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# Retrieving Civil Society in a Postmodern Epoch

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This article develops Jurgen Habermas' emphasis on critical theory as a means to retrieve the social and restore its place as a central concept in the social sciences. It argues that Habermas has been misinterpreted by varieties of thinkers across political, ideological, and intellectual domains; and has been misused by neo-conservatives and postmodernists in particular. Habermas' critical theory is driven by an emphasis on social and political praxis, and establishes the possibility of an authentic social existence. At the base of this existence is a solid moral order that defines human existence in terms of Reason rather than in terms of Power. In effect, civil society is possible when humanity can be free to engage in an informed political discourse that is based on shared understandings of legal and societal normative structures.

Echoes:

There is no such thing as society. There are individual men and women and there are families.

Margaret Thatcher, quoted in *The Observer* (1 November 1988)

"Society" is not a valid object of discourse. There is no underlying (constituting) principle.

Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics* (1985)

Sociology can only depict the expansion of the social and its vicissitudes. It survives only on the positive and definitive hypothesis of the social. The reabsorption, the implosion of the social escapes it. The hypothesis of the death of the social is also that of its own death:

Jean Baudrillard. *In the Shadow of the Silent Majorities . . . or the End of the Social* (1983)

We are . . . inhabitants of another Time and another Space, and we no longer know what response is adequate to our reality.

Ihab Hassan. "POSTmodernISM" (1975)

Awesome! Triple awesome!!! Funkarheumatech!!!!

The metaphors of the young.

We are very much full of postmodernist metaphors and style. Whether we are truly past the modern epoch may be another story.

Jean Baudrillard sees America as the postmodern "utopia achieved." Synonyms for postmodern are siderale (astral), hyper-real and terrifiante (Awesome!). Baudrillard sees Americanization and postmodernism as involving emptiness, a harrowing emptiness. The metaphor of the desert is used over and over and over again. We are in an epoch that banishes all sociality, sentimentality and sexuality. Proteus redux. Robert Musil's *The Man Without Qualities* is the paradigm.

But despite the nihilist bravado and lack of faith in any collective sense of reason, social movements flower. New public spheres are continuously being constituted. 1989 turned out to be neither the

celebration of the French Revolution nor the dawning of a new postmodern Aquarius: over-produced commodities, postcards and televisuals. It was the year of the democracy movements in Tiananmen Square, of Civic Forum, New Forum, Václav Havel, and the Velvet Revolution that made Frank Zappa safe for Czechoslovakia. It was a year of rebirth for democratic social movements and their projection of alternative and transcendent collective identity.

The social was visible again.

And the quest for a retrieval of some sense of civil society moved from the domain of theoreticians to the streets once more. What has prevailed in Eastern Europe is double-edged: the world sovereignty of capital, and the struggle to affirm universal civil and social rights, entitlement and their constitutional guarantee.

To what degree do Eastern Europeans have an authentic humus of civil society, a usable tradition for civic association, multiple access, consent-minded liberalism and constitutionalism? The East European social movements of the 1980s manifest a persistent concern for the development of non-commodity forms subject to popular democratic controls, social solidarity and the struggle for social justice. Can these movements and their institutionalization provide a moral yet proceduralist discipline to the ever-evolving world system of integrating circuits of exchange?

This article shows us how Jürgen Habermas' strand of critical theory helps us retrieve this concept from its inauthentic appropriation by the neo-conservatives and its premature burial by the postmodernists. Postmodernism is disturbed from within. Once under the skin of modernism's own genealogy, its own living tradition, we are confronted by the once more released shock of the old.

Habermas' strand of critical theory holds out the possibility of social solidarity and moral community that can still ground individuals bound by normative evaluations for which individuals are held responsible, for which we are responsible to sustain, and by which we intersubjectively sustain our capacity to comprehend the "Autonomy of Reason."

