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Introduction

Theorizing Modern Transformations of Law and Democracy

Social scientists today attempt to formulate categories that illuminate evolving supranational developments and emerging international institutions associated with globalization, most concretely the European Union (EU).[1] Simultaneously, many political theorists refine a normative model of democracy legitimated by deliberative practices and instituted through legal-constitutional procedures.[2] This study combines and contributes to

[1] In an ever-growing literature on European integration, the following works are generally concerned with the issue of democracy in the EU: Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, NY: Cornell University Press, 1998); Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays* (Cambridge: Cambridge University Press, 1999); Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); G. F. Mancini, *Democracy and Constitutionalism in the European Union* (Oxford: Hart, 2000); Philippe C. Schmitter, *How to Democratize the European Union . . . And Why Bother?* (Lanham, MD: Rowman & Littlefield, 2000); Larry Siedentop, *Democracy in Europe* (New York: Columbia University Press, 2001); Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001); and Klaus Eder and Bernhard Giesen, eds., *European Citizenship: National Legacies and Transnational Projects* (Oxford: Oxford University Press, 2001).

[2] Out of another vast literature, consult Seyla Benhabib and Fred R. Dallmayr, eds., *The Communicative Ethics Controversy* (Cambridge, MA: MIT Press, 1990); James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven, CT: Yale University Press, 1993); Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven, CT: Yale University Press, 1993); James Bohman, *Public Deliberation: Pluralism, Complexity and Democracy* (Cambridge, MA: MIT Press, 1996); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard Belknap Press, 1996); James Bohman and William Rehg, eds., *Deliberative Democracy: Essays*

these efforts by asking how democracy and the rule of law may be secured and advanced in supranational institutions such as the EU during the dawning century. However, I venture an answer to this question in an apparently indirect and ostensibly anachronistic manner: the book revisits two of the *last century's* most powerful normative-empirical analyses of European state transformations: specifically, Max Weber's sociology of law and Jürgen Habermas's discourse theory of law and democracy. I demonstrate how these theorists' strengths and shortcomings contribute to a more sophisticated theoretical engagement with the current situation of law and democracy as the European state transforms as a result of globalization and the integration process.

Part of my task is to show that Weber's "Sociology of Law"[3] is much less of an encyclopedia of legal categories or a history of legal development in the West than many scholars commonly suppose. Weber's SL is first and foremost an intense confrontation with what was a transformation of state and society in Weber's own time: specifically, the transition from the nineteenth-century liberal state, or *Rechtsstaat*, to the administrative/welfare state, or *Sozialstaat*, of the twentieth century.[4] Despite the incomparable breadth of Weber's analysis, his study underestimates the progressive possibilities for the rule of law and substantive democracy in the emerging *Sozialstaat*. I trace this shortcoming to historical

on Reason and Politics (Cambridge, MA: MIT Press, 1997); Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); and Stephen Macedo, ed., *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford: Oxford University Press, 1999).

[3] I refer to the following sections of Weber's *Economy and Society* as the "Sociology of Law" and combine them for citation purposes under the abbreviation SL in the text: Weber, "Economy and Social Norms" and "Sociology of Law" in *Economy and Society: An Outline of Interpretive Sociology* (c. 1920), Guenther Roth and Claus Wittich, eds., 2 vols. (Berkeley: University of California Press, 1978), 311–38 and 641–899.

[4] Generally I use the German term "*Sozialstaat*" – literally, "social state" – rather than the alternatives ("welfare state," "regulatory state," "administrative state") because it captures both crucial aspects of state–society interaction inherent in the model: the egalitarian redistributive *and* capital-friendly regulatory aspects of the social, economic, and political configuration. I occasionally use the term "administrative/welfare state," as previously, since it seems most appropriate if more cumbersome than "*Sozialstaat*." On European state development generally, see Charles Tilly, *Coercion, Capital, and European States, AD 990–1992* (Oxford: Blackwell, 1992); on the European *Sozialstaat* more specifically, see Peter Baldwin, *The Politics of Social Solidarity: Class Bases of the European Welfare State, 1875–1975* (Cambridge: Cambridge University Press 1992); and on its emergence in the U.S. context, see Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press 1982).

assumptions that compel Weber to associate the *Sozialstaat* with characteristics of premodern patrimonial authority. Weber's comparison of these two political examples is not a straightforward deployment of Weber's famous "ideal types," through which similar social phenomena from different historical contexts might be better understood. Rather, I suggest that it is in fact a desperate and ideological misrecognition of a dauntingly novel historical development that threatens Weber's social scientific categories, as well as the normative worldview that he purported to keep separate from them.

