴⁶ This is the case for state emergencies as well as for everyday application of the law by judges where mediating or arbitrating procedures come into play whose practical success is dependent on the authority of a mediator or arbitrator, that is, on extra-legal factors (*CT*, 176-180). “That the legal idea cannot translate itself independently is evident from the fact that it says nothing about who

¹⁴⁵ As Dyzenhaus also points to in his analysis of this sentence, the definition is also unclear as to who the sovereign is in the following sense. Is it the one who as a matter of fact decides on the exception? Or does it mean that the sovereign decides on the exception in virtue of his position. I take it that a liberal or positivist lawyer would not disagree with the second definition since it clearly demarcates a position within a legal order, which is what matters in a closed, formal, legal order. Dyzenhaus, *Legality and Legitimacy*, 43.

¹⁴⁶ However, it is important to remember that Schmitt frequently, in fact, took the exception to be norm-governed in other writings, as in his distinction between sovereign and commissarial dictatorships. See Schmitt’s, *On Dictatorship*. Carl Schmitt, *La Dictadura*, (Madrid: Revista de Occidente, 1968).

should apply it. In every transformation there is an *auctoritas interpositio*. A distinctive determination of which individual person or which concrete body can assume such an authority cannot be derived from the mere legal quality of a maxim” (*PT*, 31). Again, positivists are mistaken in their understanding of the legal order as a closed system of rules and procedures.

Schmitt’s groundless decisionism coexisted, however, with a need to find a deeper grounding for law, a deeper source that did not lie in the will of the sovereign or the constituent will of a people (represented in the sovereign). Schmitt did not believe that a merely legally valid norm could represent this ultimate, stable source—as legal positivists would have it—nor could the legislative act of the sovereign—as decisionists would argue. Schmitt’s answer to this question came in the form of “concrete order theory,” or institutionalism, foreshadowed in many of his early writings but made explicit for the first time in his 1934 publication *On the Three Types of Juristic Thought*.¹⁴⁷ Through an examination of this provocative yet largely overlooked text we will outline what I take to be Schmitt’s most scathing critique of legal positivism from the standpoint of concrete-order thinking. While concrete order thinking was supposed to surpass decisionism, in the end as we shall see, it nevertheless constitutes another non-normative legal theory which in the end results in decisionism.

Schmitt presents concrete-order thinking as an alternative to normativism, decisionism, and legal positivism (which he takes to be an amalgam of the former two). As a post liberal legal theory that Schmitt took to be embodied in the “new” conception of law put forward by the National Socialist League of German Jurists (*OTT*, 97) Schmitt’s concrete order thinking as presented in *On the Three Types of Juristic Thought* is significant, especially when considering that some of its basic presuppositions can be traced back to his earlier Weimar work.¹⁴⁸ While this indeed is an important topic for analysis, I will concentrate on this text for different reasons. *On the Three Types* presents one of the most incisive critiques of legal positivism. Based on the notion of concrete order, Schmitt considers legal positivism an (ideological) theory “completely

¹⁴⁷ Schmitt’s concept of Constitution (as distinguished from Constitutional Law) already contained the idea of concrete order when he equated the idea of the state with the constitution and traced back to Aristotle’s concept of *politeia* as *stasis*, or order. Schmitt, *CT*, 60. See also Gross’ discussion of this in *Carl Schmitt and the Jews The ‘Jewish Question,’ the Holocaust, and German Legal Theory*, (Madison, WI: University of Wisconsin Press, 2007), 46, 61.

¹⁴⁸ For a good analysis of the ways in which *On the Three Types* shares many features with Schmitt’s earlier Weimar concerns about the abstract nature of law and the gap between norm and concrete life see Scheuerman, *Carl Schmitt*, especially 125.

bound to the state and societal conditions characteristic of the nineteenth century” (*OTT*, 70). Now that these conditions no longer hold, according to Schmitt, positivism, together with the liberal order, must make way for a new kind of legal thinking, one that can actually make sense of the new economic and political reality.

This analysis will set things up for our presentation of Neumann who also set out from the “concrete order” of the nineteenth century finding that legal theory and economic-political reality no longer complement each other. Neumann’s solution, however, avoided fascist conceptions of the law and state choosing to go back to the ethical element in the classically conceived liberal rule of law ideal.

2.3 Schmitt’s critique of legal positivism from the standpoint of concrete order.

If Schmitt’s Weimar period critique of the liberal rule of law was carried out from the perspective of a decisionist theory of law and state power, in *On the Three Types of Juridical Thinking* Schmitt once and for all distances himself from decisionism understood as the central concept of modern jurisprudential thought. As discussed above, Schmitt’s Weimar writings argued that it was the political unity of the people that constituted the legitimating non-normative principle of the modern liberal state—not a foundational norm. This political unity, expressed by means of the sovereign will, however, can be as substanceless and abstract as a Kelsen’s foundational norm. If positivist jurisprudence tends towards overly abstract, open-ended clauses, decisionism, as Schmitt wrote in 1934 preface of *Political Theology*, “runs the risk of missing the stable content inherent in every great political movement” (*PT*, 3). While Schmitt’s Weimar writings could be seen as urging liberal lawyers to seize the political, decisionistic moment in law, *On the Three Types* urges lawyers to embrace concrete order thinking as a paradigm that captures the true essence of law, a move that would lead to a more stable political order. Schmitt was looking for some kind of ground or subject matter for the decision, something on the basis of which the sovereign could decide.

While Schmitt's rejection of the decisionistic paradigm can be seen as constituting a 'break' in his theoretical work, Schmitt's decisionism was never completely groundless in relation to the political order.¹⁴⁹ Indeed, Schmitt routinely insisted that the sovereign decision is always a *concrete* decision based on *concrete* circumstances. We have to remember that his concept of the political is, as he defines it, *existential* and *concrete*, not something abstract.¹⁵⁰ The sovereign decision, as accounted for by Schmitt, results from a particular, concrete friend-enemy configuration. One could thus take the embrace of concrete order thinking as providing a fuller account of the basis for the friend-enemy distinction. Indeed, as I will attempt to show, concrete order thinking turns out to be another variant, a more substantiated variant, of his earlier decisionism.

On the Three Types makes use of the terms "types," "kinds," and "ways" of juristic thinking to refer to the ultimate essence of law. In other words, this work is concerned with the concept of *Recht* (OTT, 43). When thinking about law (*Recht*), Schmitt argues, scholars necessarily conceive of it "either as a rule, as a decision, or as a concrete order and formation (*Gestaltung*)" (OTT, 43). The *foundation* and *essence* of law, in other words, can be understood in terms of rules, decisions or concrete order, all of which he identifies as "eternal types." In other words, the various natural and rational law theories in the history of jurisprudence have been conceived on the basis of three eternal or permanent principles—*ratio*, *voluntas*, and order or formation. As we'll see below, legal positivism does not constitute an eternal type since this legal paradigm is based on a mix of normative and decisionistic principles and is furthermore based on the concrete order of the nineteenth century state. Much like the friend-enemy distinction, which, as we saw in chapter one, could be understood almost as an ontological feature of reality, so it seems with these three eternal types in legal history.

¹⁴⁹ For the most part, Schmitt scholarship takes Schmitt's sovereignty and decisionism to be completely groundless. For views that stress the similarities between Schmitt's concept of sovereignty and that of concrete order see Montserrat Herrero, "Estudio preliminar", Introduction to Carl Schmitt, *Sobre los tres modos de pensar la ciencia jurídica* (Madrid: Tecnos, 1996); Ingeborg Maus, "The 1933 'Break' in Carl Schmitt's Theory," in Dyzenhaus, *Law as Politics*, and William Scheuerman, *Carl Schmitt: End of Law*.

¹⁵⁰ "The friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols, not as mixed and weakened by economic, moral, and other conceptions..." CP, 27. See also the Introduction to this dissertation. *Political Theology* might be an exception to this since Schmitt's decisionism here is taken to its extreme groundlessness.

As Schmitt points out, every kind of jurisprudential thought works with rules, decisions as well as with concrete orders and formations but, in the end, every legal paradigm will posit one ultimate notion from which all others can be derived juristically. The question for Schmitt is “which concept of law uses the others as instruments in its own actualization.”¹⁵¹ Accordingly, legal normativism contends that law is founded and derived from norms and rules; decisionism contends that law is essentially constituted from decisions (at its origin as well as in the legislating process); and concrete order thinking contends that law is an emanation and expression of concrete forms of life. Concrete order thinking, thus, is one approach to the question of law and like the other two concepts, “claim[s] *Recht* for itself” (*OTT*, 47).

The idea behind concrete order thinking concerns the claim that norms, like decisions, are predicated upon an already given order, or social fabric. This is the thrust of Schmitt’s critical stance here: that while normativism and decisionism claim to impose either impersonal law or subjective will onto human relations, thereby creating the ‘normal’ order, it is the internal order of natural “institutions”—such as marriage, family, *Stand*, or office—which define and assure the normal condition under which norms and decisions can be applied. Social formations and practices produce their own inner standards.¹⁵² Concrete order thinking begins from natural associations and contends that these, in their already organized form of life, are the condition for the possibility of rules as well as decisions, not the outcome of norms and statutes. The claim being made here for concrete order thinking is *descriptive*. Thus, most of Schmitt’s argument is focused on establishing that normativism and decisionism ignore the concrete institutional orders on which they are really founded on. Part one of *On the Three Types* is an attempt to establish concrete order thinking as the only approach to correctly understanding the “true sense and core of *Recht*” thereby relegating normativism and decisionism as *derivatives* of concrete order thinking.

In the vocabulary of concrete order thinking, or institutionalism, every concrete order displays a *Nomos*. *Nomos* as used by Schmitt here refers to the existence and development of a community of persons in a given space in accordance with their natural mode of existence, their “way of life.” In other words, *Nomos* expresses the way of life of a community (*Gemeinschaft*) in

¹⁵¹ Bendersky, Introduction, *OTT*, 20.

¹⁵² Mariano Croce, “Does Legal Institutionalism Rule out Legal Pluralism? Schmitt’s Institutional Theory and the Problem of the Concrete Order” in *Utrecht Law Review* 7, No. 2, (2011), 50.

a given space and time under the conditions of their traditions, customs, and geography. Central to Schmitt's argument is his identification of *Nomos* with *Recht*.¹⁵³ *Nomos*, the moral and rational principles configured in the customs, sentiments, and environment of a people—all of the human and natural elements that Kelsen would dismiss as ideology—is the essence and source of law. Schmitt's concrete order thinking could be thus described as a non-normative theory in that *Nomos* is a *reflection* of the internal development of a community.

Echoing his anti-modernist distaste for technology, abstractness, and formalism expressed in so many of his writings, Schmitt rejects the idea that law can exist as a set of rules, legal stipulations and positive norms. Under the normativist legal paradigm, a King, leader, or judge, constitute normative *functions* within a system. These offices are the result of appointment processes which derive from higher norms that eventually lead to the highest of norms, the norm of norms. Alternatively, concrete order thinking takes a judge, king, or leader as embodying the *Nomos* of a concrete order, not as a function that regulates social interaction. The *Nomos* which a legitimate king embodies “must have in itself certain of the highest, unalterable, but also concrete qualities of an order. One would not say that a mere method of operation or a schedule is ‘king’” (*OTT*, 50).

As Schmitt argues, “order” is what normativism takes to be the “normal” situation. However, the concept of the normal situation cannot be created by means of abstract norms. It is generated from a *Nomos*, an already given “juridical substance” (*OTT*, 54). Only through a second instance does *Nomos* come to be expressed in rules and norms; only as a specification of its particularity and of its internal order. “Every order, including the legal order,” Schmitt contends, “is bound to concrete concepts of what is normal, which are not derived from general norms, but rather such norms are generated by their specific order and for their specific order. A legal regulation presupposes concepts of what is normal, which develop so little from the legal regulation that the norming itself becomes so incomprehensible without them that one can no longer speak of a ‘norm’” (*OTT*, 56).

In Schmitt's view, general rules should, indeed, remain independent from individual cases since they must regulate a variety of different cases. But general rules should elevate themselves from the concrete case only to a very limited extent. If rules existed independently

¹⁵³ “But *Nomos*, like ‘law,’ does not mean statute, rule, or norm, but rather *Recht*, which is norm, as well as decision and, above all, order.” *OTT*, 50

and abstracted from real life then they would become “senseless and unconnected” (*OTT*, 56). This is the famous ‘gap’ Schmitt occasionally brings up—the gap between a formal rule and the particular case, or the gap between law and ‘life.’¹⁵⁴ The idea is that a formal, abstract rule could never contain, or capture the ‘excess’ that is ‘life.’ But this in a sense is what normativism promises—that a norm will remain valid no matter what happens in reality and no matter who it refers to in reality. This is one of the core ideas behind the idea of the modern rule of law— that norms don’t pick out particular persons. Also essential to (a progressive understanding) of the rule of law, is that norms can be employed in order to question and criticize normality, and potentially change “normality,” or, in other words, the social context.¹⁵⁵

Schmitt, however, understands norms as being an *expression* of the underlying social fabric. Schmitt offers the following definition of concrete order thinking by referring to Santi Romano’s *L’ordinamento giuridico*: “The legal order (*l’ordinamento giuridico*) is a uniform essence, an entity that moves to some extent according to rules, but most of all itself moves the rules like figures on a gameboard; the rules represent, therefore, mostly the object or the instrument of the legal order and not so much an element of its structure.”¹⁵⁶ Ultimately, the customs, regulations and calculations of a concrete order do not “consume the essence of this order” but merely serve it. Indeed, the naturally arising, internally ordered spheres of life *resist* being subsumed under norms. Every legislator and legal official understands this when creating or applying the law, says Schmitt. Institutions such as family and marriage are presuppositions of normativistic laws. When dealing with the cohabitation of a marriage, family, or clan, for example, judges and legislators subject themselves to these traditional institutions which resist normativistic dissolution (*OTT*, 55). “The normalcy of the concrete situation regulated by the norm and the concrete type presupposed by it are therefore not merely an external, jurisprudentially disregarded presupposition of the norm, but an inherent, characteristic juristic

¹⁵⁴ This has been a constant throughout Schmitt’s writings. In his early Weimar writings, the gap between law and concrete case can only be mediated by the will and decision of an authority—a sovereign or the personality of a judge. “Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment.” *PT*, 30. See also the first chapter of Schmitt, *On Dictatorship*, where he discusses the necessity of dictatorship for actively intervening in the world in a concrete, as opposed to general, manner.

¹⁵⁵ Croce, “Does Legal Institutionalism Rule out Legal Pluralism?,” 46.

¹⁵⁶ Santi Romano, *L’ordinamento giuridico* (Pisa, 1918), 17. Cited in *OTT*, 57

feature of the norm's effectiveness and a normative determination of the norm itself. A pure, situationless, and typeless norm would be a juristic absurdity" (*OTT*, 56-57). In this view, law would serve to confirm and reaffirm the concrete orders of a polity and in so doing maintain the polity's identity.¹⁵⁷

Schmitt's injunction against decisionism follows a similar pattern. For decisionist jurists, the foundation and source of law is the command of a sovereign body or authority. It is the sovereign groundless decision which first establishes order as well as the norms which legislate over it. But, Schmitt argues, "the pure nothing-but decision" is always already "restricted by and incorporated into order thinking." Just like norms and rules, the decision is the "emanation of a presupposed order" (*OTT*, 60). Pace Hobbes, situations of complete disorder and chaos do not exist. Indeed, Schmitt argues, while papal infallibility contains a strong decisionistic element, it nevertheless operates within the institution of the church—it does not establish the order and institution and cannot exist apart from it. Bodin, whom Schmitt had often quoted as the paradigmatic theoretician of sovereign decisionism, also remains within the confines of order thinking since his theory of sovereignty maintains institutional frameworks such as the family, *Stand* as well as the figure of the sovereign as a legitimate authority, a legitimate king (*OTT*, 60-61).¹⁵⁸

Lastly, Schmitt turns to legal positivism, his real target in this piece. Schmitt did not identify legal positivism as an "eternal type" since it is constituted by of a mix of normativism and decisionism, what he takes to be two irreconcilable eternal types. We've already outlined the problems with normativism and decisionism. The problems with these two eternal types also afflict legal positivism. Legal positivism however, also carries the burden of combining these two irreconcilable types without making a precise commitment as to its ultimate source of validity. The normativist element in positivism demands that the decision be a firm and inviolable norm, "that the state legislator himself also be subject to the very same statute and its interpretation that had been created by him" (*OTT*, 67). The decisionistic element of legal positivism reveals itself in two ways. On the one hand, it is displayed in the historical "polemical" decision to concentrate power in the legislative function of parliament. On the other

¹⁵⁷ Croce, "Does Legal Institutionalism Rule out Legal Pluralism?," 51.

¹⁵⁸ It is interesting to note that Bodin and the ideal of papal infallibility were two of Schmitt's most favored examples during Weimar of law as groundless *voluntas*.

hand, decisionism is part and parcel of the everyday functioning of normativism in that law requires that we subject ourselves to the power of the legislature “because only [the] legislator has the actual power to bring about the decision’s realization” (*OTT*, 67). The fact that positivism fails to assert one criterion of validity is why positivism is not an “eternal type” of legal thought and why, in the final instance, must always adopt a decisionist stance based on the factual will of the legislator.

Security, certainty, firmness, strict scientific method, functioning calculability, and all kinds of ‘positive’ qualities and advantages were in reality generally not advantages of the legal ‘norm’ and human statute. These were, instead, only the attributes of the normal, relatively stable situation of a political system at that time in the nineteenth century, which had its focal point in legislation and therefore in the legality system of a legislative state. Not because of the norm, but because and in so far as this state system was constructed in a certain stable, secure, and firm manner, could one be so positive (*OTT*, 66).

Foreshadowing Kosselleck’s account of the political nature of the bourgeoisie in *Critique and Crisis* (chapter one) we could take Schmitt to be arguing that the modern liberal order, with legal positivism as its ideological tool, is the political rule of the bourgeoisie. The specific political nature of this rule comes out through its disguise in a neutral theory of law. The combination of decisionist and normativist elements allows the bourgeoisie to rule “without presenting this power as an institution or other kind of concrete order or generally to inquire about its actual justification” (*OTT*, 70). The bourgeoisie’s rule by means of general law, Schmitt finally states, “is distinct from other kinds of value in that it is necessarily always something real and factually realizable directly through human force” (*OTT*, 68).

Schmitt criticizes legal positivists such as Kelsen and “that fanatic of positivistic legal certainty, Jeremy Bentham,” for not acknowledging the “real and factually realizable” power of the state (*OTT*, 66 and 68, respectively). The application of norms can be realized only in the context of the bourgeois constitutional state and its coercive guarantees. It is hard to disagree with this claim but as we’ll see below, it is one of the challenges both Neumann and Habermas face in making the facticity of the state part and parcel of the legitimating nature of law.

Schmitt makes an important observation about the self-defeating nature of the bourgeois legal positivism of Kelsen and Bentham by means of an analogy with scientific positivism. Max Planck argued that the pure positivism of the natural sciences hindered the pursuit of scientific

knowledge. Its reliance on pure sensation resulted in its not being able to distinguish “deceptive and illusory sensory perceptions from others” (*OTT*, 71).¹⁵⁹ Similarly, the legal positivist who, in relying on the pure legal procedures and norms disregards economic, political and other “ideological phenomena” from the understanding of law, may not be capable of distinguishing the smooth functioning of a legal system from a social context that is devoid of legitimacy. This is not a minor point given the historical and political context of the book’s publication in 1934.

Part two of *On the Three Types* presents institutionalism in relation to Germany’s legal present and future. As Schmitt maintains, the Hobbesian state was the *defining order* which engulfed and diluted all traditional orders in their entirety—ecclesiastical communities, feudal *Ständen*, as well as other kinds of traditional and hierarchical stratifications. Through a slow development the positivization of law resulted in the juridification of the private sphere as well. Marriage and the family ceased to exist as a natural order and became “reciprocal legal relationships of individuals contractually constituted on the basis of the dominating norms of rational law” (*OTT*, 76).¹⁶⁰ Schmitt’s point is that in the history of the development of the bourgeois state, norms came to reflect and incorporate what are considered to be almost perennial institutions, institutions which the state takes upon itself to preserve.