Versus the postmodernists, Habermas understands: how Reason both becomes Power and checks Power; how Reason constitutes individuals as subjects with an intersubjectively meaningful order within a seemingly meaningless modern universe.

Habermas seeks to transcend the uncoupling of law and morality. Law is not Caesar's will, but that by which Caesar is judged, by which voluntas is checked by ratio. The validity of law rests not on the will of the Prince, divine authority or consanguinity, but on the obligation to observe discourse ethics, to use the logic of argumentation, to raise claims of normative rightness, to be accountable.

How can we constitute ourselves?

How can we avoid entropic dissensus?

How do we attain and institutionalize a self-disciplinary consensus--i.e., a moral discipline rather than a statist discipline--that protects us, enables us and empowers us?

To the extent that these questions persist both among the philosophes and in the streets, social theory persists, rather than founders and shipwrecks on a Postmodernist ontology of power.

#### THE POSTMODERN SENSIBILITY

The image of New York City, actually Manhattan, has been transformed during the past two decades--transformed from the once throbbing heart of America's steely modernist civilization to "a system which is composed from its own explosion" and constitutes itself out of its own decay".[ n1] We are increasingly confronted with either anti-modernist or post-modernist representations filled with doubt and despair: the gray and grimy sameness of Manhattan, Paris's La Defense and Hamburg in Wim Wenders' film *The American Friend*; the character of Winnie sitting blissfully and talking aimlessly within a pile of garbage heaped up to her neck in Samuel Beckett's play *Happy Days*; Joseph Beuys' sculpture of a Volkswagen bus tied to twenty sledges, each carrying felt, fat and searchlight.

In his well-received TV series and book *The Shock of the New*, Robert Hughes[ n2] perceptively noted that

. . . the idea that we are in a "post-modernist" culture has been a commonplace since the mid-seventies . . . [Modernist] reflexes still jerk, the severed limbs still twitch, the parts are still there; but they no longer connect or function as a lived whole. The modernist achievement will continue to affect culture for another century at least, because it was large, so imposing and so irrefutably convincing. But its dynamic is gone, and our relationship to it is becoming archaeological.

With this sense of *depassé* mounting, Jurgen Habermas in his 1981 James Lecture at New York University--polemically entitled "Modernity versus Postmodernity"--took on various anti-modernist currents in Western criticism. The lecture, delivered a year before as the Theodor Adorno Prize Lecture of the city of Frankfurt, a.M., was originally and more accurately entitled "Modernity--An Incomplete Project." Habermas hits hard on Western intellectuals' failure to provide any vision for the closing decades of the century. Specifically he attacks any form of aestheticism that ignores this problem.

Postmodernism, a radicalization of the logic inherent in modernism, sees itself as the true modernism as opposed to the distorted, instrumentalized, and manipulated modernism that has become institutionalized as the official culture. Traditional modernist lines between mind and body, self and other are wiped away. There is a search for alternatives in our relationship with subjectivity, with narration, and with nature--including the nature of our bodies. Pure temporality is unabashedly asserted as it mirrors the dissolution of the Enlightenment's sense of history unfolding--the seeming failure of history to transcend itself, the solidifying of history at an inhumane moment and the inability of the dialectic to move beyond affirmation.

Postmodernism is driven by a vision of freedom that is essentially post-Marxist. It is a vision that displaces any particular totalizing project--a vision of freedom in which humans are freed from the obligation to progress, and the compulsion to enslave others in order to make progress possible.

As in the late films of Jean-Luc Godard or songs like "Language is a Virus" by Laurie Anderson, there is in postmodernism a "morose conviction that speaking will never disclose anything". [ n3] There is more of a suggestion of Nietzschean Niedergang or drive toward catastrophe, than a Hegelian Aufhebung to a higher rationality.

And as Charles Jencks writes in 1986, [ n4] postmodernism offers us a double coding, a paradoxical dualism:

(T)he continuation of Modernism and its transcendence . . . Of one thing we can be sure: the announcement of death is, until the other Modernisms disappear, premature . . . There is the same snake-like dialectic which the movement has shown, and one suspects that there will be several more surprising twists of the coil before it is finished.