In light of this analysis of Weber, I interrogate Habermas's attempt to rectify the historical and normative deficiencies of Weber's efforts in his own theoretical-empirical projects: in particular, Habermas's more differentiated historical analysis of the rise of both the liberal and welfare states in *Public Sphere*[5] and his later formulation of the legal and democratic potential of communication within the postwar *Sozialstaat* in works like *Communicative Action* and *Between Facts and Norms*.[6] However, I argue that Habermas ultimately repeats Weber's historical missteps, especially in recent attempts to apply his discourse model of law and democracy to supranational developments in the EU. In essays and book chapters contained in *The Inclusion of the Other* and *The Postnational Constellation*,[7] and in several important pieces published after them, Habermas interprets the EU as an emerging constitutional-social democracy in a way that directly repudiates his earlier fine-grained sociohistorical analyses of the *Rechtsstaat*'s emergence and its subsequent transformation into the *Sozialstaat*.

Habermas often ascribes to the development of supranational institutions like the EU a historical logic continuous with previous state transformations. In other words, he understands these developments as largely

[5] Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1962), trans. Thomas Burger with Frederick Lawrence (Cambridge, MA: MIT Press, 1989), hereafter STPS.

[6] Habermas, *The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society* (1981), trans. Thomas McCarthy (Boston: Beacon Press, 1984), hereafter TCA1; *The Theory of Communicative Action, Vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (1981), trans. Thomas McCarthy (Boston: Beacon Press, 1987), hereafter TCA2; *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1992), trans. William Rehg (Cambridge, MA: MIT Press, 1996), hereafter BFN.

[7] Habermas, *The Inclusion of the Other: Studies in Political Theory*, Ciaran Cronin and Pablo de Grieff, eds. (Cambridge, MA: MIT Press, 1998), and *The Postnational Constellation: Political Essays*, Max Pensky, ed. (Cambridge, MA: MIT Press, 2001).

repeating or further expanding the rise of the nation-state, rather than as signaling a qualitative change within the history of the latter. I argue that the development of the EU, according to strictures of Habermas's own critical-theoretical methodology, necessitates the consideration of historical rupture and institutional innovation. Habermas makes some gestures in this direction, but they prove insufficient to ensure that normative aspirations from the *Sozialstaat* configuration can be carried over to the new configuration presently emerging in Europe – one that I call a supranational "*Sektoralstaat*." Rather than entertain, articulate, and confront the possibility of a new structural configuration, Habermas stubbornly holds out the hope of adapting the *Sozialstaat* – reconstructed according to his normative specifications, to be sure – to the structural transformation presently entailed by European integration.

Just as Weber misapprehended the progressive possibilities of the *Sozialstaat* by evaluating it through antedated categories drawn from premodern cases, Habermas now potentially mislocates the progressive possibilities of the EU by imposing upon its historical development evaluative categories largely derived without qualification from an earlier era. What facilitates this "uncritical" or "ideological" theoretical move that Habermas, preeminent heir to the Frankfurt tradition of critical theory, would have sought at all costs to avoid in his early work? Midway through his career, Habermas turns from a theory of historical change focused on transitions of discrete epochs in modernity (e.g., absolutist, mercantilist, liberal and state-capitalist historical configurations) to a transhistorical evolutionary model where important social change is understood largely in terms of a tradition–modernity dichotomy. Moreover, rather than political economy, Habermas has come to rely extensively on Weberian notions of secularization and value pluralism to explain the mechanisms of historical change. As I point out, this move is only marginally problematic so long as Habermas theorized the *Sozialstaat* as a quasi-permanent sociopolitical arrangement – one whose overall structure as opposed to discontinuous history indicates the way to secure normative aspirations. But, as I explain later in this chapter and demonstrate throughout this book, successful normative-empirical analysis of the transition from sovereign European *Sozialstaat*s to an integrated European *Sektoralstaat* requires attention to intramodern historical change associated with transformations in political economy and sociopolitical aspirations related to such transformations.

