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Introduction

Jürgen Habermas, world-renowned as a social theorist, philosopher, and leading European public intellectual for more than five decades, is also one of the public figures most responsible for the liberalization of German political culture after World War II. This book departs from most studies of Habermas by focusing on his political and legal thought. While communication and the public sphere surely are leading leitmotifs of his life's work, they are not the concepts that best illuminate Habermas's historical significance. Rather, the dilemmas posed by the twentieth-century German experience with the rule of law and its absence provide the interpretive key that decodes the signature duality of his creative work, namely, as philosopher and social theorist, on the one hand, and as public, politically engaged intellectual, on the other. The focus of this study of the legal theme in Habermas's oeuvre furnishes a new interpretation of Habermas's intellectual career as a whole.

But Habermas's reconstruction of German political and legal thought illuminates more than just the meaning of his intellectual project. His reconstructive work on German tradition is also a window through which we observe the normative reorientation of West German political culture to a liberal-democratic model after 1945.

This book thus pursues a double task: Historical contextualization of Habermas adds much to our understanding of the impulses central to his theoretical project; at the same time, Habermas's theoretical and political writings provide a privileged vantage point from which to reconsider twentieth-century German history. Habermas's contributions to philosophy and social theory will endure, but from the mid-1950s to the mid-1990s, he was also a great reformer of German political culture. Habermas's work on German social, political, and legal theory and his grappling in particular with its concepts of state, constitution, and law helped to anchor West

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Germany in the West. As such, his thought is part of the dramatic intellectual reconstruction and recovery work of the postwar period that enduringly liberalized and Westernized German politics and political thought.

Looking back in the mid-1980s, Habermas wrote: "The unreserved opening of the Federal Republic to the political culture of the West is the great intellectual achievement of the postwar period, of which my generation in particular can be proud."[1] Tracing the contours of this "opening" toward a Western model of liberal democracy is a central task of this book. Typically absent from Habermas's narration of his own history, however, is the fact that his own opening to the West was at first ambivalent and incomplete. Habermas was highly critical, for example, of the efforts of Chancellor Adenauer to anchor Germany in a West conceived as an anticommunist bulwark backed by the military power of the North Atlantic Treaty Organization (NATO), supporting instead a political party that argued for German neutrality in the emerging Cold War.[2] Habermas argued in the 1950s that *Westbindung* – being bound to or integrated in the West – was not worth the price of admission, as it were; Adenauer's anticommunism seemed to be purchased at the price of a failure to come to terms with the Nazi past.

Also foundational for the Frankfurt School tradition of "Critical Theory" from which Habermas emerged is sociologist Max Weber's view that the Occident's signature characteristic – instrumental rationality – had created an unshakeable "iron cage" of bureaucratized capitalist society. By contrast, Habermas sought to recover the "substantive" aspects of rationality – its quality as a faculty of practical reasoning and political deliberation. Due to the influence of Weber, he wrote, the tradition of Western Marxism had lost sight of the substantive dimension of Occidental rationalism.[3] Habermas sought to resolve his ambivalence by binding West Germany to an

[1] Jürgen Habermas, "Apologetische Tendenzen," in *Eine Art Schadensabwicklung* (Frankfurt/Main: Suhrkamp, 1986), 120–35.

[2] The party was the All-People's Party (*Gesamtdeutsche Volkspartei*) founded by CDU renegade Gustav Heineman. See Habermas, "Der verschleierte Schrecken," *Frankfurter Hefte* 13 (1958): 530–2; and Peter Dews, *Autonomy and Solidarity: Interviews with Jürgen Habermas* (London: Verso, 1987), 36, 39.

[3] Jürgen Habermas, *Theorie des kommunikativen Handelns*, Vol. I: *Handlungsrationalität und gesellschaftliche Rationalisierung*. Vol. II: *Zur Kritik der funktionalistischen Vernunft* (Frankfurt/Main: Suhrkamp, 1981).

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ideal West that did not yet exist – a utopia based on an idealized portrait of Enlightenment Europe as the space of public deliberation and the rule of law.