One of Schmitt’s goals in this second part is to claim that Germany and “the spirit of the German people” has long resisted the disintegration of order thinking at the hands of normativism (*OTT*, 77, 80).¹⁶¹ Completely erasing Kant’s influence on German legal thinking, *On the Three Types* champions Hegel’s legal and political philosophy as the “summation” of concrete order thinking and its dominance over abstract normativity. In Schmitt’s view, Hegel’s *Philosophy of Right* provided a theoretical foundation “for rendering innocuous, as far as it was still possible in the reality of the nineteenth century, the claim to totality that the bourgeois contractual society extolled in that century and which had also ultimately prevailed” (*OTT*, 78).¹⁶² Neumann called this “demagogic” appropriation of Hegel ludicrous since Hegel always

¹⁵⁹ This is “the myth of that which is the case,” that Horkheimer and Adorno talked about in relation to positivist claims to knowledge. See *Dialectic of Enlightenment*, xi.

¹⁶⁰ For an absurd take on this kind of normativism, Kant defined marriage as a contract of individuals mutually interested in their sexuality, *Metaphysik der Sitten*, Rechtslehre, paragraph 23, quoted in *OTT*, 76.

¹⁶¹ Hegel and Otto von Gierke are two organicist philosophers of the state mentioned in this chapter. Another example of the “resistance” to normativism is the administration of the Prussian Army, 81.

¹⁶² As Schmitt further notes, in his *Philosophy of Right*, Hegel called Kant’s legal account of marriage ‘disgraceful.’

held fast to the idea of abstract right as formal equality before the law.¹⁶³ Schmitt maintains that a certain form of concrete order thinking has survived in Germany to the present day in the practices of governmental administration and the Prussian army. Schmitt maintains that concepts such as “leadership, and the power of command, supreme command, supreme commander-in-chief, and supreme legal authority,” concepts that are constitutive of the Prussian army, for example, express leadership roles that cannot be functionalized nor contained by a normativistic system that regulates appointments.¹⁶⁴

Schmitt’s second major point here is about the historical development of law and is important insofar as it ties into Neumann’s explanation of the changing function of modern law—our focus in the next section. Both theorists addressed the crisis of law in the twentieth century but gave different explanations concerning the origin of the crisis. For Schmitt the rule of law was reaching a breaking point and opening the way for a return to a kind of concrete order thinking that moves past the structure of the bourgeois state and positivist thinking. Going back to the discussion of the relationship between norm and normality (or reality), Schmitt argued that a norm will not be able to regulate a concrete situation “if the normality of the concrete situation presupposed by the positive norm but ignored by positivist jurisprudence collapses.” “Then,” he continues, “the use of every firm, calculable, and inviolable norm collapses” (*OTT*, 71). What Schmitt is arguing here is that if something in the social fabric changes, making it abnormal, then the law would not be in a position to regulate it, much less identify it. The question now becomes, what would law have to look like for it to be able to accurately regulate normality?

Thus Schmitt defended the use of “general clauses,” a kind of open or indefinite rule or principle that refers, for example, to “good faith,” “common decency,” or “important reason.” General clauses were common during the Weimar republic and their use progressively increased during the republic’s final days. Because Schmitt thought that formal norms could often lead to contradictory interpretations and thus to the increase of a plurality of views, and because normativism’s neutrality takes into account the inviolable personhood of everyone, the embrace of general clauses was straightforward. “Good faith,” “common decency,” and “important reason” are not abstract norms divorced from social reality. They are instruments for confirming

¹⁶³ Franz Neumann, *Behemoth*, 447.

¹⁶⁴ In other words, the highly formalized and value neutral nature of normativistic constitutional through is unable to grasp “leadership thinking (*Führergedanken*)” since “it demands... and oath to the constitution, to a norm, instead of to a leader (*Führer*)” (*OTT*, 82).

and reaffirming the “normality” of the social order and can be used by judges who apply norms to concrete situations. One could describe general clauses as providing a better opportunity to parcel out friends from enemies. As mentioned above, Schmitt turned towards concrete thinking because decisionism did not provide a ground or subject matter on the basis of which to make the decision. In the framework of concrete order thinking, a judge, for example, is in the position to decide whether an action conforms or not to the social order. It is left up to the judge-interpreter to gauge the situation in relation to the meaning of the general clause. It is easy to see how the use of general clauses within the framework of Schmitt’s concrete order thinking is nothing but situational justice.¹⁶⁵ To repeat the claim at the beginning of this section, I take Schmitt’s embrace of concrete order thinking as providing a fuller account of the decision on the friend-enemy distinction. As such, concrete order thinking turns out to be another variant, a more substantiated variant, of his earlier decisionism.¹⁶⁶

In Schmitt’s view, the increasing adoption of general clauses was an expression of the demise of positivism’s “certainty” (*OTT*, 90). The rise of general clauses furthermore proved for Schmitt that concrete order thinking has deep roots in the “German spirit.” National Socialism’s open embrace of general clauses constituted for Schmitt a step forward in eliminating the artificial separation between law and traditional institutions. General clauses, in that they refer to extralegal criteria such as cultural mores, are highly problematic in pluralistic societies. Indeed, for general clauses to work under any sort of regularity and certainty judges must share a common worldview and the social reality they regulate must, as well, remain homogenous.¹⁶⁷

It is not an uncommon position in Schmitt scholarship in English to take his membership in the party as well as his anti-semitic writings to have been paying mere lip service to the

¹⁶⁵ This is not to say that all forms of institutionalism are authoritarian. For an overview of a form of institutionalism that is non-decisionistic see Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, (Boston: Kluwer, 1986).

¹⁶⁶ See also Croce, “Does Legal Institutionalism Rule out Legal Pluralism? Schmitt’s Institutional Theory and the Problem of the Concrete Order,” 52-53 and Neumann’s understanding of concrete order thinking in the following section.

¹⁶⁷ It is not difficult to see how elements of Schmitt’s concrete order thinking could blend well with Nazi anti-semitism. For an extensive analysis of this see William Scheuerman, *Carl Schmitt: The End of Law?* For a review of the literature on Schmitt and anti-semitism see Joseph Bendersky, “New Evidence, Old Contradictions: Carl Schmitt and the Jewish Question,” in *Telos* 132, (Fall 2005): 64-182.

regime.¹⁶⁸ Whether this is the case or not and regardless of his being forced to leave the party in 1936, it is possible to trace a connection between core tenets of the Nazi regime and Schmitt's legal theory. For Schmitt, a detached normativity that "tears apart" law and economy, law and society and law and politics—the bourgeoisie state/civil society distinction—calls for a turn to and embrace of community, concrete order and formations of life (*OTT*, 95). In National Socialism's grand unification of the state, the movement (party), and people, the state/civil society divide was effectively eradicated. As Schmitt argues, "As soon as this dualistic structure of state and state-free society ceases, the jurisprudential type of thinking belonging to it must also collapse" (*OTT*, 98).

Schmitt saw in concrete order thinking a solution to a perennial political philosophical problem—the distinction between might and right and the possibility of bridging it. Concrete order thinking moves beyond this dualism in arguing that law is an expression of concrete order. There is no need to normatively justify concrete orders. *On the Three Ways* does a good job at historicizing legal positivism as the legal paradigm of the bourgeois state, even though one cannot say the same for his theory of concrete order thinking. The bourgeois state came under attack not only from conservative intellectuals such as Schmitt, however. It was a common activity among the avant-garde left to dismiss the liberal system of law, what with its 'square' and bourgeois insistence on regularity and order, as well as its complicit role in maintaining and reproducing capitalism (introduction). As Neumann notes in *Behemoth*, the Weimar Constitution together with its rule of law project was pressured and ultimately sabotaged from both sides—from the radical left as well as from counter-revolutionary parties.¹⁶⁹ It was only after his forced exile from Germany in 1933 that Neumann realized the dangerous territory he had been treading with his critique of the liberal bourgeois elements of the Weimar constitution. While many jurists, intellectuals, workers and ordinary citizens saw in the law a lifeless system, an iron cage, of neutral and technical rules no longer able to establish justice or bring any kind of meaningful order to life in mass societies, Neumann took the unusual position of defending a progressive reading of the classic conception of formal, general law. Section 2.4 will reconstruct Neumann's account of law and the rule of law project as well as a historical materialist critique of Schmitt's

¹⁶⁸ George Schwab argues that Schmitt did not hold the same racial views as the Nazis. See his *Challenge of the Exception*. See also Bendersky, *Carl Schmitt, Theorist for the Reich*, chapter 9.

¹⁶⁹ Neumann, *Behemoth*, Introduction.

decisionism and concrete order thinking. Neumann's theoretical shortcomings will then lead the way to Habermas' discourse theory of law that, by focusing on the procedural and discursive generation of legitimacy, moves beyond positivist and decisionist paradigms of law.

2.4 Between sovereignty and freedom: Franz Neumann's revitalization of the classically conceived liberal Rule of Law.

It is a well known fact that Neumann was a student and avid reader of Schmitt in the early thirties.¹⁷⁰ Neumann attended his seminars in Berlin and was in general greatly influenced by Schmitt early on in his career, in particular, by Schmitt's theory of state sovereignty and critique of bourgeois liberalism. Schmitt's argument concerning the inherent tension between liberal rights and democratic politics was popular among Schmitt's left-wing students, serving to fuel distaste for "state neutrality" *vis-à-vis* struggles between capital and labor.¹⁷¹ As I argue in the introduction, some of Schmitt's criticisms of the bourgeois liberal state point to legitimate concerns—for example, the tension between the democratic and liberal principles of the constitution, more specifically, how universal equality can be established along with democratic particularity. It is not particularly problematic, I take it, or illiberal, for Neumann to point to this tension. After joining the Institute for Social Research in 1936, Neumann devoted what was left of his unfortunately short career to challenging Schmitt's intellectual corpus and political involvements.¹⁷²

¹⁷⁰ The Frankfurt School theorist Otto Kirchheimer attended these seminars as well. Both Kirchheimer and Neumann also took part in a loose discussion group organized by the social democratic journal *Die Gesellschaft*. Hannah Arendt, Paul Tillich, Walter Benjamin and Herbert Marcuse may have also attended these gatherings. Scheuerman, *Between the Norm and the Exception*, 5.

¹⁷¹ See Otto Kirchheimer, "Weimar, . . . and then?" in *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*, F. S. Burin and K. L. Shell, (eds.), (New York: Columbia University Press, 1969). See also Scheuerman's detailed discussion of Kirchheimer's relation to Schmitt and the Frankfurt School in Scheuerman, *Between the Norm and the Exception*.

¹⁷² Neumann died in 1954, at the age of 54, as the result of a car accident. For a discussion that makes Neumann and Kirchheimer into accomplices to the rise of Nazism, see Stephen Turner, "Schmitt, Telos, the Collapse of the

As a young trade-union lawyer and scholar of labor law, Neumann applied Schmitt's concepts to labor issues and legal scholarship. He also wrote extensively on Weimar politics during its worst period of economic crisis and parliamentary instability following the world market crashes of 1929. Three essays of the pre-1933 period stand out in this sense, his "The Social Significance of the Basic Laws in the Weimar Constitution" (1930), "On the Preconditions and the Legal Concept of an Economic Constitution" (1931), and "Union Autonomy and the Constitution" (1932).¹⁷³ These early essays put into question the concept of freedom, in its liberal bourgeois conception, in relation to the idea of economic democracy. "The Social Significance of the Basic Laws" provided a social democratic reading of the Weimar Constitution arguing that Article 109 ("All Germans are equal before the law") could and should be understood as a law establishing positive social and economic equality against a "negative" conception of bourgeois law stating that all persons are "legally free to make contracts, acquire property, establish commercial enterprise" without assuring the *possibility* for the actual realization of this freedom.¹⁷⁴ Without completely discarding the very basic intention behind the concept of *Rechtsstaat*—the idea that state intervention in the private sphere should be regulated and calculable—Neumann defended an interventionist reading of the Weimar constitution, arguing for legally measured expropriation initiatives that "benefit of the common good" and take place "on a lawful basis."¹⁷⁵ Neumann's defense of the social *Rechtsstaat* over against the liberal *Rechtsstaat* goes hand in hand with his understanding of democracy in Rousseauian terms. The democratic construction of the Reich does not direct itself towards "the freedom of the individual," Neumann writes, "but rather seeks to justify the compulsion of the state."¹⁷⁶ Neumann's Rousseauian and Marxist understanding of negative liberal rights as fundamentally incompatible with social and economic equality resulted in a problematic disregard for

Weimar Constitution, and the Bad Conscience of the Left" in *Fast Capitalism* 5 (2009).
<http://www.fastcapitalism.com>

¹⁷³ The first two essays can be found in Otto Kirchheimer and Franz Neumann, *Social Democracy and the Rule of Law*, edited by Keith Tribe, (London: Allen and Unwin), 1987. For the "Union Autonomy" in its original see *Koalitionsfreiheit und Reichsverfassung: Die Stellung der Gewerkschaftern im Verfassungssystem* (Berlin: Heymann, 1932).

¹⁷⁴ Neumann, "The Social Significance of the Basic Laws," in *Social Democracy and the Rule of Law*, p. 31 ff.

¹⁷⁵ "Social Significance," 38

¹⁷⁶ "Social Significance," 28-29.

fundamental civil rights. Against the parliament's interest group-guided "pluralistic system," Neumann outlined in several articles written just prior to 1933 the idea of an "economic constitution" as a "system of norms which orders state and social intervention into economic freedom, which is solely an enhanced legal freedom."¹⁷⁷

In *Union Autonomy and the Constitution* (1932), Neumann comes closest to Schmitt when he argues for the need of "social homogeneity, the substrate of every true democracy," as opposed to the merely formal rights of liberal constitutions.¹⁷⁸ While Neumann never distinguished liberal political rights from democratic legitimacy as *strictly* as Schmitt did, his privileging of the social legal state over liberal subjective rights comes close to what has aptly been described as both a form of "authoritarian laborism"¹⁷⁹ and "legal decisionism."¹⁸⁰ What happened after the Nazi seizure of power? Neumann's theoretical output after 1933 can be characterized as an outright indictment of Schmitt's theories through a serious attempt to come to terms with the tension arising out of the dual nature of law: between its grounding in basic rights of freedom—its rational impulse—and its reverse tendency, state sovereignty. This is coupled with a serious attempt to bring together Marxist historical materialist sensitivities and liberal legal theory.

Neumann's project is laid out systematically in *The Rule of Law: Political Theory and the Legal System of Modern Society* (1936), which, together with a few essays which draw on this work, will be the major focus of analysis for the rest of this chapter. *The Rule of Law*, written under the auspices of the London School of Economics, contained distinctive features that would allow Neumann to formally join the Institute of Social Research in 1936. Neumann's reconstruction of the modern rule of law places jurisprudence at the center of a theory of bourgeois reason.¹⁸¹ What's more, the Institute's distinctive approach can be detected in Neumann's treatment of the tension between the rule of law and sovereignty "as both reflecting

¹⁷⁷ "On the Preconditions," 58.

¹⁷⁸ Franz Neumann, "Union Autonomy" cited in Scheuerman, *Between the Norm and the Exception*, 57.

¹⁷⁹ Scheuermann, *Between the Norm and the Exception*, 57.

¹⁸⁰ Alfons Söllner, "Leftist Students of the Conservative Revolution: Neumann, Kirchheimer, and Marcuse," *Telos* 61 (Fall 1984), 61.

¹⁸¹ Alfons Söllner, "Franz Neumann," *Telos* 50 (1981-2), 175.

social trends and in a certain sense transcending them.”¹⁸² As we will see, *The Rule of Law* is a major forerunner to contemporary critical theoretical approaches to law, in particular, a major forerunner to Habermas’ *Between Facts and Norms*.

Neumann’s *On The Rule of Law*

As Neumann explains, one of the goals of his investigation is to place the rise of Weimar fascism within a historical and theoretical account of bourgeois society, an investigation, that is, that traces the development of fascism out of liberalism. The theoretical and historical tensions between sovereignty and the rule of law are key to understanding this process as is the changing social structure of society. As the book argues, the development of monopoly capitalism out of competitive capitalism forced a radical change in the legal system whereby general clauses, materialized (non-formal) legislation, and a spurious natural law theory, came to replace the liberal rule of law’s ethical dimension.

The Dual character of law

Neumann’s reconstruction of the modern liberal rule of law begins with the concept of the state characterized as being the embodiment of two irreconcilable spheres: sovereignty and the rule of law. These spheres are the “constitutive elements” of the modern state. “Only if sovereignty exists can we speak of the state as such. The sovereign state exists independently of the different struggling groups within society...At the same time modern society recognises in the decisive periods of its existence certain human rights—i.e. guarantees a certain realm of freedom from the state...The conception of such a realm of freedom, however, can only be reached by *general norms*” (*RL*, 3, my italics). Both elements are indispensable for modern societies integrated by means of law.¹⁸³

¹⁸² Martin Jay, forward, *The Rule of Law*, xii.

¹⁸³ “The Change in Function of Law in Modern Society,” in *The Democratic and the Authoritarian State* (NY; Free Press, 1964), 22-23.

Neumann speaks of a “logical” contradiction between the sphere of sovereignty and the rule of law (the sphere of freedom from it) since both cannot be realized at the same time in the same place. “So far as the sovereignty of the state extends there is no place for the Rule of Law. Wherever an attempt at reconciliation is made we come up against insoluble contradictions” (*RL*, 4). Even so, all political-legal systems contain both elements; even those which take themselves as being constructed monistically.¹⁸⁴ The logical contradiction, for Neumann, does not necessitate a factual contradiction between the two spheres since history has demonstrated how state power can exist and maintain itself within the confines of the rule of law. As we will see further below, in Weimar the move from competitive to monopoly capitalism tilted the scales in favor of sovereignty (*RL*, 4-5).

The contrast between state sovereignty and the rule of law in a sense parallel Neumann’s conception of “the dual notion of law,” the idea, that is, that law is constituted by both political and rational elements. We’re familiar with the political concept of law from Schmitt’s Weimar writings on decisionism (2.2). An utterance of the sovereign, whether just or unjust, is law by the mere fact that it was uttered by the sovereign. Law in this case is nothing but *voluntas* and does not bind the legislator (*RL*, 45-46).¹⁸⁵ On the other hand, law also contains a rational, freedom guaranteeing element (*ratio*). Law as *ratio* is “a norm which is intelligible and contains an ethical postulate which is frequently that of equality” (*RL*, 45-46).¹⁸⁶ Prior to the conflict of the nominalists with the church, law as *voluntas* and *ratio* were not separated. Indeed, in the Thomistic system of natural law both elements are fully integrated.¹⁸⁷ Secularization and the long course of disenchantment began the process of separation resulting in two distinguished concepts of law. As Neumann points out, the political concept of law became detached from the non-secular natural law in the course of this process. Since then political law, emanating from a sovereign, has been taken as a pure social construct (a measure of the political sovereign) and

¹⁸⁴ As in Hobbes and Locke, for ex., whose theories embody the two extremes of sovereignty and freedom from the state (*RL*, 4).

¹⁸⁵ See also “The Change in Function,” 22-23.

¹⁸⁶ See also “Change in Function,” 26.

¹⁸⁷ “In the nominalistic philosophy the belief in the existence of natural law is well maintained, but the political law is emancipated from it. The law becomes a conscious invention, the creation of the whole of human society, and nothing else. The naturality of the feudal hierarchical order can no longer be justified.” “Change in Function,” 61.

natural law as an opposing force restricting absolute power.¹⁸⁸ Using the terminology of German jurisprudence, this contradiction can also be expressed in the dual concepts of “objective law” (law created and attributable to the sovereign) and “subjective rights” (the claims of an individual legal person).¹⁸⁹

Law becomes fully positivized in the liberal age in tandem with the decline of natural law. From here on, Neumann explains, the rational element of law and the sphere of freedom from the state will originate from democratic legitimacy and social contract theory. Neumann’s reconstruction and revalorization of the liberal rule of law by means of an account of general law arises out of this conceptual framework: “From the time of Kant until the end of the nineteenth century the demand for the generality of law forms the center of German legal theory. By demanding that the domination of the state be based on general laws Kant adopted the theories of Montesquieu and Rousseau.”¹⁹⁰ Before moving on to a more precise account of what is entailed by the concept of general law one important aspect of Neumann’s methodology needs to be pointed out.

Neumann makes it a point to stress the sociological aspect of his treatment of law. Indeed Neumann’s incorporation of what he calls a ‘sociology of law’ becomes central to his whole analysis and in many ways parallels his dual conception of law. Borrowing from Wilhelm Dilthey, Neumann defines the legal system as the “ordering of the aims of society,” an ordering which can be maintained only by means of coercion. Social norms, that is, can become legal only through the coercive power of the state (*RL*, 11). In order for a norm to possess juridical validity, it must have the power of the state at its disposal. “Sociologically... the legal norm grants an expectancy which is in fact realized by the coercive machinery of the state.” In this case, “the consent of the legal subject is therefore unessential. The reason for disobedience or acquiescence is not the subject matter of a sociology of law” (*RL*, 12). Anticipating much of Habermas’ theoretical framework and standpoint, Neumann sees the need for a theory of law that goes beyond normative jurisprudence, in this case, Kelsen’s pure science of norms.¹⁹¹ As Neumann

¹⁸⁸ “Change in Function,” 28.