In short, Habermas attempts to retain the normative goals of his mature transhistorical work (those associated with the *Sozialstaat* legitimated by the discourse theory of law) in circumstances that hearken back to his

more historically specific earlier efforts (circumstances of structural transformation). He moves from a model that theorized multiple structural transformations within modernity – indeed, due to the various commodification dynamics unique to capitalist societies, one that understood such transformations to be possible *only* in modernity – to a model that, like Weber's, prioritizes the traditional-to-modern transition in worldviews as the single or primary transformation within modernity.[8] While Weber would not fully accept the normative challenge of the structural transformation toward the *Sozialstaat*, and so interpreted it as a reversion to a more primitive and authoritarian social form such as medieval patrimonialism, Habermas insists that his theoretically reconstructed *Sozialstaat* is an appropriate normative-empirical model for the new circumstances associated with European integration (even if, as we will see, he sometimes comes very close to describing it in terms of a structural transformation).

Therefore, I suggest that *both* theorists posit the *past* – one more distant, the other more recent – as the *future* in ultimately unreflective ways. Habermas's discourse theory of law and democracy impressively corrects the normative myopia of Weber's legal analysis of the *Sozialstaat*. But Habermas's project itself proves particularly susceptible to Weber's historical astigmatism as he attempts to reconcile it with supranational developments in our own time. As I explain in the next section, my critique has implications for both (1) the project of critical theory today and (2) the attempt to advance democracy in the contemporary supranational, historical constellation.[9] My analysis is relevant in these regards because,

[8] For a serious interrogation of the "modernity" issue that is suspicious of most treatments of the concept, whether deployed in evolutionary *or* historically specific strategies, see Bernard Yack, *The Fetishism of Modernities: Epochal Self-Consciousness in Contemporary Social and Political Thought* (South Bend, IN: Notre Dame University Press, 1998).

[9] A work influential on this study that combines normative concerns, empirical sophistication, and historical sensitivity in the analysis of earlier supranational developments is Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944), fore. Joseph E. Stiglitz, intro. Fred L. Block (Boston: Beacon Press, 2001). For multidisciplinary approaches to globalization today, see David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press, 1995); Paul Hirst and G. Thompson, *Globalisation in Question: The International Economy and the Possibilities of Governance* (Cambridge: Polity Press, 1996); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996); Saskia Sassen, *Globalization and Its Discontents* (New York: New Press, 1996); and Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996). For liberal perspectives on globalization, see John Rawls, *The Law of Peoples: With the Idea of Public Reason Revisited* (Cambridge, MA: Harvard University Press, 1999), and the following review of it: Charles Beitz, "Rawls's Law of Peoples," *Ethics* 110 (July 2000), 670–5.

on the one hand, Habermas still remains expressly committed to a critical project of social research that contributes to emancipatory political practice and, on the other, progressive engagements with globalization today tend to rely on undertheorized presuppositions about the history of the modern state rather than on fully articulated theories of historical change.

1. Critical Theory and Structural Transformations

The theory of historical change expressed by Habermas's work of the 1970s and 1980s has two dimensions: on the one hand, he describes a social evolutionary process of improving communicative capacities, grounded in transhistorical human learning processes, and he repeatedly invokes the transition from traditional (or premodern) to posttraditional or modern social forms. Here I would like to sketch briefly the extent to which this constitutes a dramatic departure from the Hegelian–Marxist orientation of critical theory, arguably best exhibited by the young Habermas's *Public Sphere* book. As I will show in Chapter 2, this departure is sufficiently serious to undermine some of the normative potentials for mutual understanding that Habermas considers immanent to advanced capitalist – that is, *Sozialstaat* – societies and also, as I show in Chapters 5 and 6, sufficiently serious to jeopardize his efforts to account for state transformation in a supranational historical constellation today.