Describing Habermas as a Westernizer – albeit an ambivalent one – begs the question of the identity of the West and Germany's relationship to it. But the most compelling recent work on the intellectual history of German democracy – its successful acculturation and institution building – has found it impossible to dispense with the categories of liberalization and Westernization.[4] Alfons Söllner's studies of the history of the establishment in West Germany of a "science of politics" highlights the role played by German emigrés to the United States, such as Ernst Fraenkel and Franz Neumann, and christens their contribution "normative Westernization."[5] Thus a scholarly consensus has emerged in the last decade that "normative Westernization" and "liberalization" are the best general terms we have for describing the multidimensional processes that recivilized West Germans after World War II.[6] Illuminating the concrete meaning of these general terms is one of the goals of this book.

Particularly fruitful for grounding these abstract concepts of Westernization and liberalization has been the study of what experiences were shared by the post–World War II generations. Until the late 1990s, a consensus obtained that there were two postwar

[4] Ibid., 6. Recent works in English that exemplify this research trend include Heinrich August Winkler, *Germany: The Long Road to the West* (Oxford, England: Oxford University Press, 2006); Konrad Jarausch, *After Hitler: Recivilizing Germans, 1945–1995* (Oxford, England: Oxford University Press, 2006); Thaddeus Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* (Ann Arbor: University of Michigan Press, 2006); and Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Postwar Europe* (New Haven, CT: Yale University Press, 2003). See also Ulrich Herbert, "Liberalisierung als Lernprozess: Die Bundesrepublik in der deutschen Geschichte," in Ulrich Herbert ed., *Wandlungsprozesse in Westdeutschland: Belastung, Integration, Liberalisierung* (Göttingen: Wallstein, 2000), 7–49; A. Dirk Moses, *German Intellectuals and the Nazi Past* (Cambridge, England: Cambridge University Press, 2008); Jan Werner-Müller, ed., *German Ideologies Since 1945: Studies in the Political Thought and Culture of the Bonn Republic* (New York: Palgrave Macmillan, 2003).

[5] Alfons Söllner, "Normative Westernization? The Impact of the Remigres on the Foundation of Political Thought in Post-War Germany," in Werner-Müller, *German Ideologies*, 40–60.

[6] "Recivilizing" is Jarausch's term. The Westernization paradigm is associated with historians from Tübingen, for example, Anselm Döring-Manteuffel. Not all West German "Westernizers" or "Occidentalists" were liberal democrats, however.

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generations in West Germany most responsible for the transformations of its political culture. The first, the so-called founder generation, was born before 1900 and therefore experienced World War I and the Weimar Republic. Among them were Konrad Adenauer (1876–1967) and Kurt Schumacher (1895–1952),[7] leaders of the postwar Christian Democratic Union (CDU) and Social Democratic Party (SPD), respectively. The other leading protagonist was supposedly the "'68ers," the generation born between 1938 and 1946. Figures such as Joschka Fischer, Rudi Dutschke, Rainer Werner Fassbinder, and others challenged the political establishment and their fathers, mothers, and teachers for their silence about their Nazi past.[8] Recent scholarship has shifted attention to the generation in between: Those born between 1922 and 1932 were too young for the army but old enough to be recruited to auxiliary combat duties in the Hitler Youth. Those born between 1938 and 1946 experienced the end of the war only as young children. Habermas was not among those who had the "gift" of late birth. Boys as young as twelve were enlisted to help with the antiaircraft artillery (*Fliegenabwehrkanone*). Born in 1929, Habermas was recruited to the Hitler Youth in 1944 and sent with his youth cohort to help man the antiaircraft artillery of the western wall defenses.[9] Scholars have defined Habermas's generation as the "*Flakhelfer* generation," in reference to their teenage experiences on the western front, but they disagree on the exact dates that define the cohort.[10]

This terminology is commonly understood, as the 2005 obituary of political scientist and activist Jürgen Seifert (b. 1928) shows:

> It was a stroke of luck for the development of the Federal Republic of Germany after the war that the leading minds of the anti-aircraft support generation (*Flakhelfer-Generation*) – such as Habermas, Dahrendorf, Luhmann, Grass and Enzensberger – were not only the ideational shapers (*Innenausstatter*) of this historic period, but were the ones to give democracy its spiritual anchor for decades.[11]

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7 Schumacher led the SPD from 1945 until his death in 1952.