¹⁸⁹ “Change in Function,” 23.

¹⁹⁰ “Change in Function,” 34.

¹⁹¹ For an extensive critique of Kelsen see *RL*, 13-15.

states, “What is here important is the fact that law in the philosophical sense is not identical with the needs of the state or of society. In the dialectical tension between justice and necessity lie the main problems of the philosophy of law” (*RL*, 12). Long before Habermas and other critical legal theorists even began to focus on revisiting and reconstructing the (apparent) contradiction between legitimacy and legality, between the legitimate, freedom guaranteeing aspects of law and its coercive nature, Neumann’s *The Rule of Law* began with a recognition of it as a theoretical and historical problem.¹⁹²

Competitive capitalism and the rule of law

The notion of formal, general law is the basis of the legal system of competitive society and the nodal point from which Neumann traces the development of fascism out of liberalism. As mentioned above, liberal legal theory is based on a conception of positive law, the idea, that is, that law is valid only if it can be imputed to the sovereign state. On the other hand, law is also *ratio*, and the way the rationality of law manifests itself in the modern liberal age is through the postulate of the generality of law. In particular, it is the generality of the legal norm which opposes the coercive aspect of the rule of law. This feature, and this feature only, lends the liberal rule of law legitimacy (*RL*, 212). On a surface level, Neumann’s account of general law is simple and has been amply rehearsed in the history of modern political philosophy. The consequences he draws from the analysis of this idea, however, are deep and provocative as we shall see.

The essence of the rule of law, so Neumann’s argument goes, is the demand that the state govern through *general laws*. “Only a norm, which has a general character, is regarded as law.”¹⁹³ General law can be defined as “an abstract rule which does not mention particular cases or individually nominated persons, but which is issued in advance to apply to all cases and all persons in the abstract” (*RL*, 213). We can talk about generality at three different levels. First, the

¹⁹² As we’ll in the next chapter, one of Habermas’ main tasks in *Between Fact and Norms* is to prove how the factual and coercive aspect of law arises co-originally with the legitimate, freedom guaranteeing aspect. In other words, for Habermas in no way do sovereignty and the rule of law present a logical contradiction.

¹⁹³ “Change in Function,” 28.

law is general in its formulation (*RL*, 212-213).¹⁹⁴ A law can decree that there will be privileges, for example, but cannot confer them on anybody by name. Second, a general law does not refer to moral standards which are neither generally binding nor generally accepted as binding. As such, general clauses (*Generalklausen*), mentioned in earlier in the chapter, would not be considered general laws in this sense since different interpretations of “healthy popular sentiment” or “violation of good morals” can lead to varying judicial decisions. Third, general laws are not retroactive. A law which provides for retroactivity contains a particular command.¹⁹⁵ The generality of law provides for non-retroactivity, displays semantic generality, and does not refer to non-binding principles. These three elements guarantee the law’s independence from individual, discretionary measures, that is, absolute power. The liberal principle of the separation of powers furthers the realization of the rationality of law and its administration (*RL*, 256). As Neumann understands the impetus behind generality of law, “[A] predictable action of the state, i.e., its measurable interference, even if oppressive, is to be preferred to immeasurable intervention (unpredictable, arbitrary action), even if at one time benevolent, [since] such immeasurable state of affairs creates insecurity... That is, in truth, the eternal value of the ideas of the ‘Rule of Law’ and of the *Rechtsstaatscharakter* of the State” (*RL*, 32-33). This is an important statement considering that for corporate societies, Neumann will end up defending legalistic state intervention by means of particular laws, as we’ll see below.

Because *The Rule of Law* is a sociological study of the western legal system, the social origins of law, that is, the law’s relation to a particular kind of economic order, becomes central to the analysis. The generality of law, in its positivized form, has to be considered as functionally related to the economic and political structure of liberal capitalism. Neumann draws attention to three functions the law performs *vis-à-vis* the political and economic substructure of the modern state. On the one hand, general law was conceived as a way of guaranteeing the bourgeois class the formal rationality needed for the proper functioning of competitive capitalism. Thus, in addition to the protection of liberty and property, the general law sought to assure the conditions

¹⁹⁴ See also “Change of Function,” 28-30.

¹⁹⁵ The law’s “general character and its non-retroactivity are mutually linked. If a law provides for an indefinite number of future individual cases, a retroactive law cannot possibly be law; because those facts already realized are computable, and therefore the law is confronted with a definite number of particular cases.” *RL*, 222.

for the pursuit of profit. The state's function was to measure the fulfillment of contracts. "The expectation that contracts will be performed must always be calculable. The fulfillment of this expectation in a competitive society presupposes...general laws" (*RL*, 256).

Secondly, general law displays a "disguising" or "veiling" function which serves to conceal the inequalities of the social basis of the legal system (*RL*, 186, 213). Effectively following Marx's critique of the liberal state, Neumann does not hesitate to call the *Rechtsstaat* a state of the ruling classes. "By the postulate that the state may rule only through general laws, the competitive economic system is invested with the dignity of moral value" (*RL*, 213, 263). General law is an inherent part of the legal system of competitive society which was a political order in which the working class as a social class did not exist (i.e., it was not recognized). As we will see below, this function no longer holds once the working class becomes part of political life.

Besides its veiling function, however, general law contains a third, "decisive ethical function" which is the realization of personal and political equality. Neumann traces this ethical function back to Rousseau's conceptualization of general law as *volonté générale*. In his reading of Rousseau, "the first modern thinker to see and solve the problem of a synthesis of material law and sovereignty, of liberty and rule," general law guarantees not merely formal freedom but also freedom in a sociological sense (*RL*, 126). For sociological freedom a certain degree of equality is required.¹⁹⁶ The generality of law has a function which transcends the needs of competitive capitalism, Neumann argues, since it assures personal liberty and equality. The ideological moment in law comes from its claim to have already extended formal equality to all in a society still under the grip of social inequality. Its ethical moment results from its rational imperative, i.e., its justification on the basis of the needs and the will of persons (*RL*, 27). Neumann sees the ethical function of law most clearly in Rousseau who was able to anticipate the full realization of the rule of law in an egalitarian postcapitalist political order. Under Neumann's reading, Rousseau's concept of general law embodies a democratic general will based on substantial social and economic equality. In Rousseau's ideal democratic community there is no room for

¹⁹⁶ Indeed, as Rousseau states in Book II of *On the Social Contract*, "If anyone enquires into precisely wherein the greatest good of all consists, which should be the purpose of every system of legislation, one will find that it boils down to the two principal objects, liberty and equality. Liberty, because all particular dependence is that much force taken from the body of the state; equality, because liberty cannot subsist without it." Jean-Jacques Rousseau, *Political Writings*, (Indianapolis: Hackett), 170.

non-formal individual measures or executive decrees since general law emanates from a socially and economically homogenous population. In such a context, the individual will and general will coincide erasing the gap between might and right. Neumann quotes this important idea from Rousseau: “Since individual property ownership is so slight and dependent, the government has little need for force and controls the citizenry with gestures of the finger, so to speak.”¹⁹⁷

In Neumann’s view, the idea of the generality of law had wide-ranging ethical implications. As he asserts, general law has a “disintegrating effect” in a society based on inequality. “[A]ny general norm, whether it be one of natural law, or of positive law, which is intended to set a limit to state activity, necessarily contributes to the disintegration of the status quo. Any such norm is double-edged, is a double-edged sword” (*RL*, 5-6). For Neumann, Rousseau’s vision was the realization of the best form of constitution for modern political communities, the only way to fully reintegrate might and right in the age of positive law.

Weimar, Monopoly capitalism, and the rule of law

One of Neumann’s main goals in *The Rule of Law* is to point to the historical and sociological particularity of the law’s “ethical minimum.” As we’ve just seen, this argument is fairly simple and quite rehearsed in the history of political philosophy. The particular force of Neumann’s argument lies, however, in the next step which shows how the particular functions of the rule of law cease to hold once a society’s extra-legal conditions are transformed (*RL*, ch. 15).

Neumann’s concern here was the dramatic economic and political changes undergone by the Weimar Republic in the interwar years, although much of what he says about the corporate nature of Weimar holds for many other Western advanced capitalist liberal democracies. Indeed, in parallel to the rise of monopoly capitalism, Weimar’s parliamentary institutions experienced a fundamental crisis of authority.

The incorporation of the working class into the political process brought unbridgeable divides in parliament, a traditionally relatively small and homogenous institution. In Weimar

¹⁹⁷ Quoted in “Change of Function,” 52. This is the Marxist “withering away of the state” and the point at which general law has reached its final, fully developed stage Neumann states: “In this, [Rousseau’s] theory really resembles that of Marx...Marx has, therefore, filled in Rousseau’s logical structure with history. Here Rousseau stands at the frontier of bourgeois thought.” *RL*, 137.

labor and capital had become fundamentally unbridgeable.¹⁹⁸ As historically excluded groups began to gain access to parliament and legislative law-making, the state, influenced by powerful economic groups, began to weaken, sabotage and finally break with the formality of law and parliamentary sovereignty. The Weimar Republic relied heavily on temporary stop-gap measures in order to overrule parliament.¹⁹⁹ This development led to a fundamental crisis in parliamentary authority.²⁰⁰

In Neumann's view, the new economic and political landscape required a new conception of law since the generality of law no longer guaranteed an ethical minimum. Indeed, as Neumann argues, it becomes "absurd" to talk about the equalizing function of the generality of law in any context other than competitive society. "In the economic sphere...the postulate of the generality of the law becomes absurd if the legislature is no longer concerned with equal competitions, but with monopolies violating that principle of equality on the market which we have found to be essential to the theory of classical economy. So long as there are equal competitors, equal regulation can naturally be brought about only by general abstract laws" (*RL*, 275). This runs contrary to Schmitt's explanation for the transformation of general law into de-formalized law. Schmitt took mass democracy as the main factor for the crisis of law and the pathologies of parliamentary democracy. Neumann, on the other hand, suggests that the decay of the generality of law and the delegitimization of parliament is the direct result of the corporatization of Weimar. "In a monopolistic economic organization the legislature is very often confronted with only one individual case or with a limited number of monopolistic undertakings. The legislature often can and must use individual regulations in order to do justice to these *specific* circumstances" (*RL*, 275).

At other times, the regime's hostility towards parliamentary democracy came in the form of a sudden revival of the generality of law, based, in this case, on a strategic conception of

¹⁹⁸ Echoing not only Schmitt's critique *Crisis of Parliamentary Democracy* but also Habermas' in *Structural Transformation of the Public Sphere*, Neumann notes, "Parliaments are no longer places where the representatives of the privileged parts of the nation deliberate. They have rather become the stage where compromises are reached between the various partners in the class struggle." *RL*, 272.

¹⁹⁹ Indeed, Article 48 was used 130 times during the first five years of the Republic's existence. Cindy Skach, *Borrowing Constitutional Designs*, (Princeton: Princeton University Press, 2009), 50.

²⁰⁰ A general resentment towards the parliamentary system in general can be taken as one of the major factors for the decline of parliamentary power. See Hans Mommsen, *The Rise and Fall of Weimar*, chapters 5, 7 and 8; Neumann, *Behemoth*, first chapter 'The Collapse of the Weimar Republic,' especially 24-27.

property rights based on natural law. Neumann discusses the juridical and political debates surrounding the 1926 bill providing for the expropriation without compensation of dynastic properties. Schmitt criticized the bill mainly on the grounds that the expropriation of royal property was unconstitutional, since it violated the individual's right to property and liberty. As discussed in the previous section, Schmitt was critical of the parliament's use of discretionary, individual legal statutes. Since the expropriation bill entailed a violation of private property and liberty, Schmitt characterized it as a case of political tyranny.²⁰¹ The liberal ideal of the generality of law was taken up by Schmitt in order to oppose the parliament's reformist social policies aimed at economic redistribution through individual regulation. As Neumann states of Schmitt's efforts, "The general law was intended to be applied as a means of maintaining the existing property order, and it was used as a factor designed to discredit the sovereignty of Parliament. By this the generality of the law took the place of a natural law. It was in fact nothing but a hidden natural law" (*RL*, 276). For Schmitt, in other words, the real question "is who intervenes, and whose interests are to be served by the intervention."²⁰² Following the elite's general "hostility to democracy" (*RL*, 280) Schmitt aspired to displace the political concept of law (anti-formal, discretionary statutes) from the parliament to the center of state power. Ingeborg Maus has characterized Schmitt's strategic endorsement of liberal property right principles in the following way: "A cynical form of bourgeois thinking about the limits of state activity is no longer directed against the executive, the 'state' that used to be separate from society, but instead against parliament. The autonomy of society in a narrow sense, i.e., of those societal groups which identify with the state, is now threatened by previously underprivileged social groups. Therefore, this autonomy can only be guaranteed by a strong state."²⁰³ Schmitt's endorsement of private property laws was a reaction to the interventionist state.

The systematic undermining of the rule of law was completed during the Nazi regime under the guise of concrete order thinking, which, as we saw with Schmitt, does away with

²⁰¹ Schmitt, "Judicial Independence, Equality before the Law, and the Protection of Private Property According to the Weimar Constitution" (1926) cited in Scheuerman, *Carl Schmitt: The End of Law*, 211.

²⁰² Scheuerman, *Carl Schmitt*, 216.

²⁰³ Ingeborg Maus, "The 1933 'Break' in Carl Schmitt's Theory," in David Dyzenhaus, (ed.), *Law as Politics: Carl Schmitt's Critique of Liberalism*, (Durham: Duke University Press, 1998), 204-205.

formality by espousing non-formal general clauses.²⁰⁴ Under the National Socialist regime, the entire legal order became subordinated to non-formal blanket clauses and vague legal standards of conduct (*Generalklauseln*) left to the discretion of the particular judge. As Neumann argues, the formal rationality of the liberal rule of law was under constant threat of decisionistic measures not as a direct result of the intrusion of the masses in political life as Schmitt contended but because formal law contains critical elements that challenge social inequalities. “This abandonment of formal rationality is the response of the judges to the challenge of formal rationality extended to the large masses of the populace.”²⁰⁵ The gradual turn to concrete order thinking during the Nazi regime fits this social context—the legal standards of conduct to be taken into consideration by judges refer to the moral norms which prevail in the community (understood as traditional *Gemeinschaft*) (*RL*, 281).

While the formal generality of law contains concealing functions, it does not eliminate the bearers who occupy the different positions in the social reproduction of labor. National Socialism, under concrete order thinking is much more dangerous, Neumann argues, since institutions such as the state and the plant are divorced from the social relation. Under an organicist view of *Gemeinschaft*, worker and capitalist, citizen and government, renter and landlord become ‘sublated’ under estate (*rechtsständische*) articulations. “A legal structure derived from this principle of construction finds its justification in the fact that fronts and occupations are articulations of the natural order of the people, in which a series of laws created by occupational and estate groups appears to be the optimum principle of a voluntary and orderly growth of law.”²⁰⁶ This system, which in Neumann’s view cannot be called a legal system (since law always carries with it an element of *ratio*), is in essence a decisionist system since it cannot properly determine how to interfere in any given case and by means of which norm. Similarly to our criticism above, concrete order thinking for Neumann is not capable of determining “which institution is ‘primitive’ and which is merely ‘purposive’ in any given situation. It can never

²⁰⁴ As Neumann claims, Weimar’s constitution was fairly progressive in its regard for worker’s rights. To mention one example, the legal system permitted low-income workers to sue without cost which “made the legal system of the Weimar Period the most rationalized system in the world.” “Change in Function,” 46.

²⁰⁵ As Neumann continues, “In spite of the political weakness of the Weimar democracy, the legal protection of the poor and of the working class, reached a very high standard.” *RL*, 283.

²⁰⁶ Neumann, *Behemoth*, 451.

determine which interference and which norm are appropriate to the concrete situation. It cannot determine the concrete position of the racial comrades, for example. These distinctions are made by the various machines, party, army, bureaucracy, and industry through their leaders.”²⁰⁷ Indeed as Habermas has argued in relation to institutionalist and neo-Aristotelian theories, when there is a clash of values without a procedural method for further rationalizing them, the strongest interest will be the one that prevails.²⁰⁸ The classical liberal and, above all rational, division of power was replaced by a “rule of lawlessness and anarchy,” a Behemoth state, in contrast to the Leviathan state of order.²⁰⁹ Indeed, if general law contains an ethical function, then the changed nature of the legal system cannot be taken as law.²¹⁰

One of Neumann’s important points is that the legal reforms during late Weimar and the first years of Nazi rule took many different guises only to turn away from the equalizing, or ethical, function of the formal rationality of law. Executive measures are not an inherent feature of the modern rule of law, as Schmitt suggested (for Schmitt modern legal positivism is decisionistic and thus illegitimate). For Neumann, there existed a correlation between the system of monopoly capitalism and decisionism. Speaking of the Nazi regime’s “legal revolution,” Neumann states,

National Socialism completely destroys the generality of law and with it the independence of the judiciary and the prohibition of retroactivity. Legal standards of conduct acquire greater significance than before because even the restrictions set up by parliamentary democracy against the demands of monopoly, insufficient as they may have been, have been removed. By its very vagueness, the legal standard of conduct serves to bring pre-Nationalist Socialist law into agreement with the demands of the new rulers.²¹¹

²⁰⁷ Neumann, *Behemoth*, 451.

²⁰⁸ Jürgen Habermas, “Law and Morality” in *The Tanner Lectures on Human Values*, Volume 8, (Salt Lake City: University of Utah Press, 1988), 241.

²⁰⁹ Neumann, *Behemoth*, xii.

²¹⁰ For an interesting analysis on debates surrounding the nature of totalitarianism and its relation to law see William D. Jones, *The Lost Debate: German Socialist Intellectuals and Totalitarianism*, (Chicago: University of Illinois Press, 1999).

²¹¹ *Behemoth*, 447.

In 1934 Marcuse had already pointed towards this when he argued that the totalitarian theory of the state disguises its true position in the battle by criticizing the liberal *Weltanschauung* while leaving the fundamental economic and social structure of liberalism untouched. Fascist theory could be understood as an ideological adaptation to the objective transition from individualistic competitive capitalism to monopoly capitalism. “The *Weltanschauung* reviles the ‘merchant’ and celebrates the ‘gifted economic leader,’ thereby only hiding that it leaves the economic functions of the bourgeois untouched.”²¹²

This does not mean for Neumann that we should discard the rule of law. “The *Rechtstaat* was ... at once a minimal programme of equality that needed to be preserved rather than merely abandoned and an inadequate mockery of the real equality that only a socialist society could provide.” Since it contained the promise of substantive legal equality, Neumann was not ready to do away with the rule of law. Taking the view that the rule of law is a *mere* tool for the furtherance of capitalism results in danger: “If one views—as, for example, Carl Schmitt does—the generality of laws as a means designed to satisfy the requirements of free competition, then the conclusion is obvious that with the termination of free competition and its replacement by organized state capitalism, the general law, the independence of judges, and the separation of powers will also disappear, and that the true law then consists either in the *Führer’s* command or the general principle (*Generalklausel*)”²¹³

Under conditions of competitive capitalism, the rule of law protected the bourgeoisie from intervention by the absolute state. Its ethical function however transcended the needs of competitive capitalism since it secured personal freedom and equality. The law could be taken as legitimate on the basis of this function. As we’ve seen, however, under monopoly capitalism the rule of law can no longer guarantee the ethical minimum. The generality of law, that is, does not provide an ethical minimum in monopolistic societies and should thus not be taken as the guiding (moral) principle of law.

²¹² Herbert Marcuse, “The Struggle Against Liberalism in the Totalitarian View of the State,” in *Negations*, (Beacon Press, 1969), 11. Given more space, it would be interesting here to compare Marcuse’s thesis on the development of fascism out of liberalism in this essay against Neumann’s. I take it that one of the essential differences in Neumann and Marcuse’s understanding of the development of fascism out of liberalism is that Marcuse, at least in this essay, forecloses the possibility of fusing socialism and liberalism. Neumann’s identification of an ‘ethical function’ in the liberal rule of law ideal does, indeed, open this possibility.

²¹³ “Change in Function,” 42.