Contrary to the view of many commentators on the Frankfurt School, Western Marxism, and critical theory, the decisive "standing Hegel on his head" adopted by the later Marx, the early Lukács, the Frankfurt Institute for Social Research, and the young Habermas was not the prioritization of a "material base" associated with orthodox Marxism and, concomitant with it, a labor-centric notion of historical change throughout human history.[10] Although often incapable of resisting the temptation to revert

[10] Notwithstanding differences with my own interpretation of this tradition, consult the following important studies of it: Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923–1950* (Boston: Little, Brown, 1973); David Held, *Introduction to Critical Theory: Horkheimer to Habermas* (Berkeley: University of California Press, 1980); Raymond Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (Cambridge: Cambridge University Press, 1981); Richard Wolin, *The Terms of Cultural Criticism: The Frankfurt School, Existentialism, Poststructuralism* (New York: Columbia University Press, 1992); Rolf Wiggershaus, *The Frankfurt School: Its History, Theories, and Political Significance*, ed. Thomas McCarthy, trans. Michael Robertson (Cambridge, MA: MIT Press, 1994); and in a broader philosophical context, Michael Rosen, *On Voluntary Servitude: False Consciousness and the Theory of Ideology* (Cambridge, MA: Harvard University Press, 1996).

to such orthodox-materialist positions, in another spirit entirely, critical theory reconstructed Hegelian dialectics and philosophy of history by deemphasizing (and sometimes even jettisoning) the transhistorical periodizations that Hegel posited (both crudely and brilliantly) across human time to illustrate consciousness's coming to know itself.[11]

Rather, the critical as opposed to dogmatic aspects of Marx, Lukács, and the Frankfurt scholars accentuate changes *within* modernity itself, changes facilitated by dynamics unleashed by the specifics of modern society – not only the strictly economic dimensions of free labor and universal exchange but also the sociocultural dimensions of civil society and the state.[12] Such a critical theory identifies the interactions among and changing forms of these sites as more appropriate contexts in which to realize the quasi-Kantian notions of human consciousness and norms of autonomy that Hegel himself situated in a linear and ideational transepochal theodicy.[13] Nevertheless, the significance of the intramodern as opposed to transhistorical orientation of critical theory is still very much "Hegelian": after all, for Hegel, the *transition* between epochs was crucial for exhibiting the conflicts between and eventual *Aufhebung*

[11] See G. W. F. Hegel, *Phenomenology of Spirit*, trans. A. V. Miller, fore. J. N. Findlay (Oxford: Oxford University Press, 1979), and Hegel, *Introduction to the Philosophy of History*, trans. Leo Rauch (New York: Hackett, 1997).

[12] See Karl Marx, *Capital: A Critique of Political Economy, Vol. 1*, trans. Ben Fowkes (London: Vintage, 1976), and Georg Lukács, *History and Class Consciousness*, trans. Rodney Livingstone (Cambridge, MA: MIT Press, 1988). Moishe Postone distinguishes the historically specific and subjectively social aspects of *Capital* from the crudely transhistorical and materially objective characteristics of Marx's earlier work in *Time, Labor and Social Domination: A Reinterpretation of Marx's Critical Theory* (New York: Cambridge University Press, 1993). Andrew Feenberg, in *Lukács, Marx, and the Sources of Critical Theory* (Oxford: Oxford University Press, 1986), separates the commodity-focused and nondeterminist moments of *History and Class Consciousness* from the logic that culminates at the book's climax with Lukács's anointing of the proletariat as a world-historical subject. Seyla Benhabib convincingly traces back the labor-centric and materially evolutionary – and thus socially undifferentiated and politically authoritarian – aspects of Hegelian Marxism to Hegel himself, but also highlights important moments throughout this tradition where the reality of, and prospect for further, human intersubjectivity is discovered, elaborated, and promoted: see Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986).