8 See Clemens Albrecht, *Die Intellektuelle Gründung der Bundesrepublik* (Frankfurt/Main: Campus Verlag, 1999), 500.

9 Dews, *Autonomy and Solidarity: Interviews with Jurgen Habermas*, 78 (orig. March 23, 1979).

10 Albrecht prefers 1926–37 for the *Flakhelfer* generation. See the discussion in Moses, *German Intellectuals and the Nazi Past*, 45–56.

11 Alexander Cammann, "Uber die Zaune und Sperren hinweg. Zum Tod von Jürgen Seifert," *Vorgänge: Zeitschrift für Bürgerrechte und Gesellschaftspolitik* 170:44 (2005) 2, 128–9.

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The list of academic and literary intellectuals from the *Flakhelfer* generation reads like an honor roll of West German academic accomplishment. To name only the most well-known: Kurt Sontheimer (1928–2005), Niklas Luhmann (1927–98), Ralf Dahrendorf (b. 1929), Hans-Magnus Enzenberger (b. 1929), Günter Grass (b. 1929), and Hans-Ulrich Wehler (b. 1931).[12] Another popular label for this group is the "skeptical generation," as they were categorized by sociologist Helmut Schelsky. Like Schelsky, the psychoanalytically-oriented social critics Alexander and Margarete Mitscherlich also argued that a generation that experienced the collapse of Nazi ideals developed a political disposition skeptical of all utopias, whether of the left or the right. Habermas's robust idealism does not fit well within the paradigm of the skeptical generation, however.

More promising is the notion of the "'45ers." Historian A. Dirk Moses proposes that the *Flakhelfer* generation, which he calls "the '45ers," is the one most responsible for the "discursive democratization" of the Federal Republic – the "… key generation … uniquely placed to commence the process of republican value development."[13] He is not alone in this judgment.[14] Moses calls them the '45ers because the collapse of the Nazi regime and the beginning of liberal freedoms marked "…the turning point of their lives and the beginning of their own (and Germany's) intellectual and emotional (*geistige*) reorientation."[15] Two important studies of Habermas's intellectual biography[16] both emphasize the centrality of 1945 as a marker of Habermas's generational identity. Habermas fits this paradigm

[12] Other '58ers whose careers intersected with Habermas's include Hermann Lübbe (b. 1926), Karl Otto-Apel (b. 1922), Gustav Rohrmoser (b. 1927), Martin Kriele (b. 1927), and Robert Spaemann (b. 1927); historians Andreas Hillgruber (1925–89), Hans Mommsen (b. 1930), Helga Grebing (b. 1930), Ernst Nolte (b. 1923), and Gerhard Ritter (b. 1929); political scientists Iring Fetscher (b. 1922), Karl-Dietrich Bracher (b. 1922) Thomas Ellwein (b. 1927), Helge Pross (1927–86), Martin Greiffenhagen (b. 1928), Wilhelm Hennis (b. 1923), Horst Ehmke (b. 1927), and Peter von Oertzen (b. 1924); the jurists Peter Häberle (b. 1934), Ernst-Wolfgang Böckenförde (b. 1931); the sociologists Oskar Negt (b. 1934), M. Rainer Lepsius (b. 1928), and Ludwig von Friedeburg (b. 1923); the theologian Dorothée Sölle (1929–2003); and the journalist Christian Geissler (b. 1928).

[13] Moses, *Intellectuals*, 50.

[14] See the concurring judgment of historians Lutz Niethammer and Hans-Ulrich Wehler, September 1, 2008: *Frankfurter Allgemeine Lesesaal*, "Sind die 68er politisch gescheitert?"; available at www.faz.net.