Habermas' project is the quest for that form of life where social institutions and practices can exist that permit free, responsible, and nonideological social discourse in which we can intersubjectively constitute a universal public sphere of communication. Habermas' redefinition of critical theory starts with communication in which implicitly raised validity claims are naively accepted, but focuses in on those emergent situations in which one or more of those validity claims becomes problematical. Such situations develop when the accepted framework of norms and opinions is called into question, and the claims which were previously implicit now require discursive justification. For Habermas, the validity of problematic truth claims or problematic norms can be "redeemed" only by entering into a discourse which has the purpose of judging the truth of the problematic opinion or the correctness of the problematic norm. Questions of legitimation become the focus. And to a universal grammar of intersubjective discourse is attributed the position of a transcendental horizon of communicative praxis.

Postmodernist experimentalism, on the other hand, seems more interested in grammar as a playground for language games as in Wittgenstein, or as some sort of prison-house by which *la langue* (a grammatical structure) constrains *le langage* (collective discourse) or practice) and *la parole* (individual speech acts). Speech acts and the consequent discourse represent the signifying components of the cultural life-world. And this cultural life-world is never fixed but rather in a perpetual state of creative effort to cope with its natural and objectified environment[. [ n5] Indeed, given alleged diseases of verbal systems (Wittgenstein, Heidegger, Sartre) and "the Retreat from the Word" (George Steiner [ n6]), we have John Cage and Elie Wiesel listening to the sounds of silence and Susan Sontag (1969) even fashioning an "aesthetics of silence."

In contrast to Habermas' totalizing/universalizing project, postmodernist experimentation in its radical pluralism recognizes

radically different language games and leads to an implicit and explicit cultural and political assessment, which sees the possibilities for a progressive praxis in what he calls the "legitimation par la paralogie" which no longer searches for universal consensus, but for a consensus which <<doit être local.>> [ n7]

RETRIEVING CIVIL SOCIETY

Historically, from the 19th century on, civil society came to mean a domain of interaction distinct from the state, and protected from state interference. For G.W.F. Hegel the dynamic of civil society as a system of mutual interdependence necessitates the creation of institutions which limit the private autonomy of individuals bent on satisfying their selfish interests. Hegel--like Durkheim after him--replaced political democracy in the modern highly differentiated social world by participation in nonpolitical organizations such as corporations or professional associations. He never accepted the radical implications of the rights of the citizen as distinct from the rights of man posed by Rousseau and grasped by Marx after him. An alternative to Hegel and Durkheim's social integrationist project would be a repoliticization of public spaces, a revitalization of the values and norms of participatory democracy--out of which could emerge the ethical life (Sittlichkeit) or collective conscience transcending difference which civil society, in the liberal sense, lacks.[ n8]

For the current of critical theory represented by Habermas, civil society is the domain out of which the reflective, creative and institutionalizing potential of group needs and interests are embodied in autonomous public spheres. Civil society is understood as being comprised of a plurality of social institutions such as productive units, households, voluntary organizations and community-based services legally guaranteed; and not just a non-statist sphere dominated by privately owned enterprises and patriarchal family arrangements. A pluralist society of men and women deliberating and acting in a participating collective order is posed as the basis of political obligation and legitimacy, rather than the individual consent of liberalism. With this in mind, Arato and Cohen[ n9] note how

The contemporary (social) movements demonstrate that if the norms of civil society (plurality, publicity, democratic association) no longer have sufficient motivating power for twentieth century liberalism, they still inform the identities and projects of social actors, albeit in radicalized and reinterpreted versions.