[13] Although this description may be an unfair exaggeration of Hegel's philosophy of history, see Michael Rosen, *Hegel's Dialectic and Its Criticism* (Cambridge: Cambridge University Press, 1985), 23–54; Steven B. Smith, *Hegel's Critique of Liberalism: Rights in Context* (Chicago: University of Chicago Press, 1989), 168–79; Robert B. Pippin, *Idealism as Modernism: Hegelian Variations* (Cambridge: Cambridge University Press, 1997), 17–18, 418; and Alan Patten, *Hegel's Theory of Freedom* (Oxford: Oxford University Press, 1999), 163–200.

of different modes of consciousness, much more so than simple *contrasts* between discrete, already superseded, and eventually superseding epochs.[14]

Yet, in the English-language literature on the Frankfurt School of the 1970s and 1980s, the excesses of the "philosophy of history" associated with attention to structural-historical change was perhaps overemphasized because Habermasian critical theory had wagered that modern history had reached something like a final or only minutely changing form in "late" or "advanced" capitalism. In this literature the philosophy of history was often assimilated to the "philosophy of the subject" or the "philosophy of consciousness" – both of which became dirty terms associated with the authoritarian theory and practice of Orthodox Marxism and Soviet-style state socialism. Consequently, the centrality of historical change within modernity to the critical theoretical method was often neglected, replaced by Habermas's fairly linear evolutionary communicative theory that explained little about the actual historical past and portended even less about the future.[15] But growing popular and academic awareness of globalization in recent years has put history and structural-historical change back on the table, as contemporary critical theorists are beginning to realize.[16]

[14] As Charles Taylor explains, the dialectical *process* itself yields knowledge, not just paradigmatic or epochal *contrasts* that result from it: "What could not be expressed in external existence is expressed in the movement by which these existents come to be and pass away. The 'distortion' which external reality imposed on Spirit's message is corrected by its necessary demise. Spirit never comes to one unchanging expression which says it all, but in the play of affirmation and denial it manifests what it is." See Taylor, *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979), 56. Cf. also Rosen, *Hegel's Dialectic and Its Criticism*, 55–90.

[15] Benhabib upholds the place of "the transfigurative" and not merely "reformist" impulses of critical theory; the former is open to new normative aspirations in new historical circumstances, and is not just concerned with comparing present reality to its own ideals, as is the latter. But she is far more critical of the foreclosure of this transfigurative potential by Hegel's and Marx's labor centrism and macrohistorical "transsubjectivity" than she is of Habermas's social evolutionism, which, as she concedes, serves to reify the present as future. See Benhabib, *Critique, Norm, and Utopia*, 13, 60–1, 114, 142, 276–7. In Chapter 2, I will also push more forcefully the criticisms of Habermas's increasingly unreflective philosophy of history set forth by, e.g., Thomas McCarthy's *The Critical Theory of Jürgen Habermas* (Cambridge, MA: MIT Press, 1978) and Axel Honneth's *Critique of Power: Reflective Stages in a Critical Social Theory* (1985), trans. Kenneth Baynes (Cambridge, MA: MIT Press, 1991).

[16] See Held, *Democracy and the Global Order*; Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (London: Routledge, 1996); and Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002).

We will observe in Chapter 5 Habermas's attempt to adapt his theory to these new developments, more specifically his equivocations on the extent to which they signal a new structural transformation, if a transformation at all. The question will be whether, in his analysis of the EU, Habermas is able to free himself from the static historical paradigm that he adopted to better facilitate deliberative-juridical emancipation *within* a *Sozialstaat* model in works like TCA and BFN. Moreover, I ask in Chapter 6 whether Habermas's paradigm is appropriate to the *Sektoralstaat* model of governance emerging in the EU. The *Sektoralstaat* model accentuates deliberation among interested parties in microspheres of transnational policymaking, but also insulates those spheres from public and governmental oversight and regulation through which the *Sozialstaat* attempted to guarantee the equity of negotiation, if not always deliberation for all participants affected.