[15] Moses, *Intellectuals*, 51.

[16] Martin Beck Matŭstìk, *Jürgen Habermas:A Philosophical-Political Profile* (London: Rowman and Littlefield, 2001); Moses, *Intellectuals*, n. 4.

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perfectly: "'What really determined my political life was 1945,' wrote Habermas. 'At that point the rhythm of my personal development intersected with the great historical events of the time.'"[17] In an interview in 1979, Habermas recalled that he had in 1945 wished for a great rupture – an "explosive act" that would "sweep away" everything that came before.[18] He describes himself as transfixed by the radio broadcasts of the Nuremberg trials in 1945–6, from which he first learned of the Holocaust and its atrocities.[19] Thus 1945 has been called Habermas's "existentially motivated philosophical birthday."[20] The *Flakhelfer*'s generational affinity for the liberal rule of law bolsters the argument for recognition of law's centrality for Habermas's project:

> A historicizing approach might recognize that the experience of compulsion and politicization in the Hitler Youth until 1945, and of civil society and the rule of law thereafter, afforded the '45ers a unique perspective on the virtues of the Federal Republic.... The new order was patently superior, humane, and liberal because it safeguarded the private sphere from state violation. This is the primal experience of liberalism. The forty-fivers did produce an answer to the Nazi past: the Federal Republic as a project of consolidation and reform.[21]

Philosopher Martin Beck Matŭstìk makes the same point about Habermas's attachment to constitutionalism: that Habermas "invested his lifework in German constitutionalism" and is best seen as a mediator between the "securing generation" and a "revolting generation." Matŭstìk's core thesis suggests that "... Habermas's work and his philosophical-political profile emerge integrally through debates and dialogues with his era's two generations."[22] The problem with this formulation is that it abstracts from the way the securing and revolting impulses were mixed in Habermas's generation from the start. This book agrees with Moses on the importance of this generation's historic role and proposes instead the label "the '58ers." This locution is the one Habermas prefers and has gained

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[17] Dews, *Autonomy and Solidarity*, 73 (orig. May 29, 1978).
[18] Ibid., 75; (orig. March 23, 1979).
[19] Ibid., 43; (orig. December 16, 1977).
[20] Matŭstìk, *Jürgen Habermas*, 5. Matŭstìk follows Albrecht's definition of the *Flakhelfer* generation: 1926–37.
[21] Ibid., 64.
[22] Ibid., 69.

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traction in the self-description of other representatives of his generation, such as Jürgen Seifert and Oskar Negt. "I am, if anything, a '58er and cannot speak for the '68er generation," Habermas has stated on more than one occasion.[23]

While the question of whether to name Habermas a '45er or a '58er is primarily semantic, this study emphasizes 1958 for several reasons beyond Habermas's endorsement of the latter. First, the locution '58er obliquely articulates the rivalry between the older, less-heralded generation and the younger, more famous '68er one; it is tinged with irony. Second, the '58er label directs our attention away from Habermas's teenage years, about which we have very little evidence. Third, it directs our attention toward the years in which Habermas emerged as a public intellectual with meaningful contributions to the German debate on the state and constitution. The year 1958 is a good placeholder for the approximate year when members of Habermas's generation, then in their thirties, began to take important positions in universities and the media. A fourth reason to prefer '58er to '45er is that between 1945 and 1958, a dramatic turn occurred in Habermas's work. The inchoate nature of Habermas's thought before the late 1950s thus bolsters the argument for the '58er label. The making of Habermas into a '58er – his search for a method in the contexts that shaped him – is the subject of Chapter 1.