Neumann is not completely explicit as to what type of law might guarantee an ethical minimum under the changed economic and political circumstances. Neumann claims that “even if the maxim of equality should bind the legislature, it does not necessarily follow that the principle of equality can only be realised through general law.” Indeed, he argues, “the assertion that equality can *only* be reached through such a structure of law is the fallacious conclusion of Rousseau” (*RL*, 275, my italics). In a move that takes Neumann back to some of his pre-1933 arguments he concludes that material equality—as opposed to the ‘negative equality’ of the liberal state—can also be furthered by means of individual interferences by the state. The form and function of law, Neumann argues, is a reflection of the social structure to which the legal system is related. “In a monopolistic economic organisation the legislature is very often confronted with only one individual case or with a limited number of monopolist undertakings. The legislature often can and must use individual regulations in order to do justice to these specific circumstances.” As if foreseeing the US federal government bailout of major banks, insurance companies and the auto industry in 2008 Neumann rhetorically asks, “Or should [the legislature] be compelled to veil an individual regulation by having recourse to a general norm which is avowedly only intended to serve one particular case? If there is only one Kaiser, or if there are princes distinguished from the other strata of the population, must the state if it wants to provide for these particular persons use general norms without mentioning these particular persons?” (*RL*, 275, see also 193, 198). If equal competition does not exist then it becomes absurd to speak of general abstract laws. Perhaps one can read Neumann here as advocating for active and extensive intervention by the state as a temporary measure which, further down the line, under an egalitarian Rousseauian polity, would not be necessary.

Given that corporate society lacks the traditional structures that guaranteed political freedom and equality, one might ask what role democracy plays within the political and economic structure of corporate society. Does democracy play any kind of role? Is there room for it to play any kind of role? As we’ve seen through our brief analysis, neither Neumann’s pre-1933 writings nor *The Rule of Law* offer any kind of democratic theory to speak of.²¹⁴ In *The Rule of Law* we get an account of the ethical function of law, a function that is tied to the formal generality of law. One could argue that Neumann’s conception of law does not presuppose any

²¹⁴ His “The Concept of Political Freedom” published in 1953 is a step in that direction, however. Franz Neumann “The Concept of Political Freedom” in *Columbia Law Review* 53 (1953): 901-935.

kind of democratic structure and, going a step further, that law can even be understood as a partial substitute for them.²¹⁵ Political freedom and equality is created by a form of state intervention that is regulated and calculable. In this sense, one would go too far in calling Neumann's theory of law a type of "legal decisionism," in Söllner's words. However, the fact that state interventions, even if measured, regulated, and directed towards the common good, are not the outcome of substantive forms of opinion and will formation results in a skewed and problematic conception of legitimacy.

There are several insights into the idea of the rationality of law, however, which we can take from Neumann that will serve to begin to construct a critical theory of law and advance our response to Schmitt's challenge. First, the idea of the dual aspect of law, that is, the idea of law as *ratio* and *voluntas*. This means that law has both a coercive function which operates independently of the consent of individuals and is distinguished from custom and morality, and a rational component that embodies political rights. As Neumann understands it, the rationality of law should be distinguished from a rationalistic, means-end, understanding of norms. "A rational foundation of the coercive powers of state and law is a justification on the basis of the needs or the wills of men" (*RL*, 27). Secondly, generality here does not denote an abstract, particularity-denying principle as Schmitt portrayed it. Indeed, Neumann devoted nine chapters to tracing the historical development of the uneasy relationship between *ratio* and *voluntas*. Far from embodying what Schmitt took to be a rigid principle of unfounded absolutism, and "eternal type," law as *ratio* underwent a nearly four hundred year development (from Thomas Aquinas to Hegel) in which it fluctuated between being a principle subjected to sovereignty and, other times at times, a principle constraining it. Law as *ratio*, which Schmitt interpreted as a hidden form of sovereign power, a "permanent" principle, did not develop uniformly across western political history. Third, and more importantly perhaps, it has always been intrinsically tied to very historically specific political and economic realities.

Neumann's critique is an important forerunner to a full response to Schmitt from a critical theoretical standpoint in that his reconstruction of the liberal rule of law principle does not presuppose the validity of liberal institutions as they are presently instantiated. He critiques them from the standpoint of rationality's (and not rationalism's) promise.

²¹⁵ Roger Cotterrell, "The Rule of Law in Corporate Society: Neumann, Kirchheimer and the Lessons of Weimar" in *The Modern Law Review* 51, (1988), 140.

As we will see in the next chapter, Habermas' discourse theory of law provides a remedy to Neumann's theoretical shortcomings, mainly, its democratic deficit. The ethical function of law, or in Habermas' words, the legitimacy of law is tied to the process of democratic will formation that formal law enables. Here the coercive and the freedom guaranteeing aspects of law are intertwined, not "logically contradictory," as Neumann theory showed. Sovereignty and rule of law are co-constitutive and thus presuppose each other.

CHAPTER THREE

Modernity's "unclaimed heritage": Habermas' reconstruction of the normative content of law.

3.1 Introduction

One could say that overcoming the specter of Weber's reductivist conception of rationality has been Habermas' lifelong intellectual motivation. Habermas has attempted to develop a discursive conception of reason that has undergone several changes and modifications throughout the years, all in the hopes of articulating an account of modernity worth holding on to. This means, for Habermas, developing structures of interaction that allow our moral-practical competencies to interact with our cognitive, means-ends capacities. The rule of law idea, together with its institutions is, perhaps, the most important sphere of interaction for Habermas. As he indicates in the preface to *Between Facts and Norms*, "a moral-practical self understanding of modernity as a whole is articulated in the controversies we have carried on since the seventeenth century about the best constitution of the political community" (xl-xli). Failing to notice and develop moral-practical structures of understanding at the level of political institutions results in the reification of politics and law. I take it that the fundamental problem with reification for Habermas, particularly in the realm of law and politics, is that by occluding or circumventing communicative interaction as what lies at the basis of modern political orders, statist institutions as well as authoritarian and decisionistic political and legal practices materialize in their place.

Weber's conception of modernity and rationality took over a large swath of the social sciences and the humanities. This chapter covers a miniscule but important piece of Habermas' interaction with Weberian inspired theories of modernity insofar as they are related to the issue of the legitimacy of law. Niklas Luhmann was a contemporary of Habermas' and their debate was important for the development of Habermas' discursive theory of law as an alternative to Luhmann's non-normative, sociological theory of society. In a way, Habermas' confrontation with Luhmann in *Between Facts and Norms*, the culmination of Habermas' engagement with

legal theory and the main focus of our study in this chapter, can also be taken as a confrontation with Schmitt in so far as Schmitt believed that law and the state could and should be kept far removed from the demands of moral-practical justification. Systems theories of law, such as Weber's or Luhmann's, play into Schmitt's critique and rejection of modern liberal legality, specifically they play into his understanding of the modern rule of law as a set of formal and abstract rules that are inadequate for ordering "concrete life." Systems theories of law, as well as positivist conceptions of law that similarly detach law from other spheres of social life, foster the idea that decisionism is part and parcel of liberal legality and modernity as a whole. This conception of law drops any further-reaching claim to legitimation. For Habermas, when law faces us as a "quasi-Natural form," as something independent of communicative interaction, our ability to see ourselves reflected in it is diminished. While Schmitt and Neumann are barely mentioned in *Between Facts and Norms*, Habermas' discursive theory of law is, however indirectly, a response to both.

This chapter retraces and evaluates some of the important components of Habermas' discursive theory of law. Habermas has dealt with the concept of law from the very beginning of his career. But it is only in his later period that a fully developed account of the normative validity of the liberal rule of law project emerges. His early works, however, furnish important elements that help understand the standpoint on the basis of which in *Between Facts and Norms* he argues and defends a discursive theory of law that grounds the legitimacy of legality. Section two will provide a sketch of some of the basic elements of Habermas' early writings. In these early writings we find Habermas' reconceptualization of the tasks of critical theory. Habermas began this task by taking issue with the two major precursors of critical theory, Hegel and Marx, both of whom reduced (communicative) interaction to labor (instrumental action). For Habermas social theories that reduce forms of moral practical knowledge to instrumental interaction are not able to adequately explain how modern societies are socially as well as functionally integrated. Habermas has always insisted on this dual aspect of modern society. Thus, in section three we go over Habermas' conception of law in relation to his "two-level conception" of society and prepare some of the framework from which to understand his project in *Between Facts and Norms*, the topic of section four.

To reiterate, one of Habermas' main concerns in *Between Facts and Norms* is combating the "objectivating approach" to law, an approach that, in his words, "wipes out the hermeneutical

tracks that point the way into society for an action theory starting with the actors' own self understanding" (*BFN*, 47). The idea that law is a key to our self understanding as social actors is fundamental to Habermas' project. When law is uncoupled from communicative practices we can say that it has become reified, or objectified; it no longer sustains a direct exchange with its societal environment. This means that law does not reflect the normative underpinnings of social integration which ultimately "refer to the self-organization of society" (*BFN*, 51). Law, in other words, becomes external to the problems and burdens of society.

Under the functionalist systems theory view, law becomes "reduced to the special of the administration of law." (*BFN*, 50). This is how we come to the reified view of modern institutions. Reducing law to the administration of law makes us lose sight, Habermas states, "of the internal connection between law and the constitutional organization of the origin, acquisition, and use of political power" (*BFN*, 50). Habermas' critical theory of law is the latest form of Habermas' "*Lebensstema*"—the project of defending the rational (as opposed to rationalist) project of the Enlightenment. Once again, Habermas identifies reification as a pathology of modernity (not its essence) and, as a second step attempts to reconstruct its discursive and rational origin.²¹⁶ By means of a discursive theory of law, Habermas avoids the self-defeating position of early critical theory as well as other rejections of modernity.

In the conclusion to this project I will lay out some aspects of Habermas' social theory that hamper a full justification of the normative account of modern society.

²¹⁶ "Reconstruction" is a methodological approach that Habermas has been using since the seventies. At its most basic level it means explicating the skills that social agents must necessarily possess in order to act with competence. Philosophy, for Habermas, is a discipline that is especially equipped to bring to light the rule-like and abstract normative presuppositions that we all must necessarily appeal to if we are going to make use of different sorts of argumentation and deliberation, including ethical, moral, and legal. For an overview and critique of Habermas' reconstructive approach see Kenneth Baynes, "Rational reconstruction and social criticism: Habermas's model of interpretive social science," in *The Philosophical Forum* 21 (1989): 122-45.

3.2. Labor and Interaction: Early elements of Habermas Critical Theory of Law.

The value of the rule of law has always been a central concern for Habermas. Because of the central role law played in the origins and development of the Nazi regime and because it was through democratization and liberalization that West Germany came to be integrated with the West (*Westbindung*), constitutional law, especially the tensions between legitimacy and legality that get played out in it, represents the backdrop against which to read his social and political theory.²¹⁷ As this first section will point out, Habermas' work from the late sixties and early seventies was already concerned with the question of how law and morality are internally linked and already began to point to the moral practical nature of modern social institutions. A cursory glance at a few of his early texts will show how Habermas was concerned from the beginning with the discursive dimension of political legitimacy.

Habermas' early critiques of Hegel and Marx already lay out an important part of Habermas' methodological approach to the social sciences and law. By means of the distinction between *labor* and *interaction*, Habermas attempts to critique as well as hold on to core features of Hegel's philosophical idealism and Marx's materialism. Central to this effort was Habermas' reconsideration of some of the fundamentals of Marxism, in particular its theory of situated knowledge. Labor (*Arbeit*) and symbolic interaction are two modes of action on the basis of which "human subjects consciously objectify their world in the double sense that it is simultaneously constituted and disclosed to them."²¹⁸ Human beings transform the world and themselves by means of labor—a means-end type of relationship whereby nature is transformed according to human ends—as well as interaction—the way humans relate symbolically to each other in order to further social ends. Labor, in other words, is a kind of instrumental action and interaction is informed by the "moral-practical knowledge which can be embodied into structures

²¹⁷ Matthew G. Specter, *Habermas: An Intellectual Biography* (New York: Cambridge University Press, 2010).

²¹⁸ John Keane, "On Tools and Language: Habermas on Work and Interaction" in *New German Critique* 6 (Autumn 1975), 87. Labor and interaction are two different media of social reproduction that according to Habermas are correlated with human "interests," in this case, the technical and the practical. For an account of "interests" see Habermas, *TP*, 7-10; *Knowledge and Human Interests*, Appendix. By means of this concept, Habermas distinguishes a particularly human transcendental activity much like Kant, but differs from Kant in that this transcendental form is not an a priori. Human interests arise out of human activity which is based in the natural history of human species.

of interaction.”²¹⁹ Habermas’ concept of interaction owes a lot to Hegel’s theory of intersubjective recognition. His concept of labor, on the other hand, owes a lot to Marx’s articulation of labor as a non-idealistic rendering of social reality. While the conceptual and practical unity of labor and interaction, or instrumental and substantive reason, escaped the later Hegel and Marx, their theories, Habermas argues, do hold a key to their connection.

Habermas dealt with Hegel in two essays contained in *Theory and Practice*. Habermas’ main concern in his critique of Hegel was that Hegel’s theory of “abstract right” fully dissolved the interrelationship between labor and interaction. In his 1963 essay “Hegel’s Critique of the French Revolution,” (in *TP*) Habermas took on Hegel’s critique of the French Revolution as laid out in the *Philosophy of Spirit*. While Hegel praised the “product” of the revolution, he found the actual realization of it objectionable. The product of the revolution was abstract right, the “abstract freedom of the legal person in the equality of all men under formal and general laws” (*TP*, 122) or what we have been calling general law. For Hegel, the “actual realization” of this order was the Terror. Hegel saw the Terror as the necessary outcome of the problem of actualizing the idea of abstract Right, “the problem of mediating a simple, unbending, cold generality with the absolute brittleness and obstinate punctiliousness of self-consciousness as it exists in reality” (*TP*, 125). For Hegel, that is, the revolution was not able to mediate life (individual self-consciousness) and abstract right. Reason, in its inability to go beyond the abstractions of its understanding, can realize itself only at the expense of the individual. In other words, the unmediated particular (living subjectivity) does not recognize itself in the universal (the formalism of law). Hegel thus left abstract right behind for the next form that Spirit takes in its self reflection—absolute morality. As Habermas sees it, an unfortunate consequence of the Revolution has been our inability to bridge the gap between law and human praxis. This tendency has advanced in contemporary society to the point where the discursive and moral-practical origins and nature of law seem to have disappeared. We no longer recognize law as a product of moral-practical reasoning but as a “quasi-Natural form” (*TP*, 167).

As Habermas’ early essay argued, Hegel did not need to give up on abstract Right nor did he have to give up on the idea that theory can become dialectically practical. Indeed, Hegel’s *Philosophy of Right* holds a key to this actualization since it is in this text where Hegel outlines

²¹⁹ Jürgen Habermas, “Towards a Reconstruction of Historical Materialism” in *Theory and Society* 2, no. 3 (1975), 294.

the process by which abstract Right arises out of “the historical interrelationships of social labor,” as well as the process by which abstract right becomes actualized in industrial society (*TP*, 127). According to Habermas, “Abstract Right documents a concrete liberation” (*TP*, 128). It is through the process of socialization that abstract right becomes actualized since social labor produces the formal freedom of legal persons. But this social labor, Habermas points out, should not be reduced to instrumental action. “Instrumental action,” he claims, “as soon as it comes under the category of actual spirit, as social labor, is also embedded within a network of interaction, and therefore dependent on the communicative boundary conditions that underlie every possible cooperation” (*TP*, 158). The moral-practical cognitive interests that are addressed by symbolic interaction are *necessary* for the realization of technical cognitive interests (labor). In Hegel’s *Philosophy of Right*, however, abstract right, instead of being a relation that emerges as a result of the interrelationship between labor and interaction, “is introduced from the *outside* under the title of jurisprudence. It constitutes itself independently of the categories of social labor, and only after the fact enters into its relationship with the processes to which...it still owed the moment of freedom” (*TP*, 167).

If abstract Right had been adequately thematized as an objective law *guaranteed by interaction*—as an activity which gives meaning to human behavior in the social world—then the dialectical relationship between theory and practice, between formal law and the individual, would come to light. Instead, Habermas claims, the *Phenomenology* chooses to reconcile abstract Right through the “revocation” of the bourgeois public sphere, that sphere, in Habermas’ words, which “confer[s] positive validation of private right” (*TP*, 134). Hegel chose the “existentialism of national spirits,” or concrete right, as the mediation between abstract Right and substantial morality. This is why Hegel was able to be appropriated by a tradition of conservative thinkers, including Schmitt, who took Hegel as a proponent of “the idea of the folk community as the guiding principle of right.”²²⁰ The young Hegelians, conversely, approached this problem—the problem of mediating the abstract formalism of Right with individual freedom—differently. They reached into Hegel’s historical conception of the rise of abstract Right and pushed it further by extending the freedom of private Right (created by the Revolution) to the sphere of social labor itself (*TP*, 136). This is the point where abstract right becomes concrete right. “New, as

²²⁰ This is Karl Larenz, another Nazi lawyer who worked within the institutionalist framework. Cited in Habermas, *TP*, 135.

against Hegel, is the demand to conceive the morality of concrete right (now, to be sure, cut loose from its substantial ground) exclusively as the form of emancipation of social labor” (*TP*, 136). These two forms of reconciliation, the conservative and the young-Hegelian, mark “the sublation of right and society into morality” (*TP*, 136).

For Habermas Hegel’s difficulty in dealing with the legacy of the French Revolution is part of what he would later describe as the Revolution’s “unclaimed heritage” (*BFN*, 464). The interpretations of the system of law produced by the French Revolution are mirrored, he wrote in 1963, “in accordance with the political fronts of the European civil war which has raged in Europe during our century and which still determine our relationship to the Revolution down to the present” (*TP*, 136). As I will try to make evident in what follows below, I take it that the Revolution’s “unclaimed heritage” is a certain conception of emancipated life that is characteristic of modern political communities and that is made possible by law.

Habermas’ critical appropriation of Marx was also construed with an eye towards symbolic interaction as the other necessary component of conscious human activity that secures social integration. He follows Marx’s materialist argument that societal change occurs when systemic problems can no longer be solved with the recourses available to the dominant form of economic structure.²²¹ But whereas for Marx, the renewal of the mode of production follows mechanistically from productive conflicts, Habermas argues that this renewal cannot be accomplished without the completion, first, of a new form of social integration.²²² To solve the systemic problems arising with the development of productive forces, new forms of social integration must be introduced which, in turn, *require* the development of moral/practical knowledge. In other words, while the development of forces of production causes the systemic problem these forces do not cause the relations of production to evolve in tandem. Marx explained how systemic problems emerge but, to the detriment of his theory, the ‘learning mechanism’ he described “does not explain how these problems can be solved; for the introduction of new forms of social interaction, as for instance, the replacement of the kinship

²²¹ Habermas, “Towards a Reconstruction of Historical Materialism,” 292. Habermas makes use of Marxian concepts such as productive forces and relations of production but refers to them in different terms. To Marx’s concept of legal superstructure, Habermas prefers the Durkheimian concept of “social integration” which refers to the form social life takes in order to secure unity through values and norms.

²²² What Habermas’ reconceptualization of historical materialism disposes of entirely from the beginning, however, is Marx’s eighteenth century teleological conception of history.

system with the state, demands a knowledge of a practical-moral kind.”²²³ The mutual understanding of obligations and expectations required for the resolution of systemic crises is the work of a practical-moral kind and is accomplished through symbolic interaction. “Technical knowledge, which can be implemented with rules of instrumental and strategic action, or an expansion of our control over external nature, is not what is required, but, rather, a knowledge which can seek its embodiment in structures of interaction. We can understand the development of productive forces as a problem-generating mechanism that releases but does not create the evolutionary renewal of the mode of production.”²²⁴ For Habermas thus, Marx’s “brilliant insight” into the dialectical relation between forces and relations of production was easily misinterpreted in a mechanistic manner by generations of Marxists. While the moral-practical knowledge embodied into structures of interaction has today “hardened into quasi-natural forms,” Habermas states, “we have reason enough to keep these two dimensions more rigorously separated” (*TP*, 167). Marx’s reduction of symbolic interaction to labor (or purposive-rational action) not only has consequences in terms of the theoretical value of historical materialism, it also has problematic ramifications in terms of its value as a practical theory of human liberation:

[T]o set free the technical forces of production, including the construction of cybernetic and learning machines which can simulate the complete sphere of the function of rational goal-directed action far beyond the capacity of natural consciousness, and thus substitute for human effort, is not identical with the development of norms which could fulfill the dialectic of moral relationships in an interaction free of domination on the basis of a reciprocity allowed to have its full and noncoercive scope. *Liberation from hunger and misery* does not necessarily converge with *liberation from servitude and degradation*, for there is no automatic developmental relation between labor and interaction (*TP*, 169).

Habermas here distanced himself from a whole generation of left wing progressives in arguing that a change in the form of production would not necessarily result in desirable changes in the relations of production. Habermas’ stance against (left wing) technological utopianism, as well as (right wing) “technocratic” approaches to politics, is a stance against a way of thinking about politics and law that does not require legitimation.²²⁵ Related to this, we can say that Habermas’

²²³ Habermas, “Towards a Reconstruction of Historical Materialism,” 293.