Habermas' critical politics requires a strategic appreciation of the reflexivity potential that is the supportive consensus of a civil society--as well as a strategic confrontational stirring of signifying practices. Such a strategic appreciation and stirring represent the x in  $EP = TR + X$ . Emancipatory practices (EP) result from a dialectical consideration of both the transcendental rules (TR) of universal pragmatics and the strategic confrontations the normative potential of a civil society can generate in attempting to overcome some already institutionalized distortion of communication.

Following the reception of Gramscian ideas in Western Marxism, there has been a renewed focus on civil society, understood as the domain out of which the reflective, creative and institutionalizing potential of group needs are embodied. Confronted with what remains of the present-day corporatist impasse of social democracy and the statism of "already existing socialism," there has emerged--a Newer Left--e.g., Paul Hirst, John Keane, David Held; Andrew Arato and Jean Cohen.[ n10] This Newer Left comes with ( 1) images of a conceivable "socialist civil society;" ( 2) constitutional concerns regarding the prevention of a cumulation of power at the center and the need for institutional checks and balances; ( 3) strategies for the development of non-commodity firms subject to popular democratic control; and ( 4) a concern with the diffusion of power beyond the state, the reality of plural sites of sociological sovereigns as well as an obsession with the achievement of pluralism without relativism.

This Newer Left focuses not on chimeras, purely imaginary and stipulatively ideal conditions, but on specific institutions and redeemable institutional tendencies--both actual and potential--already implicit yet blocked within the development of liberal societies. What is avoided is the arbitrary imposition of some new form of life.

Socialism is understood as both a process and as an outcome, civil society as a stage and as a means (i.e., normative, legal, constitutional). Civil society can be conceived as a theatre of constitutive interaction, as a field of historicity dialectically organized by some dominant political economy, a field of unsynthesized paradoxes, antinomies, contradictions. What is sought is rational self-reflection regarding institutions, law and their development. Consciousness of the normative potential of civil society is understood as the active principle: the capacity for reasoned collective agency, the procedural basis for the institutionalization of a new collective rationality, of a moral rather than a statist discipline.

There is also a reflexive concern with the autonomy of law and the state, with the contingent wants protected by the juridical order. Law is not understood as purely command (*voluntas*) as in Thomas Hobbes, John Austin or Carl Schmitt.[ n11] It is understood as *voluntas plus ratio*, i.e., the voice of reason, as sovereign will plus the developing collective reason of civil society: its normative potential, its web of procedures, institutions, constitutions. To what extent does such a juridical order of practical reasoning founder against the rocks of sovereignty? To what extent is the procedural divorced from the realm of communicative action?

Such an institutionalist and proceduralist turning amounts to a reaction to what is perceived to be the impoverished condition of Marxist theories of normative integration and constitutionalism. The real bond is understood as the civil. As Marx himself understood it is not manipulative statist or corporatist institutions that sustain and rationalize civil society, but vice versa. Too often social democrats have focused on the statization of society rather than the socialization of the state. The regulatory institutions and voluntarism of civil society constitute the ethical root of the state. Politics and law need not be equated with relations of domination, discipline and punishment.

What is connoted is something akin to the theory of societal constitutionalism expounded by the likes of Anthony Giddens and Jurgen Habermas--the possibility of establishing a grounded basis upon which to describe and evaluate the direction of institutional changes in modern society, to specify threshold levels in the development of voluntaristic procedural restraints on the systemic pressures of bureaucratization (i.e., purposive/instrumental rationality). It is a grounding in the procedures of practical/moral rationality--one that opens up discourse to a generalizable consensus rather than sealing it off within bounds of privilege and selectivity.