The '68ers' self-description as cultural and political revolutionaries heightened the '58ers' sense of generational difference. Although they too had challenged the cultural and political continuities of restoration, the '58ers distanced themselves from the politics of the '68ers, whom Habermas at times demeaned as playing at revolution; the '68ers, in turn, denounced the '58ers for being too conservative. Habermas has portrayed himself as "injured" in 1969 by the claim of the protesting generation that they were the first to truly challenge the postwar continuities with the fascist past.[24] Habermas's support

[23] In Peter Winterling. "Das Gewissen der Demokratie. Der Philosoph Jürgen Habermas wird 80," June 18, 2009; Jürgen Seifert, "Vom '58er' zum '68er.' Ein biographischer Rückblick," *Vorgänge* 124 (Jg. 32, Heft 4), 1–6.; Oskar Negt: *Achtundsechzig. Politische Intellektuelle und die Macht* (Göttingen: Steidl Verlag, 2008). Yet another name for the generation, the "'48ers," proposed by Harold Marcuse (2001) seems not to have caught on.

[24] Conversation between Inge Marcuse and Habermas at the Korcula (Yugoslavia) Summer School in 1969, as recalled by Habermas in a 1988 interview. Cited in Matŭstìk, *Jürgen Habermas*, 91.

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for the ideals of the 1968 generation – for greater "democratization" of the university and social relationships generally and against the silence and repression of the past – was matched by strong reservations about the means the younger generation was employing. He represented himself as the more mature conscience of a reformism that was as radical as it was realistic. Before 1967, the relationship between the liberal and moderately conservative wing and the leftist wings of the '58er generation held.[25] After 1968, the '58ers split into camps, divided by the question of whether the cultural and political rebellions of 1967–9 did more to consolidate or threaten the achievements of *Rechtsstaatlichkeit* (constitutionalism) and democracy.[26]

That intragenerational debate – the "civil war" of the '58ers – dominated Habermas's political outlook from the 1970s though 1989. In an essay from 1978, Habermas strongly identified with the ideals of the left-wing publishing house *Suhrkamp*, whose cultural authority, he believed, was "militantly called into question" in the 1970s. Habermas claimed:

> If there was ever anything (in Germany, that is) to the expression, "the spirit stands on the left,“ then it was during those years, when despite the massive social restoration, the memory of Nazism and the tradition which it had broken was kept alive … by an intellectual left that could place its stamp on the cultural milieu with a certain conviction that it had been entrusted with the task. All this, however, is now over.[27]

The "*Tendenzwende*," an ideological shift to the right that began around 1972, culminated in CDU leader Helmut Kohl's victory over the Social-Liberal coalition that had governed West Germany from 1969 to 1982. Habermas reads the *Tendenzwende* as the updating of arguments and themes from the interwar German conservatives Carl Schmitt (1888–1985) and Arnold Gehlen (1904–76): the "liberals who … drifted into the neoconservative camp" and merely

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[25] Moses, *Intellectuals*, 49.

[26] While figures such as Lübbe, Luhmann, Scheuch, Rohrmoser, Sontheimer, Hennis, and Maier viewed the late 1960s generation's demand for greater "democratization" of the university and other social spheres as regressive, dangerous left-wing idealism, Habermas belonged to the other group, which included Seifert, Ehmke, Häberle, Enzenberger, Grass, and Walser.

[27] Habermas, "Introduction," in Habermas, ed., *Observations on "The Spiritual Situation of the Age": Contemporary German Perspectives*, trans. by Andrew Buchwalter (Cambridge, MA: MIT Press, 1985), 2.

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"… reactivated an existing source of argumentation by removing it from politically discredited contexts."[28] However, one historian has argued that Habermas "… time and again … mischaracterized the positions of the German neo-conservatives."[29] While Habermas's use of the label "neoconservative" is generally more enlightening than obscurantist, its historical significance lies in the fact that it attests to a decades-long intragenerational struggle for cultural hegemony in West Germany.