²²⁴ Habermas, “Towards a Reconstruction of Historical Materialism,” 293.

²²⁵ Specter, *Habermas: An Intellectual Biography*, 123.

distinction between two modes of rationalization, work and interaction, represents an early attempt at reconstructing Weber's and Western Marxism's separation of instrumental from substantive reason.²²⁶ This separation will be paramount for understanding Habermas' attempt to reconcile legality and legitimacy in *Between Facts and Norms*.

3.3 Law in the Systems Theory of Society.

Habermas' early theoretical efforts can be seen as an attempt to move away from Marx's mechanistic and apolitical theory of society. Closely related to this is Habermas' rejection of Marx's critique of bourgeois law.²²⁷ In *Structural Transformation* Habermas addressed the historical development of bourgeois law in Western Europe making the case, similar in more ways than one to Neumann's twenty five years earlier, that bourgeois law is neither merely formal nor bourgeois.

It wasn't until *Legitimation Crisis, On the Logic of the Social Sciences*, and *Theory of Communicative Action* that Habermas took a more explicit interest in a certain decisionistic theoretical framework—which went from Marx, to Weber, to Schmitt—that failed to grasp the normative dimension of law. In these writings Habermas treats law as a part of his “two level system” of society, opening a space for law's legitimacy based on postconventional morality. As this section shows, Weber's theory of rationalization is fundamental to an account of law in its legalistic dimension. However, reducing law to legality has dangerous implications that lead to decisionism, as Schmitt's understanding of modern law shows all too well.

In *Theory of Communicative Action*, Habermas lays out his conception of the function of law in modern disenchanted societies by means of a reconceptualization of Weber's rationalization thesis. For Weber as well as the early Frankfurt School theorists, the rationalization process represented the fundamental nature of modernity. For them, modernity's

²²⁶ Specter, *Habermas: An Intellectual Biography*, 124.

²²⁷ Marx did toy briefly with an orthodox Marxist critique of liberal legality in the fifties. For a fuller account of this development see Specter, *Habermas: An Intellectual Biography*, 15.

logic of instrumental reason had effectively crushed all possibilities for social emancipation. Habermas agrees with Weber's view of rationalization but argues that social life is not integrated solely on the basis of strategic action stripped of all value. It is also integrated through processes of "reaching an understanding" (*Verständigung*), what Habermas explores under the theory of communicative action. Our understanding of modern society has to be attained by means of both types of action coordination. Habermas' "two-level" concept of society corresponds to these two forms of action coordination. We will explore this idea in greater detail when we get to the analysis of *Between Facts and Norms*. For now it is important to note that in the systems world, action coordination is achieved by means of non-normative and non-linguistic functional interconnections of action (*TCA*, Vol. II, 186). On the other hand, action coordination in the lifeworld comes about through the consensus of those involved by means of linguistic understanding.²²⁸ One could easily trace the system-lifeworld duality back into Habermas' early reading of Marx in terms of labor and interaction.

One way to sum up what drives a major part of Habermas' theoretical effort is the question concerning how order is possible in the first place. His "two-level concept of society" provides a framework for answering this question because it moves beyond Weber's functionalist account of social theory. As Habermas argues, modern societies cannot be integrated solely on the basis of system imperatives—they must also hold legitimacy. "If, as I assume along with Parsons and Durkheim, complexes of interaction cannot be stabilized simply on the basis of the reciprocal influence that success-oriented actors exert on one another, then *in the final analysis* society must be integrated through communicative action" (*BFN*, 26). As we will see below the potential sources for legitimacy of systems integration is the lifeworld. From now on, Habermas' theoretical efforts would rely on the structural framework offered by systems theory combined with a hermeneutical approach for the analysis of lifeworld practices.

In terms of systems integration, modern societies require self-regulating spheres which have been relieved of demands for justification. Conceptualizing society as a system made up of sub-systems allowed Habermas to understand the evolution of societies as a result of their

²²⁸ Originally found in Husserl and Wittgenstein (*TCA*, Vol. II, 119), Habermas appropriated and developed this concept by integrating it into the theory of universal pragmatics. The lifeworld contains the skills and competencies for meaningful communication. See also, Jürgen Habermas, *On the Pragmatics of Communication*, (Cambridge, MA: MIT Press, 1998).

growing complexity or system differentiation.²²⁹ The process of rationalization “uncoupled” system mechanisms, such as the market economy and bureaucratic administration, from the lifeworld, systems which in turn came to function autonomously in accordance with purposive/instrumental rationality (*Zweckrationalität*). Face-to-face encounters, necessary for coordinating action, are not available to social agents in large, complex societies. Steering media make this coordination possible through the schematization of activity and the creation of rules. Habermas calls them “relief mechanisms” (*TCA*, Vol. II, 181). The greater the complexity of society, the greater the need for relief mechanisms. Of particular importance for Habermas are the two “media-steered” subsystems, power and money.²³⁰ “Via the media of money and power, the subsystems of the economy and the state are differentiated out of an institutional complex set within the horizon of the lifeworld; formally organized domains of action emerge that—in the final analysis—are no longer integrated through the mechanism of mutual understanding, that sheer off from lifeworld contexts and congeal into a kind of norm-free sociality” (*TCA*, Vol. II, 307).

It is important to note that for Habermas system and lifeworld are not completely polarized. The norm-free structures of subsystems do remain linked with communicative practices, that is, practices of reaching an understanding. Habermas takes law as the main institution that anchors power and money in the lifeworld (*TCA*, Vol. II, 185). This anchor in the lifeworld is the site of potential legitimacy. But the relationship between the systems and lifeworlds with respect to law can work both ways. As we will come to see shortly, law has the function of normatively grounding the media steered systems, a necessary function for their uncoupling. However, as a subsystem uncoupled from the lifeworld, law is also predisposed to extend its strategic principles to all forms of social life. In other words, law, as it is connected to the system world, functions according to system imperatives.

²²⁹ This approach provided an alternative to the teleological one of eighteenth century types of philosophy of history. “In this way trends such as scientific development, capitalist growth, the establishment of constitutional states, the rise of modern administrations, and the like could be treated directly as empirical phenomena and conceived as results of the structural differentiation of social systems. They no longer had to be interpreted as empirical indicators of an internal history of the spirit based on learning processes and the accumulation of knowledge, as signs of a rationalization in the sense of the philosophy of history.” *TCA*, Vol. II, 152.

²³⁰ Money, relieves coordination by transforming use value into exchange values. *TCA*, Vol II, 171. Power consists in the capacity to assure compliance for the achievement of collectively desired goals. As such, power embodies symbolic amounts of value without holding any value in itself. “As utility was in the case of money, so effectiveness of goal attainment is the generalized value here.” *TCA*, Vol II, 268.

How does law fit into Habermas' two-level conception of society? Habermas' approach to law in *Theory of Communicative Action* is based on two important assumptions that will later bear upon our discussion of his discursive theory of law in *Between Facts and Norms*. Both of these issues are related to the process of societal rationalization. First and crucial for the uncoupling of system and lifeworld is the separation of law and morality from the lifeworld. In what Habermas refers to as postconventional societies, law and morality are no longer tied to concrete ethical traditions. Postconventional morality is based on subjective moral-practical concerns while positive law normatively anchors (or institutionalizes) the structures of purposive-rational action (*TCA* Vol. I, 260). As Habermas indicates, legal institutions are indispensable for higher level integration. "The rationalization of law makes possible—or seems to make possible—both the institutionalization of purposive-rational economic and administrative action and the detachment of subsystems of purposive-rational action from their moral-practical foundations" (*TCA*, Vol. I, 243). By coordinating action according to formal procedures that can be internally justified according to purely formal criteria, "the moral subject of action can orient himself according to principles of methodical conduct of life" and "so too, the subject of civil law can feel himself justified in acting, within legal bounds, purely with an orientation to success" (*TCA*, Vol. I, 256-257). The predictability of the legal system takes the burden away from having to regularly negotiate behavioral expectations through communicative interaction. This constitutes its legalistic aspect. The legal system, however, also needs to be based on the possibility of justification by means of postconventional morality, its basis in legitimacy.²³¹ Indeed, as Habermas remarks, with positive law "the problem of justification is both displaced and intensified" (*TCA*, Vol. II, 178). In the context of the bourgeois constitutional state, the postconventional moral bases of law "are, in the first place, basic rights and the principle of popular sovereignty; they embody postconventional structures of moral consciousness" (*TCA*, Vol. I, 261; Vol. II, 178).

Secondly, Habermas' understanding of law as subsystem means that it can potentially pose a threat to the communicative and solidarity based orientation of the lifeworld. Like bureaucracy or the market, law can overstep its boundaries, a problem which is a growing threat in contemporary societies. When these subsystems grow and develop according to their own logic (and not by means of needs and guiding norms provided by the lifeworld) we can say that

²³¹ Law, indeed, embodies postconventional morality. *TCA*, Vol II, 175.

they “colonize” the horizon-forming contexts of the lifeworld.²³² While social systems make large-scale coordination possible by schematizing relationships, the flip side is that systems face social actors as soulless mechanisms reducing them to mere placeholders within the system. To use Weber’s famous metaphor, the subsystem of modern bureaucracy, is also an ‘iron cage’ which progressively renders our lives meaningless. Habermas saw the dangers of this particular modern experience as well and labeled it “the colonization of the lifeworld” (*TCA*, Vol. II, 362). The colonization of the lifeworld happens when non-linguistic and formalized actions oriented to success filter through the domains of the lifeworld. This process is not the default status of modernity, as Lukács and the early Frankfurt school asserted with the concept of reification. For Habermas it is a “pathology.” Reification happens when systemic forces overstep their boundaries (*TCA*, Vol. II, 318-331).²³³

As a system that furthers relations based on instrumental rationality, law can also play a significant role in the colonization of the lifeworld. While the first waves of juridification in Western Europe were freedom guaranteeing, the institutionalization of the welfare state together with the broader encroachment of law in informal lifeworld contexts meant that law acquired the potential to shut down the discussion of values.²³⁴ Excessive juridification resulted in a restriction of law’s legitimating function (*TCA*, Vol. II, 362 ff). Habermas argued here for the creation of “bulwarks” between lifeworld and system.²³⁵ As we will see below this is one of the fundamental differences between his theory of law in *Theory of Communicative Action* and in *Between Facts and Norms* where law, by means of its factual and legitimating nature, provides a connection between lifeworld and system.

Even with this predicament, Habermas found systems theory constructive for approaching the question of order, that is, how order is possible in complex societies. However,

²³² These are culture, society, and personality. *TCA*, Vol. II, 307.

²³³ As Habermas points out, “Working Weber’s diagnosis of the times into our interpretive framework has the advantage of elucidating, in terms of communication theory, the sense in which the phenomena he observed, when they appear with broad effect, should be regarded as pathologies, that is, as symptoms of a distorted everyday practice.” *TCA*, Vol. II, 327.

²³⁴ As Habermas argues, “The more leisure, culture, recreation, and tourism recognizably come into the grip of laws of the commodity economy and the definitions of mass consumption, the more structures of the bourgeois family manifestly become adapted to the imperatives of the employment system, the more the school palpably takes over the function of assigning job and life prospects and so forth.” *TCA*, Vol. II, 368.

²³⁵ Jürgen Habermas, “Further Reflections on the Public Sphere,” in C. Calhoun, (ed.) *Habermas and the Public Sphere*, (Cambridge, MA: MIT Press, 1992), 444.

Habermas could not follow this approach all the way in claiming that the law's legitimacy rests on mere legality, that is, on its internal coherence and on its ability to effectively regulate social interaction. This is one of the concerns that motivated Habermas' debate with Niklas Luhmann throughout the seventies and eighties. Luhmann, who took systems theory's functionalist approach and Weber's notion of differentiation to an extreme, understood the legal system as a self-enclosed system in which the formality of legal procedure suffices for the legitimate generation and application of law. Under this understanding of law, normative validity claims can be effectively ignored or removed without threatening the stability of the legal system. "The law of society is positivized," Luhmann states, "when the legitimacy of pure legality is recognized, that is, when law is respected because it is made by responsible decision in accordance with definite rules. Thus, in a central question of human co-existence, arbitrariness becomes an institution."²³⁶

While Luhmann could be labeled a legal positivist, his systems theoretical approach radicalized to an extreme law's autonomy in relation to morality and politics (and any other societal substructure for that matter). In fact, Luhmann says we can understand law as an *autopoietic* system within society determined wholly and exclusively by its own operations: "The legal system is a closed system, producing its own operations; not by accepting any external determination, nor, of course, any external delimitation whatsoever... As part of the societal system, the legal system is a self-organizing, self-determining system."²³⁷ Just like other subsystems, the legal system's *autopoiesis* functions on the basis of an organizing criterion or binary code. In this case, the binary code is legal right/legal wrong. This code is what distinguishes the system from its environment and makes decision-making possible. For Luhmann the norms and rules on the basis of which the legal/illegal decision is made are strictly internal to the system. "There is no further sanction and no natural or societal sorting of topics and communications as belonging or not to the legal system; it is a purely factual matter."²³⁸ Of

²³⁶ Niklas Luhmann, *Soziologische Aufklärung* (Opladen: 1970), 167 in Habermas, *Legitimation Crisis*, (Boston: Beacon Press, 1975), 98. The concept of institution here is used in the German philosophical anthropological sense, which is the same way Blumenberg conceived of institutions, that is, as a human construction that unburdens our interactions with the world. See chapter one of this dissertation.

²³⁷ Niklas Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System," in *Cardozo Law Review* 13 (1992), 1425.

²³⁸ Luhmann, "Operational Closure and Structural Coupling," 1428.

course the legal system can incorporate moral constraints into its system but this would be done within the bounds and according to the rules and regulation of the legal system. Operational (or systemic) closure “means, above all, that morality as such has no legal relevance... The law provides ample space for immoral behavior. *Non omne quod licet honestum est.*”²³⁹

In Habermas’ view, the systems theoretical approach captures an important aspect of law: its capacity to regulate social behavior in complex societies, its ability, that is, to unburden social interaction. However, systems theory is also limited in that it restricts itself to this one-sided approach. For Habermas, law is *also* a reflection of processes of post-traditional moral discourses, discourses that are a reflection on *interaction*, as we saw with his critique of Hegel. The counter-model that Habermas has at his disposal at this point is natural law theory (or social contract theory). For natural law theory, legitimacy requires the *rational justification of law*. This rational justification, moreover, can be understood as a *form of production* and as such is very much distinct from law as *autopoiesis*.²⁴⁰ Habermas leaned heavily on the normative force of natural law theory since natural law provides a normative standpoint from which to criticize illegitimate law. If law is understood as legality, as an enclosed, self-referential system authorized by state power, then unjust laws could be acceptable and legitimate provided they accord with the system. Natural law, in that it is based on a rational justification which must presuppose the inherent freedom and equality of all persons, provides a standpoint from which to assess law’s validity. However, natural law is based on a transcendental, monological account of reason. As we will look into more closely in the next section, Habermas attempts to build a theory of rational justification that lies somewhere between a pure normative theory (such as natural law) and a purely factual account of law (such as systems theory and legal positivism). He finds this form of rational justification in discourse theory. The discourse theory of law allows for the possibility of providing normative validity to law while still holding on to the positivist position that legitimate law is not based on transcendent moral or religious entities.

At issue for Habermas is systems theory’s account of rationality as based on systemic development. While instrumental reason is necessary for the organization of social life, it is not

²³⁹Luhmann, “Operational Closure and Structural Coupling,” 1429. The quote in Latin comes from Paulus, Ad Edictum 62 and translates as “Not everything which is lawful is honorable.”

²⁴⁰ Pierre Guibentif, “Approaching the Production of Law through Habermas’ Concept of Communicative Action,” in *Habermas, Modernity, and Law*, Mathieu Deflem (ed.), (London: Sage Publications, 1996), 48.

sufficient. Communicative rationality, in the form of public deliberation, is essential to social organization as well as to the revision of social goals and values. Because the systems theoretical approach to law is rooted ultimately in Weber's account of reason as purposive rationality, it is unable to understand the full normative scope of law as something rationally (i.e., discursively) agreed to. In Habermas' view, Weber reduces the broader rationalization process to the rationalization of the economy and the state and thereby omits the form of rationality (communicative rationality) that established the necessary post-traditional moral representations on which the market and the state apparatus were built.²⁴¹ Recovering this source is crucial if we want law to be something other than a "quasi-Natural form." At play again is Habermas' early distinction between labor and interaction but this time as it applies to instrumental accounts of law.

For Habermas, law is positive, rational, and formal, as Weber rightly posited—again, these are essential features of its independence from traditional morality and religion. Nevertheless, law cannot be understood solely as formal and procedural rationality. In Habermas' view, if we reduce law to systemic operations in the manner of systems theory and legal positivism, we have to give up on validating practices. This has dangerous political implications in that it reduces law to arbitrary decision. By focusing on law's facticity, on its systemic elements, we give up on its liberatory element—its moral dimension. If the positivist conception of law discounts the rational discussion of values then this prevents the possibility of legitimation. Law is thus treated as a fact, a mere given that cannot be questioned, much like objects and laws in the natural sciences. Referring to Luhmann's systems theory Habermas states: "The belief in legitimacy thus shrinks to a belief in legality; the appeal to the legal manner in which a decision comes about suffices."²⁴² Habermas goes on to equate this view with Schmitt's decisionism. While Schmitt, the critic of modernity, reviled and attacked the modern rule of law for its excessive abstractness and its inability to properly grasp 'real life' or the particulars of a *Gemeinschaft*, Luhmann praised the functionalist and systemic character of modern disenchanting law as an achievement of the modern rationalization process. What is

²⁴¹ In choosing to emphasize positivity, legalism, and formality, Weber "excludes from his account the conceptions of rational justification that arose with modern theories of natural law in the seventeenth century and since then have been characteristic....It is in this way that Weber assimilates the law to an organizational means applied in a purposive-rational manner, detaches the rationalization of law from the moral-practical complex of rationality, and reduces it to a rationalization of means-ends relations." *TCA*, Vol. I, 262.

²⁴² Habermas, *Legitimation Crisis*, 98.

bothersome for Habermas is that both theorists' account of law threaten to erase what for him is an important achievement of modernity, an ideal of public discourse whose formal procedures are the fulfillment of recognized norms.

Habermas found systems theory useful for the proper development of a critical social theory that is able to give an account of how social order is possible. It also helps explain certain problematic features of modern rationalization. However, unlike Lukács, Weber, and Schmitt who saw rationality as necessarily tied to reification and the hollowing out of value and legitimacy, and unlike Luhmann, who sees nothing wrong in conceiving of society as a giant mechanism devoid of meaning, Habermas does not take this aspect of modernity as the whole picture. Systems theory, does not offer an avenue for a meaningful response to systemic imperatives either at the level of theory, as hermeneutics does,²⁴³ or at the level of everyday life, as an account of the life-world does.²⁴⁴ For Habermas, the standpoint for critique and legitimation can be accessed through communicative interaction in the life world. Systems theory cannot offer a standpoint for critique. As Habermas puts it, systems theory is “affirmative” (*BFN*, 47).

For this reason, a critique of systems theory is of paramount importance for Habermas. Systemic or positivistic approaches to law, like Luhmann's, play into Schmitt's critique and rejection of modern liberal legality. They play into his account of the modern rule of law as formal and abstract, ultimately unable to grasp 'real life'. It thereby fosters the idea that decisionism is part and parcel of liberal legality. Ultimately, by detaching law from all internal relations to morality and politics, Schmitt and Luhmann's account of modern disenchanting law as a formal, closed-system drops any further-reaching claim to legitimation. This, ultimately, plays into Schmitt's account of law as pure facticity, as a mere given, as something that faces us

²⁴³ In *On the Logic of the Social Sciences*, Habermas takes a stance against both positivist and hermeneutical methods of understanding social phenomena. While he argues against positivist-empirical theories claiming that an explanatory social theory cannot succeed without an 'interpretive' form of understanding (*verstehen*) which takes into account both subject and object as part of a context of history and tradition, he also warns us that hermeneutical critique must make use of ideology critique since its linguistic idealism and rehabilitation of tradition may obstruct the distinction between authority and tradition. See *On the Logic of the Social Sciences*, (Cambridge, MA: The MIT Press, 1990).