#### ANOTHER STRAND OF CRITICAL THEORY: PROCEDURALISM AND RULES JURISPRUDENCE

The critical theory of society associated with two generations of the Frankfurt School (Adorno, Benjamin, Marcuse, Habermas) emerged as an alternative paradigm to the traditional or positive theory of society; it recognized that along with its greatest triumphs, modern reason has brought about the greatest of brutalities. For Adorno, after Auschwitz, modern reason must be unwilling to exist in a state of affirmative contentment, in a condition of dialectical non-self consciousness--as part of the

unconscious participation in the disenchanting rationalization process described by Max Weber as modernization. While it condemns modernity's affirmative sense of itself, critical theory affirms what Habermas calls "the incompleting project of modernity--the actualization of critical reason as a search for the sacred." Critical theory studies actually to subvert the actually existing. Critical theory attacks the social amnesia of all those who look to the future ignoring the dead and dying.

Critical theory has never minimized the reflective efforts necessary to realize the immanent possibilities present, to constitute qualitatively new frameworks of experience, new normative principles of social integration. Yet at the same time, Habermas[ n12] points to the dangers of "shattering the containers of autonomously developed cultural spheres" and their subversive content. This is the Frankfurt School's continued stress on what Benjamin referred to as the "need to produce the permanently treasurable."

It may be argued that there have been two strands in the critical theory of the Frankfurt School. One emphasizes aesthetic experience as a prefigurative indicator of spiritual redemption (Adorno, Benjamin, Marcuse). The other emphasizes rational self-reflection as a critical tool in the struggle to attain the telos of humankind in its universalizing condition as rational members of a socio-historical species. It is in this latter strand--most markedly developed by the second generation critical theorist Habermas and in an earlier generation by such fellow travelers of the Frankfurt School as Franz Neumann (1900-1954) and Otto Kirchheimer (1905-1965)[ n13]--that the contribution of the Frankfurt School to political theory can be grasped. This latter strand is concerned with institutional modes of political obligation and legitimation, and is ultimately linked to the contractarian and natural law traditions mediated by Hegel's considerations on the ethical and institutional life (Sittlichkeit), that is, the civil society and the institution of the rule of law.

There has been a rekindling of interest (e.g.) in the writings of Franz Neumann on Weimar social law[ n14] and the 1936 London School of Economics (LSE) dissertation, *The Rule of Law*[ n15] he wrote under the direction of Harold Laski and Karl Mannheim. As Roger Cotterrell[ n16] has recently noted (1988), these writings confront a new society of mass organizations, economic concentration, and administrative bureaucracies with a "procedural insistence on government, through fixed, generalizable and previously announced regulations and standards." They offer us a Left proceduralism or rules jurisprudence to counter the liberal one posed by Friedrich von Hayek and so often appropriated by the Right. These writings of Neumann precede his famous 1941 work on the Third Reich, *Behemoth* (1942).[ n17] The strict historical materialist analysis of this latter work diverges from his more subtle Marxist sociology of law in the Weimar era and his 1930s reflections on how corporatist and statist forces in an epoch of organized capitalism subvert the principle of legal generality.[ n18] For in the more competitive epoch of laissez-faire/liberal capitalism, the "generality" of the rule of law served a moral and equalizing function.

Neumann struggled to establish and defend the constitutional rights of trade unions and the institutions of labor law. He tried to get beyond the liberal Rechtsstaat of parliamentary democracy and provide the collective basis for a modern social republic (sozialer Rechtsstaat). He attempted to establish the reflective, creative, and institutionalizing potential of group needs and interests rather than the individual consent of liberalism as the basis of political obligation.

Moving on from the Austro-Marxist Karl Renner (1870--1956), Neumann developed a sociological understanding of the evolution of legal political institutions as structures of rationality. Neumann contended that any liberal legal system is incapable of being considered "fully rational" if it failed to recognize the consequences of concentrated socioeconomic power associated with the particularistic interests of private capital in civil society. Like his teacher Hugo Sinzheimer (1875--1945)[ n19] and his colleague Kirchheimer, Neumann looked to the immanent potential of social laws and rights in the Weimar Constitution to procedurally facilitate the continual struggle for a free and rational civil society.

He would argue that there is a powerful intellectual tradition from which we can extract the following lineage for a critical sociology of law.