As Habermas himself argues, those *Sozialstaat* guarantees were sanctioned by universal principles institutionalized in constitutional orders and protected, albeit imperfectly, by practices of judicial review. Notwithstanding recurring cycles of excitement over a European constitution[17] and pervasive assumptions concerning the prowess of the EU's European Court of Justice (ECJ), these institutions are markedly less powerful at the Union level than they were in the *Sozialstaat*, and are likely to remain so for structural reasons I will address. In addition, the *Sektoralstaat* that the EU is becoming will likely permit individual member states to opt in or out of different policy sectors, thus grouping themselves into multiple "policy Europes" within the polity. Different assemblages of EU member states would constitute separate energy, defense, trade, communications, welfare, environment, and other subpolities.[18] This means that the EU will be a "Union" that tolerates – in de jure and not just de facto

[17] See the proclamation of the EU Charter of Fundamental Rights (Nice, 7 December 2000) (O.J. 2000, C 346/1 of 18 December 2000) and the European Council's Laeken Declaration (14–15 December 2001) on a constitutional convention, which convened in March 2002 (europeanconvention.eu.int/plen sess.asp?lang=EN). Cf. also Richard Bellamy and Dario Castiglione, "Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union," in *Reimagining Political Community: Studies in Cosmopolitan Democracy*, D. Archibugi, D. Held, and M. Köhler, eds. (Oxford: Polity Press, 1998); "The Normative Challenge of a European Polity: Cosmopolitan and Communitarian Models Compared, Criticized and Combined," in *Democracy and the EU*, Andreas Follesdal and Peter Koslowski, eds. (Berlin: Springer, 1998); and " 'A Republic, If You Can Keep It': The Democratic Deficit and the Constitution of Europe," (manuscript, University of Manchester, 1999).

[18] This eventuality is most explicitly predicted and advocated in Scharpf, *Governing in Europe*; and Schmitter, *How to Democratize the European Union*.

manner – greater disparities of material welfare, economic liberty, and social protection among its component parts than any federal state permitted in the *Sozialstaat* era. As we will see, these characteristics of the European *Sektoralstaat* pose greater problems for Habermas's model of discursively noncoercive and egalitarian law and policy formation than his analysis of the EU suggests.

Returning to the significance of Habermas's earlier work: besides sensitivity to intramodern historical change, another advantage that his *Public Sphere* maintains over previous works of critical theory is the book's sensitivity to the indispensable place of law throughout each epoch of modernity. Habermas accentuates the emancipatory advance heralded by the *Rechtsstaat* (particularly the unprecedented potential for publicly institutionalizing discursively produced mutual understanding), the ideological and structural limitations inherent in it (such as its socially exclusionary and economically inegalitarian features), and the possibilities and pathologies immanent in the transformation from the *Rechtsstaat* into the *Sozialstaat* (on the one hand, the widening of participation and the material improvement of larger segments of society and, on the other, a devastating potential for political stultification and technocratic unaccountability). As opposed to Weber, who delineated all the normative advantages of the *Rechtsstaat* in ostensibly objective-descriptive terms in SL and yet erupted into utter panic over the ramifications of its supercession by the *Sozialstaat*, Habermas was willing to acknowledge the accomplishments and social improvements offered by the latter model – even if they could be maximized fully only through the legally facilitated and publicity-inducing reforms that he proposes toward the conclusion of STPS. In fact, as we will see, it is precisely the character of the transformation between the two configurations that points up the emancipatory possibilities of the *Sozialstaat* for the young Habermas.

Thus, while earlier critical theorists largely underestimated the progressive potential of social integration through law,[19] and while Weber

[19] On the original Hegelian formulation of the *Rechtsstaat*, see Smith, *Hegel's Critique of Liberalism*, 140, 145–8, as well as the essays contained in *Hegel and Legal Theory*, eds. Drucilla Cornell, Michel Rosenfeld, and David G. Carlson (New York: Routledge, 1991). Marx notoriously belittles law as "bourgeois form," and note Lukács's rather casual dismissal of law in the "Legality and Illegality" essay included in *History and Class Consciousness*, 256–71. Of course, Franz Neumann and Otto Kirchheimer were Frankfurt critical theorists especially attuned to transformations of modern law. See Franz L. Neumann and Otto Kirchheimer, *The Rule of Law Under Siege: Selected Essays*,