²⁴⁴ “Social systems are considered here from the point of view of their capacity to maintain their boundaries and their continued existence by mastering the complexity of an inconstant environment. Both paradigms, life-world and system, are important. The problem is to demonstrate their interconnection. From the life-world perspective, we thematize the normative structures (values and institutions) of a society... From the system perspective, we thematize a society's steering mechanisms and the extension of the scope of contingency.” *Legitimation Crisis*, 4-5.

as a second nature.²⁴⁵ When law faces us as a “quasi-Natural form” our ability to see ourselves reflected in it is diminished. Schmitt’s turn towards concrete-order thinking can be seen as a response to the reification of the rule of law, the process by which a human product such as law faces its authors as an extraneous object.

Habermas’ reassessment of Luhmann in *Between Facts and Norms* can be taken as an attempt to once again counter approaches to law that neglect, consciously or unconsciously, to discuss the kind of validity afforded by means of communicative reason. Under the functionalist systems theory view, law becomes “the administration of law. One thereby loses sight of the internal connection between law and the constitutional organization of the origin, acquisition, and use of political power” (*BFN*, 50). As such, this reassessment can also be taken to offer, once more, an answer to Schmitt’s challenge. If we take value judgments in law to be indifferent to rational resolution, Habermas maintains, we are also positing that conflicts can only be resolved by a means-end rationality, in other words, by decisionistic means (*TP*, 265). The moral component of reason is important since it is the only faculty able to transcend reason’s own instrumentalization. For Habermas, this is the only approach that can avoid the “self defeating” positions of earlier critiques of modernity.²⁴⁶

The next section will offer an exposition and critical evaluation of *Between Facts and Norms*, Habermas’ mature statement on law. Habermas no longer takes law as contributing to the colonization of the lifeworld. Law under his new conceptualization is, on the contrary, mainly an expression of the lifeworld, the language by means of which the communicative power of citizens is translated into administrative power. This also means that law as a fact, positive law, is the vehicle through which the self-understanding of a community (its identity, aims, and goals) is developed. That it is an expression of a society’s self-understanding and that society can be questioned on its basis is the source of its legitimacy.

²⁴⁵ Many scholars have noticed the interesting parallels between Schmitt and Luhmann. See for example, Müller’s take on these parallels in *A Dangerous Mind*, 198-202. See also Chris Thornhill, “Niklas Luhmann, Carl Schmitt, and the Modern Form of the Political,” in *The European Journal of Social Theory* 10, No. 4 (2007):499-522. Even though they share the idea that there is a separation between law and morality, they could not be any more different. For one, Schmitt’s talk of substances and essences would not fit into Luhmann’s strictly functionalist view of society.

²⁴⁶ Michael Salter, “Neofascist Legal Theory on Trial: An Interpretation of Carl Schmitt’s Defense at Nuremberg from the Perspective of Franz Neumann’s Critical Theory of Law,” in *Res Publica* 5, No. 2 (1999), 166.

3.4 *Between Facts and Norms*: The ‘Paradoxical’ Emergence of Legitimacy out of Legality.

Habermas’ *Between Facts and Norms* brings together many of the theoretical strands of his early social and critical theory.²⁴⁷ At a fundamental level, Habermas is still concerned with reason’s two forms of instantiation—as an objectivating and reifying, rule-governed relation towards nature and persons and as a form of social practice that can raise validity claims that anchor modern objective institutions in the lifeworld. One of the basic goals of *Between Facts and Norms* is to articulate and defend this relationship in terms of the rule of law. Is constitutional legality a legitimate institution? Or is it a system of rules and commands sustained by the coercive apparatus of the state, as Schmitt and Luhmann held? As Habermas writes in the preface, the book “is directed against the growing skepticism among legal scholars, above all against what I consider a false idealism that underestimates the empirical impact of the normative presuppositions of existing legal practices” (*BFN*, xl). Against this growing skepticism, Habermas offers a reconstruction of the rule of law ideal that shows how law and morality are internally linked. The specific connection occurs in the democratic legislative practice, a practice which has a procedural rationality built into it. Viewed this way, law and morality cannot be distinguished by means of their formal and substantive properties, respectively—as we’ll see, they are both structured by means of the discourse principle. For Habermas this relationship comes to light in the social contract idea. The social contract proposes a procedure “whose rationality is supposed to guarantee the correctness of whatever decisions come about in a procedural manner.”²⁴⁸ One can say that Habermas offers a reconstruction of the social contract in a way that draws attention to presuppositions under which an agreement has to come about if it is to hold legitimacy. The procedure of rational will formation is what grounds the law normatively. Habermas’ wants to show how both procedure and rational will formation, form and substance, are co-constitutive, an argument that goes

²⁴⁷ Habermas’ *Between Facts and Norms* is furthermore related to his earlier work if, like Michael Powers, one takes his theory as being united by what Powers calls a “counterfactual imagination,” which is the product of two components—a “reconstructive transcendental” and a “critical reflective” one. See Michael Powers, “Habermas and the Counterfactual Imagination,” in *Habermas on Law and Democracy*, Rosenfeld and Arato, (eds.), (Berkeley: University of California Press, 1998).

²⁴⁸ Habermas, “Law and Morality,” 228.

against a whole tradition of political theory that takes law and democracy as being logically contradictory.

More important for our purposes, however, is that showing how the rule of law and democracy are internally related challenges sociological and positivist accounts of law which take modern law as ‘mere’ formal legality without taking into account its normative dimensions. Habermas takes issue with Luhmann’s systems theoretical approach to law in particular but his main claim in *Between Facts and Norms*, that there is a connection between the rule of law and democracy (conceived of discursively and procedurally), would also counter Schmitt’s account of the rule of law project as validated on nothing but sovereignty, that is, the coercive nature of the state. Habermas strategy for supporting law’s claim to legitimacy is to show how the legitimacy of law is based on a rationality, i.e., validity, that is *immanent* to law. This rationality stems from the procedural nature of communicative reason.

Facticity, Validity and Communicative Rationality

The idea of law as embodying communicative reason is based on Habermas’ theory of communicative reason, the idea that every day speech contains a potential for rationality (validity), when we use language with a view towards understanding (*Verständigung*). As we’ve been arguing, Habermas’ idea of communicative reason positions itself against different forms of post-Nietzschean critiques of reason that deny reason’s liberatory potential (the early Frankfurt School), as well as functionalist social theories which write off any practice that “from the participant perspective, appears obligatory at all” (*BFN*, 3). The validity that undergirds communication is related to a form of “rational consensus” that is tied into “pragmatic counterfactual presuppositions” or idealizations that participants in a conversation engage in (*BFN*, 4).²⁴⁹ The idealizations that take place in communicative practices are “counterfactuals” or “context-transcending anticipations” that make possible the positing of facts. They are, in the

²⁴⁹Rasmussen and Cooke proved helpful guides for this and the following paragraph. See David M. Rasmussen “How is Valid Law Possible? A Review of *Between Facts and Norms* by Jürgen Habermas” in *Habermas, Modernity and Law*, M. Deflem, (ed.) (London: Sage, 1996): 21-44 and Maeve Cooke, *Language and Reason: A Study of Habermas’ Pragmatics* (The MIT Press, Cambridge, MA), 1994.

language of Kant's first critique, the conditions of possibility of communicative practices.²⁵⁰ When speakers engage in communicative practice they assume that both speaker and interlocutor ascribe identical meaning to words and expressions, that they have a right to question or defend their claims, and that they are being sincere in what they say. These "performative presuppositions" raise validity claims which can question the truth or justice of factual consensus. This is the first tension between facticity and validity which, as we will see, runs through other social spheres, beginning with the tension between life-world and communicative action. Indeed, as Habermas indicates, "these aspects of validity that undergird speech are also imparted to the forms of life reproduced through communicative action" (BFN, 4).²⁵¹ By moving from a monologic to a communicative and procedural notion of subjectivity and rationality, Habermas was able to move away from Weber and the early Frankfurt School's theoretical impasse regarding reason's potential for criticism.²⁵²

As Habermas' theory of communicative action argues, when action reaches an impasse, the facticity or "taken-for-grantedness" of the life-world can be transformed into a topic of discussion. Such thematization "overshoots the given" thereby radically casting into doubt unquestioned practices. Archaic, kinship, and pre-modern societies do not display this tension between lifeworld and communicative action since their encompassing social ethos is totalizing, that is, authoritative and binding (BFN, 24). In disenchanting, complex societies the possibility of overlapping lifeworlds and shared background assumptions shrink as "ethnocentric perspectives widen" and individualized life histories reproduce. The rationalization and differentiation of

²⁵⁰ Powers, "Habermas and the Counterfactual Imagination", 216.

²⁵¹ Habermas' conception of communicative action has been heavily criticized since the publication of *TCA*. Habermas' idealized view of speech act theory has been read as being based on a problematic idealization of reason. For a discussion of how this is reflected in his procedural theory of law see Jacques Lenoble, "Law and Undecidability: Toward a New Vision of the Proceduralization of Law" in Rosendfeld and Arato, *Habermas on Law and Democracy*.

²⁵² This is Habermas' transition from a "subject-centered" philosophy to a "mutual understanding" paradigm of knowledge outlined in chapter XI of *The Philosophical Discourse of Modernity*, (Cambridge, MA: The MIT Press, 1990). The idea is that the mutual understanding presupposed by communicative action makes it possible for a speaker to assume the perspective of a *participant* as opposed to an *observer*. In the position of participant, the second person reflection of my action provides me with a sort of non-objectivating knowledge, a form of "recapitulating reconstruction of knowledge already employed." Habermas, *Philosophical Discourse*, 297. This is the kind of "reflective knowledge" proper to self-consciousness, the kind of knowledge able to break through reification.

spheres, moreover, not only results in the multiplication of social roles, it also requires the self-interested pursuit of one's own economic success.

The point of this is that modern societies have the unique problem of having to remain integrated (of having to mediate between validity and acceptance) once self interested action and strategic rationality have become severed from processes of communicative action oriented to reaching an understanding. This is Habermas' starting point. "How can disenchanted, internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissension is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?" (BFN, 26)²⁵³ In other words, how can conflicts of interest be negotiated when the integrating capacity of communicative action is overtaxed? In this case, as Habermas indicates, "persons engaged in communicative action face the alternatives of either breaking off communication or shifting to strategic action" (BFN, 26).

This is where positive law makes its appearance if one views it as the result of actors coming to some understanding themselves "about the *normative regulation of strategic interactions*" (BFN, 26). Modern law can be defined as "a system of rights that lends to individual liberties the coercive force of law" (BFN, 27). Law provides individuals with the liberty to pursue their private interests, a liberty that is paradoxically guaranteed by the coercive force of law. In order for society to remain integrated, however, we must also be able to view law as legitimate. Law thus must be able to carry out both functions: it must present *de facto* restrictions (thus leaving open the motive for compliance) and, at the same time, it must be possible for actors to follow it out of respect for the law (because it is authorized by the actors themselves). These are the two aspects that render law valid: positive law is valid, Habermas maintains, when "the facticity of the enforcement of a law is intertwined with the legitimacy of a genesis of law that claims to be rational because it guarantees liberty" (BFN, 28). Keeping with the analysis in *Theory of Communicative Action*, modern complex societies cannot be integrated solely by means of coercive laws or by means of Adam Smith's 'invisible hand.' The reproduction of human society is fundamentally rooted on a background consensus achieved

²⁵³This way of framing the question is extremely close to the way Blumenberg framed the problem that his theory of sufficient reason and legitimacy attempted to answer. See chapter 1.2 one of this dissertation. The lack of metaphysical or supra social guarantees results in either a functionalist, means end theory of action and political orders, like Blumenberg's, or in normative attempts of legitimation. Habermas ultimately finds both necessary.

through communicative action (*BFN*, 33). Without the encompassing social ethos of a archaic societies, law can carry out this function, can mediate facticity and validity, that is, but only if the addressees of legal norms can understand themselves as the rational authors of these norms: “Without religious or metaphysical support, the coercive law tailored for the self-interested use of individual rights can preserve its socially integrating force only insofar as the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational *authors* of those norms” (*BFN*, 33). Once held together by metaphysical foundations, facticity and validity can only be brought together by law. Law is at once coercive and, at the same time, has its genesis in the idea of self-legislation, the “supposition of the political autonomy of the united citizens” (*BFN*, 39). In Habermas’ view, law, as a social institution embedded in communicative action, allows for the unleashing of communication, “that removal of restrictions that in principle exposes all norms and values to critical testing” (*BFN*, 38). Legal validity, in other words, is grounded in a non-prescriptive rationality “that is inscribed in the linguistic telos of mutual understanding.”²⁵⁴ Communicative reason displays this tension between the context-transcending claims of reason (validity claims) and the contingent, circumscribed contexts in which we come together to organize our lives by means of coordinated action. “The theory of communicating action already absorbs the tension between facticity and validity into its fundamental concepts. With this risky decision it preserves the link with the classical conception of an internal connection, however mediated, between society and reason, and hence between the constraints and necessities under which the reproduction of social life is carried out, on the one hand, and the idea of a conscious conduct of life, on the other ” (*BFN*, 8).²⁵⁵

²⁵⁴ Further down Habermas indicates that “Communicative rationality is expressed in a decentered complex of pervasive, transcendently enabling structural conditions, but it is not a subjective capacity that would tell actors what they *ought* to do.” *BFN*, 4.

²⁵⁵ Compare to Neumann, in 2.4 above, when he states “What is here important is the fact that law in the philosophical sense is not identical with the needs of the state or of society. In the dialectical tension between justice and necessity lie the main problems of the philosophy of law” (*RL*, 12). Luhmann, of course, sees a fundamental tension in Habermas’ account of communicative action as bridging validity and facticity. Habermas rejects an understanding of normative reason as anchored in the world of ideas but, as Luhmann argues, in order for reason to retain its relation to “actually realizable operations,” reason must become concrete, it must become positivised. For a critique of Habermas’ normative reason as accounted for in *Between Facts and Norms*, see Luhmann, “*Quod Omnes Tangit*: Remarks on Jürgen Habermas’s Legal Theory,” in Rosenfeld and Arato, *Habermas on Law and Democracy*.

This quote sums up, in a way, Habermas' entire critical theoretical project— to articulate the normative, binding *potential* of the self-grounded ideas and institutions (such as the rule of law) that lie at the basis of our shared public life.²⁵⁶

Below we will explore how the rule of law is able to contribute to the maintenance and reproduction of our modern “highly artificial” communities based on the threat of sanctions as well as on a rationally motivated agreement. This is possible, Habermas maintains, as a result of the particular nature of law as Janus-faced—we encounter law as addressees as well as as its authors. For Habermas, both of these moments are combined in law as “the mutual penetration of legal form and discourse principle” (*BFN*, 129). This is the key to the “paradoxical” emergence of legitimacy out of legality. For Habermas, the basic connection between legitimacy and legality comes to the fore most clearly by means of an analysis of rights (*BFN*, 83). The system of rights (legality), which will concern us below, secures for citizens the exercise of their political autonomy (legitimacy).

Excursus—Sociology vs Philosophy

Before continuing with the analysis of the system of rights, I would like to draw attention to the way in which Habermas' theory seeks a middle path between philosophy and sociology, more specifically, between purely normative theories of justice such as Rawls' theory of justice and the functionalist, objectivist tradition of Marx, Weber, and Luhmann.

For Habermas part of the problem with Rawls' theory is that it follows the social contract model.²⁵⁷ Rawls' theory begins with the concept of the “well ordered society” as the framework that allows for the just cooperation of free and equal citizens. Its basic institutions thus deserve the rationally motivated cooperation of free and equal citizens. For Rawls satisfying the requirements of justice in a well ordered society is always beneficial for citizens. Under Habermas' interpretation of Rawls, “the self-stabilization of a well-ordered society is therefore based not on the coercive force of law but on the socializing force of a life under just institutions,

²⁵⁶ Powers, “Habermas and the Counterfactual Imagination,” 208.

²⁵⁷ Habermas has mounted a fuller critique of the social contract model, particularly, a critique of its monological features. See “Popular Sovereignty as Procedure,” in *BFN*, 449.

for such a life simultaneously develops and reinforces the citizens' dispositions to justice" (*BFN*, 58). Stabilization occurs as a result of the following of norms, not as a result of coercion. In fact, the theory already assumes that just institutions are already established. For Rawls the problem concerns "how the normative concept of a well-ordered society can be situated in the context of an existing political culture and public sphere in such a way that it will in fact meet with the approval on the part of citizens willing to reach an understanding" (*BFN*, 59). Legitimacy, thus, is based on our support for those institutions that "we" could not "reasonably" reject. According to Habermas, Rawls blurs "the boundary separating the task of philosophically justifying principles of justice, on the one hand, from a particular community's enterprise of reaching a political self-understanding about the normative basis of its common life, on another" (*BFN*, 60).

For Habermas theories such as Rawls' and Dworkin's seem to have been a reaction against the sociological functionalism of social theories that he says reaches back to the Scottish moral philosophy tradition, characterized by a skepticism towards rational natural law. Adam Smith and David Ricardo's political-economic turn set the stage for Marx's concept of civil society, characterized as an autonomous system that functions independently of social agents who unconsciously live out its economic imperatives (*BFN*, 45). The economy, not law, became the organizing structure of society and law became relegated to the political superstructure of society, reduced to an "epiphenomenon" (*BFN*, 46). The objectivating approach of Marxism successfully made its way into a variety of different theoretical traditions. In the meantime, they let go of the "inverted reference to the abstract whole of an overinflated instrumental reason" characteristic of Marx's critical edge, which culminated in the "affirmative" nature of systems theory. Luhmann's systems theory took this to an extreme, Habermas claims. His sociology of law "seems to devalue law in general as a central category of social theory." Even worse perhaps, law understood as a recursively self-reproducing closed circuit, "wipes out all tracks that point the way into society for an action theory starting with the actors' own self understanding" (*BFN*, 47). This conception robs law of its integrative capacity, its capacity for facilitating self-organization. "Hence law can neither perceive nor deal with problems that burden society *as a whole*" (*BFN*, 51). The discussion of Luhmann and Rawls in chapter two of *Between Facts and Norms* is important in that it puts into relief how Habermas' reconstructive project mediates between philosophy and sociology. Following Parsons lead, Habermas' project

aims at presenting a theory “that situates the idealizing character of validity claims in concrete social contexts.”²⁵⁸

While Habermas’ theory of law in *Theory of Communicative Action* understood law as a subsystem of society, one which furthers instrumental interaction and thereby contributes to the colonization of the lifeworld, *Between Facts and Norms* is an attempt to radically rethink the nature of law. Here law is taken to be *embedded* in the lifeworld since it shares in “the linguistic telos of mutual understanding” (*BFN*, 4). Through its formation of communicative power, law operationalizes the outcome of lifeworld communication. In a sense, law mediates lifeworld and system as a kind of translator. In Habermas’ words, “normatively substantive messages can circulate throughout society only in the language of law” (*BFN*, 56).

The system of rights and the reconciliation of private and public autonomy

We’ve seen how Weber’s theory of rationalization helped Habermas frame his account of law as a mechanism for the social integration of complex societies. We’ve also briefly touched on Habermas’ concept of communicative reason which we said establishes legitimate norms and normative orders (for instance, law) because it is always situated in structured forms of life all the while transcending this order through validity claims. As such, law is a system of coercible rules and functional procedures (facticity) that also rests on a legitimacy that is the product of the communicatively-embedded reason (validity). In other words, the medium of law, “make[s] possible highly artificial communities, associations of free and equal legal persons whose integration is based simultaneously on the threat of external sanctions and the supposition of a rationally motivated agreement” (*BFN*, 8).

As Habermas outlines before beginning his reconstructive approach proper, modern law is a medium for the integration of society that emerges as a result of secularization and the rationalization of spheres for the purpose of integrating the force of obligatory action coordination with validity claims, that is, for integrating facticity and validity. Archaic social

²⁵⁸ William Rehg, “Translator’s Introduction,” *BFN*, xii. Habermas finds in Parson’s action theory a more adequate model from which to begin to think the reconstruction of the self-understanding of modern law since Parsons understood law as “a transmission belt by which solidarity—the demanding structures of mutual recognition we know from face-to-face interaction—is transmitted in abstract but binding form to the anonymous and systematically mediated relationships of a complex society.” *BFN*, 77.

orders were stabilized on the basis of the fusion of facticity and validity because earthly power was subordinated to, or had its basis in, sacred law. This fusion evaporated with the advent of the rationalization process. Modern law contains no meta-social guarantees such that the two can be combined. As such, Habermas describes *Between Facts and Norms* as an attempt to answer the classic political philosophical question: How does law integrate modern, differentiated society in a way that guarantees coercion all the while maintaining its claim to legitimacy? In other words, how does modern law stabilize the separation between facticity and validity? Disenchanted, internally differentiated and pluralized lifeworlds require the normative regulation of strategic interactions that “bring about willingness to comply *simultaneously* by means of de facto constraint and legitimate validity. Norms of this kind would have to appear with an authority that *once again* equips validity with the force of the factual” (*BFN*, 26-27, my italics). Modern disenchanted law must combine validity with the force of the factual “only this time under the condition of the polarization already existing between action oriented to success and that oriented to reaching understanding, which is to say, under the condition of a *perceived* incompatibility of facticity and validity” (*BFN*, 27).