On dozens of occasions over the last several decades, interviewers have asked Habermas to describe his intellectual and political development. Without fail, the cornerstone of these autobiographical narratives is his depiction of the 1950s as a decade of conservative "restoration." We intellectuals on the left, Habermas wrote in 1978, "… move along a beaten path first cleared by the liberal intelligentsia during the Adenauer phase of restoration."[30] By "restoration," Habermas means the failure to make a clean break with both Nazi ideology and the species of radical conservatism that predates 1933.[31] His conventional description of the 1950s has been superseded by more balanced scholarly portrayals that emphasize the rapid modernization that occurred in these years, albeit under conservative trusteeship.[32] "You cannot imagine how closed a world it was," he has said of this period.[33] Habermas's depiction of the 1950s as an entirely "closed world" dovetails neatly with the pride he expresses in his generation's contribution to the "opening" of Germany to the West. The central deficiency of the postwar restoration period for Habermas was the contradiction between the new

[28] Ibid., 12.
[29] See Jerry Muller, "German Neoconservatism, ca. 1968–1985: Hermann Lübbe and Others," in Werner-Müller, *German Ideologies*, 161–84.
[30] See, for example, Habermas's introduction to *On the Spiritual Situation of the Age*, 14; Dews, *Autonomy and Solidarity*, 35 (orig. December 16, 1977).
[31] The notion of the 1950s as a restoration era originates from the left-wing Catholic publicists Eugene Kogon (1903–87) and Walter Dirks (1901–91), who promoted a view of a "missed revolutionary" moment and the return of the old politicians as a restoration. See Kogon, *Die Restaurative Republik. Zur Geschichte der Bundesrepublik Deutschland. Gesammelte Schriften* (Berlin: Quadriga, 1996), 3; and Moses, *Intellectuals*, 41–5.
[32] The modernization paradigm is associated with the historians Hans-Peter Schwarz, Axel Schildt, and Arnold Sywotteck, eds., *Modernisierung im Wiederaufbau. die Westdeutsche Gesellschaft der 50er Jahre* (Bonn: Dietz, 1993).
[33] Dews, *Autonomy and Solidarity*, 192 (orig. December 6, 1984).

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beginning announced by the Allied occupation forces and the reality of continuities with the Third Reich. That the two spheres – the university and the state – that were intended in theory to play key roles in democratizing Germany were fatally flawed from the outset is the contradiction that provoked Habermas's political awakening and shaped his initial trajectory.

During his university studies at Bonn and Göttingen from 1949 to 1954, Habermas had two major experiences of disillusionment. The first was a crushing realization concerning Martin Heidegger (1889–1976). It was a great shock for him to discover that the philosopher he so admired had written in 1935 of the "… inner truth and greatness of the Nazi movement." The discovery came when Heidegger republished his 1935 lectures on metaphysics in 1953 – without retraction of the astonishing passage. Instead, he appended an explanatory note that the "greatness" denoted "… the encounter between global technology and modern man."[34] This provoked an intense response from Habermas in an essay on the subject that first brought him to the attention of readers of the feuilleton pages.[35] As he recalled much later, "Then I saw that Heidegger, in whose philosophy I had been living, had given this lecture in 1935 and published it without a word of explanation – that's what really disturbed me."[36] His second great shock was the discovery of the Nazi past of both of his dissertation supervisors in philosophy at the University of Bonn, Erich Rothacker (1888–1965) and Oskar Becker (1889–1964).[37] Stumbling on books written during the 1930s and 1940s by his *Doktorvater*, Habermas discovered that the teachers most important to him had been convinced Nazis. Habermas's disappointment with Heidegger, Rothacker, and Becker highlighted the failure of the new German state to take the task of denazification of the universities seriously. Habermas's disappointment eventually

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[34] Discussed in Matŭstìk, *Jürgen Habermas*, 14.

[35] Habermas, "Mit Heidegger gegen Heidegger denken. Zur Veröffentlichung von Vorlesungen aus dem Jahre 1935," *Frankfurter Allgemeine Zeitung* (July 25, 1953). Reprinted in *Philosophisch-Politisch Profilen* (Frankfurt/Main: Suhrkamp, 1971), 67–75.

[36] Dews, *Autonomy and Solidarity*, 77 (orig. March 23, 1979).

[37] Rothacker, a party member from 1933, worked for the Ministry of Propaganda on popular education (*Volksbildung*) and was a "… contact person for the students who organized the burning of books." Becker was an anti-Semite and remained an active Nazi Party member until the end. From Matŭstìk, *Jürgen Habermas*, 18.

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