The Austro-German School of Sociological Jurisprudence (Eugen Ehrlich, Rudolph von Ihering, Karl Renner, Hans Kelsen, Georg Jellinek, Otto Bauer);[ n20]

Multi-disciplinary/historical social science of which Marx and Weber are the two outstanding representatives; and

Weimar social democratic and Marxist labor lawyers, some fellow travelers of the original Frankfurt School (Neumann, his partner Ernst Frankel,[ n21] his teacher Hugo Sinzheimer, and Sinzheimer's other significant students Otto Kirchheimer and Otto Kahn-Freund[ n22]). Hermann Heller,[ n23] another key social democratic jurisprudence professor, can be added here.

Neumann's earliest attitudes about politics and law were profoundly influenced by Renner and Sinzheimer. Renner provided Neumann with a Marxist superstructural interpretation of law and social change and general appreciation for the sociological approach to the study of law. Sinzheimer combined Renner's legal sociology with the Genossenschaft theory of Otto Gierke to create the fundamental concepts of modern labor law and helped to focus Neumann's intellectual energies on the problems of the labor movement.

Renner had to work around Marx's statements to the effect that law was simply part of the ideological superstructure of society, a means of class domination dependent on the prevailing productive relationships in the economic substructure. He refused to explain how social forces create or substantially change law, and he did not attempt to determine how and why legal principles come into being during specific historical periods. He asked only how the social function of law changes, how capitalism adapts precapitalist legal institutions for its own uses.

Sinzheimer had stressed peaceful, evolutionary gains to be won through the reform of Weimar labor law. Participating in the framing of the Weimar Constitution, Sinzheimer was probably the first to lecture on labor law in Germany. Making use of the Genossenschaft theory of Otto Gierke[ n24], Sinzheimer challenged the "concession theory" of legal groups of German positive and Roman law. Like Maitland and Figgis in England, he argued that social groups are "organic entities," autonomously capable of willing and acting, rather than legally fictitious personalities. These authentic group personalities make their own rules--what Gierke called "social law." Collective bargaining agreements fit this new category. Gierke's theory meant that labor unions as well as employer associations were

legitimate groups with rights and duties, and because they were not fictitious persons as understood under Roman law, they did not require someone else to represent them; these groups could speak through their own organs in ways determined by their own internal rules, i.e., their own substantive rationality. Members of these two types of groups, trade unions and employer associations, were all part of a third and more inclusive type of group determined by industry. Employers and employees within specific industries thus had the right to decide among themselves about the particulars of their industrial relationship. Because such decisions necessarily had the character of what Gierke called "social law," the collective agreement regulating the conditions of work had the force of law and took legal priority over the simple individual labor contract.

Neumann looked to the immanent potential of social laws, social rights, and a socialist interpretation of the Weimar Constitution put in the service of social equality and freedom. Neumann's critical sociology of law starts in the conflict between the constitutional rule of law and the imperatives of socioeconomic systems transcending them. Its critical purpose is to sociologically understand the functions of legal and constitutional institutions and how they may be reconstituted to serve the purposes of universalizable interests.

Neumann's constitutional reinterpretation was designed to help adjust the legal-political superstructure of German society to the changes in the economic substructure that had occurred before 1930. He was attempting to institutionalize the growing participation of the working class in the administration of the economy, participation that had been made possible by the Revolution of 1918 and the Weimar Constitution.

Neumann and Sinzheimer recoiled in the middle of the 1930s from their institutionalist legal theory, which they had used to justify workers councils and collectivist democracy. This theory presents a model in which the individual persons, whose wills constitute the primary legal relations in liberal legal systems, are replaced by members of constituted communities whose legal aims and duties somehow derive from the objective character of those communities. Ironically, fascist jurisprudence used this rationale to destroy free trade unions. Shocked by this unintended consequence, Neumann moved to a more Leninist position with Kirchheimer in the middle 1930s.