In order to explain how this tension functions in modern law—in order, that is, to explain how law can be *both* coercive and legitimate at the same time—Habermas begins where the social contract tradition began, with the concept of rights as that which secures for citizens the exercise of their political autonomy. The modern notion of rights occupies a vital and strategic position for the claim that the rule of law and democracy are internally connected. Habermas had already argued that human rights (closely related to the notion of moral self-determination) and popular sovereignty (closely related to the idea of democracy and ethical self-determination) represent the two normative conceptions from which modern legal orders can derive their legitimacy (*TCA*, Vol. I, 261; Vol. II, 178).²⁵⁹ Contrary to what is generally assumed by republican and classical liberal theory, both of these principles—the system of basic rights and the principle of democracy—are “equiprimordial” or “co-originally constituted” (*BFN*, 122). As Habermas says, “the paradoxical emergence of legitimacy out of legality must be explained by means of the rights that secure for citizens the exercise of their political autonomy” (*BFN*, 83). As we shall see further below, the system of rights and the democratic principle are derived from the interpenetration of the discourse principle and the legal form.

²⁵⁹ See page 106 above.

Habermas' internal reconstruction of the normative character of law clarifies the conditions of possibility of the internal dependence between moral autonomy and legal formalism. The idea of basic rights is Habermas' starting point for his reconstruction of the modern rule of law idea. This idea has always formed part of the Western understanding of the individual's liberty and freedom of action. "Rights ('subjective rights' in German) fix the limits within which a subject is entitled to freely exercise her will" (*BFN*, 82). The limits of individual action are determinable by law. As Habermas notes, this idea is reflected in Kant's universal principle of law (*Rechtsprinzip*), the idea that for an action to be right or lawful it has to have a guiding maxim which conjoins my freedom of choice with everyone's freedom in accordance with universal law.²⁶⁰ "The concept of a law or legal statute makes explicit the idea of equal treatment already found in the concept of right: in the form of universal and abstract laws all subjects receive the same rights" (*BFN*, 83).²⁶¹

However, and as we outlined above, for Habermas law must be normatively grounded. It must integrate society socially, not just functionally. The legitimacy requirement is provided by the principle of popular sovereignty, which takes place "through the achievements of mutual understanding on the part of communicatively acting subjects, that is, through the acceptability of validity claims" (*BFN*, 83). In Habermas' view, for popular sovereignty to unfold, a system of rights is needed that *secures* for citizens the exercise of their political autonomy. Human rights make this exercise of popular sovereignty possible: "without basic rights that secure the private autonomy of citizens there is also no medium for legally institutionalizing the conditions under which these citizens... can make use of their public autonomy."²⁶² Democratic legitimacy requires human rights, and these rights, require at the same time a democratic process for reaching an understanding about their content. This is how Habermas understands the function of modern law: "Modern law displaces normative expectations from morally unburdened individuals onto the laws that secure the compatibility of liberties. These laws draw their

²⁶⁰ This is also the basis of Rawls' first principle: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." *BFN*, 83.

²⁶¹ It is obvious, Habermas says, why modern law is especially suited for the economic integration of society. Markets "rely on the decentralized decisions of self-interested individuals in morally neutralized spheres of action." *BFN*, 83.

²⁶² Habermas, *The Inclusion of the Other*, 261. For an alternative view, see Frank Michelman "Family Quarrel" in Rosenfeld and Arato, (eds.) *Habermas on Law and Democracy*. Michelman sees a tension between the rule of law (founded on innate human rights) and the self-organization of a community.

legitimacy from a legislative procedure based for its part on the principle of popular sovereignty” (BFN, 83). As Habermas indicates, the system of rights can be taken as “the reverse side” of the principle of democracy (BFN, 94). The principle of democracy, on the other hand, “can only appear at the heart of a system of rights.” Since human rights (moral autonomy) *materialize* solely by means of popular sovereignty (political autonomy), Habermas sees law as mediating between the principle of morality and that of democracy (BFN, 94). Law institutionally enables the grounding of human rights out of the democratic procedure. “Because the democratic principle cannot be implemented except in the form of law, both principles must be realized *uno actu*” (BFN, 94). In other words, legal systems institutionalize what grounds them normatively—the social conditions of argumentative discourse, that is, autonomy.²⁶³

Habermas’ claim that there is an internal relation between private and public autonomy goes against a long tradition in political philosophy that sees human rights (private autonomy) and popular sovereignty (public autonomy) as irreconcilable. For Habermas, privacy-guaranteeing rights emerge co-originally with political autonomy because “at a conceptual level, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary, as elements of the legal order they presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens. This mutual recognition is constitutive for a legal order from which actionable rights are derived” (BFN, 88).

Habermas thinks that the reason traditional social contract theory has had a hard time reconciling private and public autonomy in a satisfactory way is that its conception of rights is rooted in a “philosophy of consciousness.” For Kant, self-determination, the unification of reason and will, is found in the concept of a subject that is pre-political. In Rousseau, autonomy resides in the macro-subject of a people or a nation. In that both accounts are mired in the philosophy of consciousness, “both conceptions miss the legitimating force of a discourse process of opinion- and will- formation, in which the illocutionary binding forces of a use of language oriented to mutual understanding serve to bring reason and will together” (BFN, 103). Habermas says that both Rousseau and Kant sought to conceive of popular sovereignty and practical reason as coalescing in such a way that they would presuppose each other but in the end

²⁶³ Klaus Eder, “Critique of Habermas’ Contribution to the Sociology of Law” in *Jürgen Habermas*. Sage Masters of Modern Social Thought. David Rasmussen and J. Swindal, (eds.) (London: Sage, 2009), 166.

neither went far enough in establishing how both principles “reciprocally interpret one another.”²⁶⁴

The semantic form versus the democratic procedure: law’s ethical minimum

Since Habermas is concerned with the discursive practice that underlies the formalism of positive law, he can be sharply contrasted to Neumann’s focus on the formality of law. As we saw in chapter two, Neumann locates the ethical moment of the classic, liberal rule of law ideal in the generality of the legal norm. This ethical quality was tied to the socioeconomic basis of competitive capitalism but also transcended it. Neumann’s argument sought to show that if the socio-economic conditions specific to the liberal rule of law changed then law could not be preserved in its classic form. As a result, the ethical quality of the modern rule of law was also lost. In Neumann’s view, the unequal distribution and the unfair playing field of modern monopoly capitalism required an active, far reaching form of state intervention, one that moved within a system of legal regulations. Equality and freedom would be the result of a form of state activity that, by means of material law, guaranteed the formal legal equality specified in the constitution.²⁶⁵ When Neumann mentions democracy at all, it is only in relation to classical *Rechtsstaat* theory and becomes important only in that it *expresses* the ethical quality of the general norm, as in Rousseau’s concept of the general will. Here Neumann links the normative content of the principle of law to the semantic property of what is willed. Rousseau’s general will is legitimate prior to any actual convergence of wills.

In Habermas’ view, a focus on the semantic nature of law leaves out what really constitutes the validity and rationality of the rule of law—the public and democratic character of the process of law formation. For Habermas, the validity of law lies “in the pragmatic conditions that establish how the political will is formed” (*BFN*, 103). Neither Rousseauian nor interventionist accounts of law are legitimate since they do not allow a space for deliberative democracy. Neither of them furthers private or political autonomy. This is Habermas’ main

²⁶⁴ Habermas, *The Inclusion of the Other*, 259.

²⁶⁵ For a discussion of legal formalism in relation to welfare state law see Habermas, “Law and Morality,” 220-250. See also *BFN*, chapter 9.3.1.

argument in *Between Facts and Norms*, that there is an intrinsic (conceptual and not only historically) relation between the rule of law and democracy. The substance of the freedom-guaranteeing nature of law “resides in *the formal conditions for the legal institutionalization of those discursive processes of opinion-and-will formation in which the sovereignty of the people assumes a binding character*” (BFN, 104, my italics).²⁶⁶

Habermas’ insistence on the procedural approach is thus opposed, on the one hand, to the “liberal paradigm of bourgeois formal law” which privileges individual freedom, the “watchdog state,” legal certainty and formal equality before the law. “Premised on the separation of state and society,” private law has always presumed that “organizing a depoliticized economic society withdrawn from state intrusion, guaranteed the negative freedom of legal subjects and therewith the principle of legal freedom” (BFN, 396). On the other hand, the proceduralist approach also differs from the “social welfare paradigm of materialized law,” directed towards the realization of substantive social goals. We could include Neumann’s theory of law here. This paradigm of law reflects the idea that legal freedom is worthless unless citizens have at their disposal the means to make use of freedom. Different sorts of labor and property regulations are made use of to provide compensation for market failure (BFN, 404). For Habermas, besides the danger of the state impairing individual autonomy, the social-welfare model, also referred to as the distributive justice model, is based on liberal bourgeois premises. They both “share the *productivist image of a capitalist industrial society*” (BFN, 407).²⁶⁷ As Habermas argues, the expectation of justice for both paradigms is based on the pursuit of personal interest. “Both views are fixated on the normative implications of how a legally protected negative status functions in a given social context.” As such, they “both lose sight of the internal relation between private and political autonomy, and thus lose sight of the democratic meaning of a community’s self-organization” (BFN, 408).

Contrary to Neumann’s conception of legitimacy on the basis of law’s semantic generality, Habermas’ understands legitimacy as law’s capacity to further not just private

²⁶⁶ For Bernstein, however, the normative, freedom-guaranteeing aspect resides rather, in the democratic ethos presupposed and reproduced by the discourse theory of law and democracy. As Bernstein argues, Habermas unnecessarily holds on to a too rigid and formal sense of procedural. This problem is related also to a conflation between different sense of substantial and substantial-ethical convictions (or “thick” and “thin” ethical convictions). See Richard Bernstein, “The Retrieval of the Democratic Ethos,” in Rosenfeld and Arato, *Habermas on Law and Democracy*.

²⁶⁷ Habermas makes use of Iris Marion Young’s critique of justice as distribution. See BFN, 419.

autonomy but public autonomy as well. It owes it legitimacy, at the same time, to the discursive procedures that express this autonomy. As Habermas states, “after the formal guarantee of private autonomy has proven insufficient, and after social intervention through law also threatens the very private autonomy it means to restore, the only solution consists in thematizing the connection between forms of communication that *simultaneously* guarantee private and public autonomy *in the very conditions from which they emerge*” (BFN, 409). For Habermas, issues concerning rights have to be raised in the political public sphere by those who have a grievance. The “mutual recognition” afforded by rights always emerges, he claims, as a result of a “struggle for recognition” (BFN, 426). While welfare state interventions are accurate in the diagnosis of bourgeois formal law—that an equal opportunity clause does not necessarily translate into substantive equality without the necessary material conditions—we cannot throw away the idea of rights out completely. Habermas’ interpretation of rights as intersubjective in nature (as opposed to a priori), results in a concept of rights where citizens clarify by means of discussions in the public sphere those aspects of their living situation which make it impossible for them to take advantage of individual liberties. Under Habermas’ proceduralist view, “the realization of basic rights is a process *that secures the private autonomy of equally entitled citizens only in step with the activation of their political autonomy*” (BFN, 426).²⁶⁸ Citizens need to form part of a discussion which, at the same time, interprets and defines “the standards by which legal equality can be established in the face of actual inequalities” (BFN, 428).

The legitimacy of law is thus thoroughly bound to the conditions for democratic procedures. Needless to say procedural rationality can be conceived either as a specific form of moral reasoning or as a mechanism that churns out valid legal norms from procedural rules. Validity, again, is not the result of a system of rules and procedures for Habermas. The validity of law as procedure stems from the idea that the structure of legal reasoning is a special case of the structures representative of moral argumentation.²⁶⁹ Here we get to the point where the specific relationship between law and morality can be clarified.

²⁶⁸ Habermas admits in a footnote here that he himself was drawn to the materialization of law. “In Germany the discussion over the generality of legal statutes is still colored by the rather extreme views found in Carl Schmitt’s 1928 *Verfassungslehre* (Constitutional Theory). This view became influential in the Federal Republic through the direct efforts of Ernst Forsthoff and indirectly through Franz Neumann.” BFN, 565-566, n. 75. See also his discussion of this German trend in “Law and Morality,” 233-235.

²⁶⁹ Eder, “Critique of Habermas’ Contribution to the Sociology of Law,” 166.

Law and Morality

From Habermas' postmetaphysical standpoint, subjective rights are not "things" that agents possess and they certainly do not exist pre-politically. They are relations among agents based on a form of mutual recognition. Citizens, Habermas claims, "participate in legislation only as legal subjects; it is no longer in their power to decide which language they will make use of. The democratic idea of self-legislation *must* acquire its validity in the medium of law itself" (*BFN*, 260). This is what distinguishes Habermas from Kant. While the content of individual liberties expressed in law must pass the universalization test (expressed, for Kant, in the Categorical Imperative), legitimacy for Habermas requires the principle of democracy. "It is only participation in the practice of politically autonomous lawmaking that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves" (*BFN*, 121). For Habermas autonomy is realized in the medium of law itself.

Habermas' earlier discourse theory did not make a distinction between the discourse principle and the moral principle (*BFN*, 108). *Between Facts and Norms* reconsiders this relationship. Here law and morality are "two different but mutually complementary kinds of postmetaphysical action norms" (*BFN*, 105). Both kinds of action norms reside, that is, at the postmetaphysical level of justification. While the legitimacy of legal validity refers to (and can certainly not contradict) basic moral principles this does not mean that morality is "ranked higher" than legal norms as is the case when positive law is reduced to the moral law or in Kant's case, where positive law is subsumed under natural law (*BFN*, 106, 153-157). Morality and positive law "stand in a complementary relationship" (*BFN*, 106). Both types of action norms refer to the same set of problems—problems having to do with the ordering of interpersonal relationships, the coordination of action through justified norms, and the resolution of conflicts—but they refer to each in different ways. Posttraditional morality, Habermas indicates, "represents only a form of cultural *knowledge*, whereas law has, in addition to this, a binding character at the institutional level" (*BFN*, 107). Law and morality differ in that morality is non-coercible and only internally binding, whereas law is only externally binding.

As Habermas claims, both discourses are regulated by "the discourse principle" (D) which expresses the postconventional requirements of justification. Moral and civic autonomy, subjective rights and objective law, emerged simultaneously (but in differentiated form) from the

remnants of a social ethos in which both were once fused. As such they are “co-original” and, more importantly, are both different expressions of (D). Habermas defines (D) in the following way: “Just those norms are valid to which all possibly affected persons could agree as participants in rational discourses” (*BFN*, 107). In this way, (D) accounts for the most abstract of principles that governs any kind of action norm requiring postconventional justification. In Habermas’ view, (D) can contribute to any sort of interaction that attempts to reach an understanding of validity claims—it is the most abstract of principles that establishes “the point of view from which norms of action can be impartially justified” which in turn “reflects those symmetrical relations of recognition built into communicatively structured forms of life in general” (*BFN*, 109). Again (D) governs moral discourse as well as legal discourse but in no way is there a hierarchical conception where positive law would be a special case of morality. Indeed moral and legal discourses each refer to different addressees and regulate different matters.

(D) can be said to govern moral discourse when the principle is used for norms governing *all* those affected. The object of moral discourses is not the citizen but the universal community of human beings, the “integrity of fully individuated persons” (*BFN*, 452). Here (D) operates in the form of *the moral principle*. The object of legal discourses, on the other hand, is restricted to the justification of action norms between citizens of the same state. When applied to the justification of pragmatic, ethical-political, as well as moral reasons, (D) operates in the form of *the democratic principle* (*BFN*, 108-109). As Habermas indicates, law is at once narrower and broader in its scope. The scope of law is narrower in that it has access to coercible behavior only. It can only regulate our external behavior. Law is broader in its extension, however, in that it regulates a whole host of relationships of an entire legal community and not just interpersonal conflicts. Thus, the justification at the level of legal discourses is not restricted to moral reasons alone. Law, in a sense, depends on a broader range of discursive networks and forms of bargaining (*BFN*, 452).²⁷⁰

As Habermas indicates, law must be in harmony with morality (this is the condition for the protection of autonomy) but it must look for legitimacy through the democratic principle. This is because, on the one hand, legal regulations are too concrete. But furthermore, morality

²⁷⁰For an account of the tension between the discursive plurality now involved in Habermas’ account of law and discursive rationality, the tension, that is, between difference and unity, see Gunther Teubner, “*De Collisione Discursum*: Communicative Rationalities in Law, Morality, and Politics,” in Rosenfeld and Arato, *Habermas on Law and Democracy*.

does not mobilize in the way conceived, say, by Kant. This is the reason for the positivization of law. The legitimation requirement cannot be met “simply by conceiving the right to equal liberties as a morally grounded right that the political legislator merely has to enact” (BFN, 120). This route, which is the route Kant takes, subordinates the ‘Universal Principle of Right’ to the categorical imperative and thus to the moral law. As Habermas indicates, subordinating law to morality is “incompatible with the idea of an autonomy realized in the *medium of law itself*” (BFN, 120). Just as modernity has to find its legitimating resources within itself, so must law. “It is only participation in the practice of politically autonomous lawmaking that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves” (BFN, 121). The locus of legitimacy, of autonomy, lies in the idea of self-legislation by citizens, the idea that the subjects of law are also its authors. Thus, Habermas states, “the autonomy that in the moral domain is all of a piece, so to speak, appears in the legal domain only in the dual form of private and public autonomy.”²⁷¹

According to Habermas, law is “a functional complement to morality.”²⁷² In contrast to Kant, positive law is in no way subordinated to the moral law: postconventional morality is not an action system that can effectively motivate actors since it can only provide for “cognitively indeterminate and motivationally unreliable results.”²⁷³ Positive law disregards the sort of internal motivation of morality “by way of an institutionalized legal system that *supplements* postconventional morality in a manner effective for action. Law is two things at the same time: a system of knowledge and a system of action... Because motivations and value orientations are interwoven with each other in law as an action system, legal norms have the immediate effectiveness for action that moral judgments as such lack” (BFN, 112). What this means is that coupled with the legal system, morality is able to spread to any sphere of action—even those media-steered spheres, like the economy and state power where citizens are unburdened of any moral expectations.

²⁷¹ Habermas, *The Inclusion of the Other*, 257.

²⁷² Habermas, *The Inclusion of the Other*, 257.

²⁷³ Habermas, *The Inclusion of the Other*, 257.

The justification of the system of rights

In Habermas' understanding, it is not the legal form that furnishes positive law its full normative meaning, nor is it a morally grounded right that the political legislator enacts paternalistically. The idea of self-legislation requires that citizens understand themselves as authors of law. "Legitimate law is compatible only with a mode of legal coercion that does not destroy the rational motive for obeying the law" (*BFN*, 121). As we've been arguing, for Habermas self-legislation cannot be reduced to the moral self-legislation of individual persons, as in Kant. The principle of democracy is what confers legitimacy to self-legislative practices. This is where (D) comes in—"just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses". This principle assumes the form of the democratic principle when coupled with the legal form. The principle of democracy, in other words, results from the legal institutionalization of the discourse principle. This constitutes the "logical genesis of rights."

One begins by applying the discourse principle to the general right to liberties—a right constitutive for the legal form as such—and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape. Hence the principle of democracy can only appear as the *heart* of a system of rights. The logical genesis of these rights comprises a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law—hence the democratic principle—are co-originally constituted (*BFN*, 121).

Habermas' "circular" reconstruction of the "logical genesis of rights" establishes the "equiprimordiality" of private and public autonomy, that is, of subjective liberty and objective law. According to this reconstruction the liberties of autonomous private individuals and the rights of politically autonomous citizens to participate in democratic legislation are equiprimordial or "mutually enabling." Habermas describes the logical genesis of the system of rights as a "circular process" since subjective liberties are *the prerequisite but also the result* of democratic lawmaking. This is why Habermas claims that the principle of democracy can only appear as the heart of a system of rights. Without human rights and political rights there is no

democracy. At the same time it is the principle of democracy (the institutionalization of the discourse principle) which engenders the system of rights.

Law, as embodied in the system of rights, favors neither private autonomy, as Lockean forms of liberal theory do, nor does it favor political autonomy, as do Rousseauian forms of republicanism. The classical tension between positive law and natural law is dissolved and transformed in this reconstruction into a tension between facticity and validity within law.²⁷⁴ What is important here is that the system of rights contains the individual rights necessary for legitimately (democratically) regulating social interaction by means of positive law. More specifically, when (D) is brought together with the legal form, the result is the establishment of five different kinds of rights that Habermas postulates at a very abstract level. As he argues, these rights do not appeal to substantive arguments about the needs and capabilities that rights protect. Three sets of rights guarantee reciprocal recognition of citizens as addressees of law: 1) “the right to the greatest possible measure of equal individual liberties,” which require 2) citizen rights to political membership, and 3) the right to legal actionability and legal protection (*BFN*, 122). By means of these rights citizens are granted “a status on the basis of which they can claim rights and bring them to bear against one another.” The other two sets of rights materially enable the exercise of political autonomy which enables citizens to further change, expand, or reinterpret their rights and duties (*BFN*, 123): 4) the right to exercise political autonomy through legislation, and 5) basic rights that provide the opportunity to use the civil rights listed in 1) through 4).²⁷⁵ Habermas’ takes the set of rights that results from the interpenetration of (D) with the legal form as “unsaturated placeholders” that are to be filled and made concrete by citizens through democratic legislation, the rights that correspond to 4): political autonomy. Habermas calls the rights involved in political autonomy as “reflexive rights” since they apply to the further elaboration and re-elaboration of 1)-4) which are abstract “placeholders.” As Habermas states, neither (D) (in all its abstractness) nor the democratic principle can ground any right. What grounds the system of rights, what grounds law, is democratic legislation understood

²⁷⁴ Ingeborg Maus, “Liberties and Popular Sovereignty: On Jürgen Habermas’ Reconstruction of the System of Rights,” in René Von Shomberg and K. Baynes, *Discourse and Democracy*, 90. *BFN*, 129.

²⁷⁵ Habermas indicates that 5) cannot be “absolutely justified” as 1)-4). The rights that follow 5) can only be justified “relatively.” *BFN*, 123. I take this to be central to Habermas’ theory not incorporating a critique of capitalism. I will touch on this point further in the conclusion. I thank Lorenzo Simpson for this insight.

as the interpenetration of (D) and the legal form. The system of rights so understood “brings private and public autonomy into a relation of mutual presupposition” (*BFN*, 128).

At this level, we are still dealing with the horizontal relationship between the legal form (facticity) and communicative action (validity) as it relates to the genesis of basic rights among citizens. This system of rights, however, lies on shaky grounds if it is not secured vertically by the constitutional state, a power already presupposed by the form of law. Our next and final step briefly examines the shift in focus to the relationship between law (grounded in the communicative praxis of citizens) and political power (facticity).

From the genesis of rights to the genesis of the state

To become socially effective the system of rights requires the establishment of a centralized power. Without this, the reciprocal conferral of rights remains “metaphorical,” as Habermas says.²⁷⁶ This is the next step of his account of the institutionalization of communicative reason. Habermas argues that the interpenetration of private and public autonomy in the system of rights can be rendered permanent only through a juridification that does not limit itself to the liberty and communicative freedom of private persons. Juridification must spread through the “political power already presupposed with the medium of law, a power to which the making as well as the enforcing of law owe their binding character” (*BFN*, 132). Up till now, we have been delineating the “horizontal genesis” of legitimate law focusing on the relationship between communicative praxis and law within a community of citizens. Now we focus on the “vertical genesis” of legitimacy which takes place within a constitutional state. Here the focus is no longer the tension between the mutual understanding that is embedded in communicative praxis and the legal form. Rather, the focus shifts to the relationship between law as an expression of communicative praxis and political power. Political power, just like law, is essential for the proper unfolding of communicative practice.

On the one hand, law and political power fulfill system functions for each other: the authorization of the exercise of power provides procedures that define governmental power and

²⁷⁶ “It can perhaps be recalled and ritualized, but it cannot become permanent unless state power is established and put to work.” *BFN*, 132.

governmental power provides the threat of sanction that makes law socially effective. On the other hand, the law employed by the state must be legitimated through a broad discourse of citizens and representatives. Habermas makes use of Hannah Arendt's concept of communicative power in order to explicate how the authorizing power expressed in jurisgenesis (the creation of law) is generated. Quoting Arendt, "Power corresponds to the human ability not just to act but to act in concert" (*BFN*, 148). Habermas stresses the facticity of communicatively generated power, a type of motivating and authorizing power that in turn influences the production of legitimate law. Habermas labels this communicative power a "jurisgenerative" power: "Law joins forces from the outset with a communicative power that engenders legitimate law" (*BFN*, 149). In contradistinction to Arendt who did not have an account of law,²⁷⁷ for Habermas the process of juridification mobilizes and secures the communicative power that comes about whenever people act in concert. Law as well as the use of administrative power is essential to the unfolding of communicative power. In this sense, law is "the medium through which communicative power is translated into administrative power" (*BFN*, 150). As Habermas' reconstruction of law maintains, the principles of the constitutional state specify the general institutional guidelines for the *generation* of communicative power (as we've seen this can be brought about only through the institutionalization of the system of rights) as well as the *exercise* of power. Government authority derives its legitimacy by means of the connection between communicative power and administrative power (*BFN*, 136). As Habermas states, "We can interpret the idea of the constitutional state in general as the requirement that the administrative system, which is steered through the power code, be tied to the lawmaking communicative power and kept free of illegitimate interventions of social power...Administrative power should not reproduce itself on its own terms but should only be permitted to regenerate from the conversion of communicative power" (*BFN*, 150).

Contrary to Luhmann's purely systemic and objectivist account of law, Habermas' attempt to integrate the sociological as well as normative dimensions of law and political power results in a paradigm that, on the one hand, understands law and the state as providing certain systemic functions for each other and on the other, takes law as being the expression of a broad process of democratic will formation which puts communicative power into effect. Law can thus

²⁷⁷ Nor did she acknowledge how administrative power functions as implementing communicative power. *BFN*, 148. Of course, Arendt's account of communicative power operates outside the bounds of legality and administration.

be seen as a “sluice” between democratically formed values in the lifeworld and the administrative/economic systems that organize our lives in complex societies. It is the “hinge between system and lifeworld,” Habermas claims, “a function that is incompatible with the idea that the legal system, withdrawing into its own shell, autopoietically encapsulates itself” (*BFN*, 56). Contrary to reified accounts of law provided by objectivist and sociological approaches, Habermas’ reconstruction of law reveals law’s centrality in “the constitutional organization of the origin, acquisition, and use of political power” (*BFN*, 56). Under conditions of complexity, law, the only social institution of its type, functions as a system of integration that is based on coercive as well as normative elements. Habermas’ account of legal validity inserts the rational and discursive nature of language and speech into the facticity of modern social organization.

In chapter two we laid out Schmitt’s critique of the liberal rule of law idea, first from the standpoint of decisionism and then from the standpoint of concrete order. In his decisionistic phase, Schmitt understood law as sheer facticity. The existential will of a people, embodied in the sovereign, congealed into a form a coercive power. The decision, taken on the basis of a friend-enemy distinction, is what bore legitimacy. His turn to concrete order thinking furnished a substance for the sovereign decision, the particular, concrete social fabric of a polity. With pure decisionism, the law is equivalent to the ungrounded concrete will of the sovereign. With concrete order thinking, law is reduced to “the positivity of an imitation of substantial ethical life” as Weimar anti-positivists and Nazi legal scholars would have it. In this case law becomes absorbed into politics (*BFN*, 153).²⁷⁸ In both cases, the tension between facticity and validity disappears—validity is subsumed to the will of the sovereign or to an organized social formation. Even though Habermas’ discourse theory of law offers a way in which democratic practices mediate and help bridge law and legitimating practices, for Habermas there must always remain a tension between facticity and validity. The moment facticity and validity are wholly integrated, there is no perspective from which to gauge and criticize law and social reality.

What also disappears, if we take Schmitt’s view, is the idea that law is the medium by which communicative power is *transformed* into administrative power. For Habermas, this is exactly what defines the constitutional state: “Government by law is designed to spell out the system of rights in terms of a constitutional order in which the legal medium can become

²⁷⁸ This is one of the several references to Schmitt in the book. Habermas reads concrete order here as referring, not to the concrete order of the 19th century state, as we did in chapter two, but to the institutional model made use of by the National Socialist regime.

effective as a power transformer that reinforces the weakly integrating currents of a communicatively structured lifeworld” (*BFN*, 177). Against the Weberian legacy represented by Schmitt, Luhmann, and other objectivist theories that take law as a reified mechanism whose recursive process of production and reproduction holds society together, Habermas retrieves the normative basis of legal systems. This normative basis constitutes the self-understanding that lies at the basis of social coordination. The system of rights enables the communicative interaction that is necessary for the practice of self-determination. The discursive practices that are enabled and protected by means of the system of rights are capable of producing the binding power necessary for social integration because they produce rules for strategic interaction—coercive rules—that are at the same time taken as valid since citizens can, by means of discourse, negotiate the interpretation of rules and attempt to modify them accordingly. As Habermas states, “the emergence of legitimacy from legality admittedly appears as a paradox only on the premise that the legal system must be imagined as a circular process that recursively feeds back into and legitimates itself. This is already contradicted by the evidence that democratic institutions of freedom disintegrate without the initiatives of a population accustomed to freedom” (*BFN*, 130).

As Habermas understands it, modern law is first and foremost a normative source for the legitimation of administrative power, not just the medium for its exercise. For this reason, administrative power must remain bound to the communicatively generated power. While Neumann believed, like Habermas, in the dual nature of law—that law is not only coercive but also guarantees freedom—his interpretation and defense of the rule of law project was based on a “narrow interpretation” of democratic law. Neumann’s focus on the general and abstract form of normative propositions and then on a materialized law guided by specific social ends makes no room for processes of democratic legitimation. For Habermas it is “the proceduralist understanding of law [that] opens a perspective for the determinate negation of injustices that can be indentified here and now” (*BFN*, 427).

CONCLUSION

We began with Schmitt's contention that the modern rule of law state is not legitimate. In his view, the liberal rule of law idea is the product of a four hundred year long process of neutralization, that is, depoliticization. What this process neutralized is, more specifically, sovereignty, the quality that grants law its legitimacy. Schmitt waged a long intellectual battle against the defenders of the liberal rule of law project by attempting to repoliticize the state. He thought he could do this by pointing out on the one hand, how legality is not a substitute for legitimacy and, on the other hand, the ways in which the modern state (and modernity as a whole) had failed to fully do away with sovereignty.

One of the approaches Schmitt used in order to repoliticize the state was by means of a philosophy of history. Schmitt argued that the principles of the modern state are grounded in theology, more precisely, in the idea of absolute sovereignty, and that there is thus no real discontinuity between the modern age and what came before it. The second approach was to attack the modern concept of law directly and show how the law's grounding in norms and rational principles, its legality, could never furnish legitimacy. For Schmitt, the ultimate basis of law is a sovereign command or decision. Even his turn away from decisionism towards concrete order thinking justified a non-normative and decisionistic concept of law.

We made use of Blumenberg's *Legitimacy of the Modern Age* and his debate with Schmitt in order to show some of the hermeneutic problems that Schmitt faced with his use of the secularization thesis as an explanatory tool. Blumenberg also exposed Schmitt's strategic use of political theology as a set of metaphors employed at the service of legitimizing decisionism. The absoluteness of theological concepts serves to express and justify the exigency of the situation. While Blumenberg's defense of the modern age served to disprove Schmitt's secularization thesis, it did not offer any principles or grounds that would help in the normative assessment of current political institutions. Legitimacy, in Blumenberg's understanding, is the result of whatever helps us cope given our fundamental estrangement from the natural world. Countering Schmitt's critique of the rule of law requires a different conception of legitimacy with a stronger normative ground.

Neumann and Habermas' critical theoretical approach to law do provide normative standards by which to judge the legitimacy of political communities organized through law. They also provide these normative standards without disregarding the factual, or sovereign, nature of the state. For both, the law displays a dual nature— one that is rational (freedom guaranteeing) and coercive at the same time. As we saw in chapter two, for Neumann the “ethical function of law” can be traced back to the context of competitive capitalism where the generality of law guarantees personal and political equality. Even though it had not been fully realized (the working class did not form part of civil society in early political economy), this was, indeed, its promise and potential. For Neumann, the turn towards non-general law, or decisionistic law, is the result of changed economic circumstances, not an inherent characteristic of modern law. Illegitimate legality is the product of corporate economies that cannot but yield law based on particular decisions. After pointing to the democratic deficit in Neumann's account of legitimacy, based, as it was, on the semantic form of law, we turned to Habermas' discourse theory of law. For Habermas the legitimacy of law does not reside in its generality. It resides rather in the communicative practices that are enabled by formal law. Formal law, at the same time, is the objectification of communicative (and rational) practices. Pace Schmitt, and to a lesser extent Neumann, the factual and legitimate (or formal and moral) elements in law are not contradictory principles but equiprimordial. Legitimacy and legality, it turns out, arise co-originally. I take Habermas' internal reconstruction of the normative force of law as a strong and illuminating theory, one that counters Schmitt's critique of law without falling back on natural law theory or purely normative accounts of law. However, I would like to end this dissertation by raising a few questions that can perhaps serve as a blueprint for further questioning.

We ended chapter three by indicating how law, because of its dual nature, is specially equipped to act as a mediator between communicative and norm-free macro steering mechanisms such as the market and administration—the two integrating spheres of complex societies. Habermas' sociological approach was shown to be necessary for a critical theory of society that conceives of “an internal connection, however mediated, between society and reason” (*BFN*, 8). In other words, Habermas' theory not only provides an internal account of the relationship of the legitimacy of law but also an external account, an account at the level of society.

As indicated above, I take Habermas' normative reconstruction of law from an *internal* aspect to be a strong account of the moral component of law. Law is not mere facticity, mere

legality—it is “a system of rights that lends to individual liberties the coercive force of law” (*BFN*, 27). The concern I wish to raise has to do rather with law taken externally, that is, as an institution that mediates public opinion and the steering of systems, especially the market system.²⁷⁹ The stark separation between the legitimating and democratic procedures of the lifeworld and the ethically neutralized sphere of economic action severely weakens what is otherwise a strong account of how law and constitutional governments can sustain the institutional conditions for the exercise of political freedom.

Modern law: between legitimacy and complexity

Between Facts and Norms is still very much guided by the structural dimension of Habermas’ sociological theory of complex societies outlined in *Theory of Communicative Action*.²⁸⁰ What this means is that opinion and will formation must work within the conditions (and constraints) of social complexity, that is, without disrupting the forces of systemic macro social integration: money and administrative power (*BFN*, 150, 301). As a result, Habermas’ “anarchic, unfettered communicative freedom” is excluded from the economic, and, to a certain point, the administrative realm. Even if we view system and lifeworld, not as two ontologically distinct objects but as two viewpoints or angles from which to view society, these two levels are, in the end, “steered” by the media money and power, not discourse.²⁸¹

While *Between Facts and Norms* gives us an account, however problematic, of the ways in which public opinion (through informal and formal spheres) interacts with administrative power (*BFN*, chap. 4.3, chap. 7),²⁸² an analysis of the relation between the lifeworld and the

²⁷⁹ The “internal” perspective is the perspective of legal theory. The external perspective, and the external tension between facticity and validity, refers to the tension between the normative self-understanding of the constitutional state and the social facticity of the political processes of constitutional democracies. Habermas’ goal is to provide an account of the transition between normative theory and sociology or political science (*BFN*, 288).

²⁸⁰ And as such, suffers from some of the same problems (i.e., the predominance of systemic integration) that McCarthy pointed out with Habermas’ “two level” approach to social theory. See Thomas McCarthy, “Complexity and Democracy: or the Seductions of Systems Theory,” in *New German Critique* No. 35 (1985): 27-53.

²⁸¹ I owe the alternative, less “ontological,” interpretation to Lorenzo Simpson.

²⁸² Several others, including Scheuerman, have pointed to the ways in which lifeworld legitimating practices bump up against the power code and the self-steering mechanism of the administrative system. See William E.

media-steered economy is altogether missing.²⁸³ As a result, Habermas' external account of the relation between validity and facticity leaves no room for a critique of capitalism, a form of economic organization whose success depends on a cycle of accumulation, inequality, and exclusion. The social effects of capitalism, as I see it, come into tension with the internal account of the relation between legitimacy and legality. Habermas' strict separation of lifeworld processes of legitimation and the broader economy thus does a disservice to his theory of law and democratic legitimacy.²⁸⁴ As Neumann rightly pointed out, capitalism, in that it reproduces itself on the basis of accumulation and inequality, hinders the otherwise rational impulse of the modern rule of law project. The ethical function of law for him could only become realized in a more egalitarian society. As such, the full realization of the modern rule of law ideal had yet to be completed.

I take it that this does not invalidate Habermas' account of the internal normativity of law and the internal relation between the rule of law and democracy.²⁸⁵ Habermas' internal reconstruction of the modern rule of law project can sustain itself independently of systems

Scheuerman, "Between Radicalism and Resignation: Democratic Theory in Habermas' *Between Facts and Norms*" in William Scheuerman, *Frankfurt School Perspectives on Globalization, Democracy, and Law*, (New York: Routledge, 2008).

²⁸³ This is the case except for the few places where Habermas talks about the effects of social inequality on political inequality. The references to "the exclusionary effects of unequally distributed social power, structural violence, and systematically distorted communication" on public will formation does not seem to mesh with his account of the institutionalization of deliberative democracy.

²⁸⁴ Perhaps another way of looking into this problem is by means of a closer analysis of Habermas' five groups of rights outlined in chapter 3.3 of *BFN*, specifically, the rights grouped under 5), the basic social rights that make possible the utilization of the civil rights listed as 1)-4). I take it that Habermas' reluctance to ground these rights "absolutely" follows from his critique of the "social-welfare model," a model, as we saw with his critique of Neumann, that understands freedom from the point of view of its liberal, *laissez faire* counterpart. As we've stressed throughout this project, for Habermas, legitimate law can only arise out of "the discursive opinion-and-will-formation of equally enfranchised subjects." *BFN*, 408.

²⁸⁵ There are those who take the public sphere- economy split to invalidate the legitimacy of the rule of law project altogether. Those include Jacques Bidet, "Falling Short of Marx—Habermas," in *Critical Companion to Contemporary Marxism*, Jacques Bidet and S. Kouvelakis, (eds.), (Boston: Brill, 2008) and Andrew Fraser, "A Marx for the Managerial Revolution: Habermas on Law and Democracy," in *Journal of Law and Society* 28, No. 3 (2001): 361-383. The following authors point to the economy-politics split without arguing that we should do away with Habermas' theory altogether: David Abraham, "Persistent Facts and Compelling Norms: Liberal Capitalism, Democratic Socialism, and the Law," in *Law & Society* 28, No. 4 (1994): 939-946; John F. Sitton, "Disembodied Capitalism: Habermas' Conception of the Economy," in *Sociological Forum* 13, No. 1 (1998): 61-83; William Forbath, "Short Circuit: A Critique of Habermas' Understanding of Law, Politics, and Economic Life," in Rosenfeld and Arato, *Habermas on Law and Democracy*; and James L. Marsh, *Unjust Legality: A Critique of Habermas' Philosophy of Law*, (New York: Rowman and Littlefield, 2001),

theory without relapsing into a Rawlsian-type normative theory. Neumann proved that one can give an account of the dual nature of law (as validity as well as facticity) without a “two level” system theory of society. Habermas seems to unnecessarily concede too much to systems theory, a theoretical framework that is not indispensable for his project: to point to the “internal connection, however mediated, between society and reason” (*BFN*, 8).

There is much to commend about Habermas’ account of the normative validity of law but insofar as the constitutional state is linked to the autonomous and self-regulating economic sphere there is a problematic “accumulation-legitimation” contradiction that is not resolved, let alone addressed.²⁸⁶ Habermas’ lifeworld-systems split risks undermining his otherwise powerful account of the normative presuppositions of law. Neumann argued that the legitimacy of the modern rule of law project could not be realized under the conditions of capitalism. Perhaps one could say that the modern rule of law project cannot be realized without a robust form of economic democracy.²⁸⁷ A full sociological account of the normative validity of law requires a critique of capitalism. What’s more, if Habermas thinks that the utopian character of the Enlightenment was, pace early critical theorists and other Enlightenment critics, certainly ideological but no mere illusion, then a critique of capitalism is in order.

²⁸⁶ This term comes from Marsh, *Unjust Legality*, 91.

²⁸⁷ There are a number of different economic democracy theories. They all nonetheless attempt to combine theories of market economy with more public forms of decision-making. Moving beyond our current immoral status quo does not entail a return to agrarian or authoritarian industrial socialism nor even, the elimination of capital investment. See David Schweikart, *After Capitalism*, (New York: Rowman and Littlefield, 2002).

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