Neumann, Sinzheimer, and later Otto Kahn-Freund (1900-1979) saw institutionalism depending on organized workers' resistance to the domination of property and on the implementation of economic democracy. They resisted any "free law" discretion or politicized interpretation by jurists. Neumann, Sinzheimer, and Kahn-Freund emphasized a rules-jurisprudence based on rationally extracting rules and emphasizing procedures versus the more standards-jurisprudence of their contemporary Ludwig Bendix--or Duncan Kennedy[ n25] today. The latter employed standards outside the evolving law--i.e., evolving both linearly and dialectically--and free discretion by jurists.

In *The Rule of Law*, Neumann stressed the significance of the generality of the law and the normative potential of civil society. He came to see civil society as an immanently intelligible historical experience by which voluntaristic procedural norms evolve dialectically. The hard experience for Neumann was his realization of socialist civil society's dialectical rather than linear evolution.

In his 1950s return to the construction of the social Rechtsstaat, Neumann moved beyond both Renner's functionalist analysis of the intended and unintended consequences of legal institutions and Sinzheimer's institutionalism. Neumann pushed the critical sociology of law to an analysis of ideological functions of law and the immanent normative potential of law.[ n26] Hence, Neumann develops an immanent critique method of legal sociology that meshes with the proceduralism of Habermas and the quasi-transcendent critique Habermas adds as a capstone.

For Neumann and Habermas, we can grasp the dialectical working-out of a constitutive emancipatory reason, the juridico-discursive order. It is an order with an immanent relation to truth--not to just what is sociologically universalizable (such as the "false" universal of commodification Marxism posits), but to what is critically, i.e., quasi-transcendentally, universalizable.

Much in the manner of the more liberal American theorists Lon Fuller and Talcott Parsons, they focus on the overarching procedural restraints that we voluntaristically and interactively create. For a strand of critical theory represented by Neumann and Habermas, socialism is a rational kernel of juridical categories and their redemptive claims--that is, rational objects of criticism to be interpreted and put into practice by progressive social involvements. For many who have been perplexed by the proceduralism of Habermas' recent turning to political theory and the sociology of law[ n27] a retrieval of the rich vein mined by Neumann brings this other strand of critical theory into sharp focus.

From the theorizing of Neumann and Habermas--and those linked to them--we can derive a critical sociology of law. Law and constitutionalism can be understood in terms of both: ( 1) a proceduralistic critique derived from a transcendental logic that serves as the foundation of language, communicative/interactive competency, and hence practical-moral rationality; and ( 2) an immanent critique of concrete practices vis-a-vis their institutional function and normative potential. It is a conjunction that becomes the problematic of this other strand of critical theory, the critical sociology of law.

Emancipatory practices within juridico-discursive order are understood by contextualizing socio-logic and immanent critique within the foundational or transcendental logic of speakingness.

Thus, a lineage of a critical sociology can be summarized as follows:

Positivism and Functionalism (Renner, Jellinek)

Institutionalism and Group Theory (Sinzheimer, Gierke, Laski)

Ideology-Critique and the threshold of Immanent Critique (Neumann)

Immanent Critique's relation to Transcendent Critique (Habermas)

Neumann ultimately found his dissertation, *The Rule of Law* too sociological, too focused on ideological functioning and without adequate recognition of the progressive character of the claims of natural law theories, that is, their legitimations. Neumann defined natural law as a set of rules expressed as a set of universally valid norms.

In his LSE dissertation, Neumann argued that during the age of liberalism, with the ascendancy of the bourgeoisie, natural law gradually disappeared and was replaced by: the notion of the rule of law. Neumann admitted that the mechanistic philosophy of Descartes and the influence of Descartes and of Montesquieu helped to produce the idea that abstract general rules provide for calculable and predictable relations between states and citizens. And this notion of general rules became the core of the rule of law idea.

Neumann contrasted specific general laws with what German jurisprudence referred to as *Generalklauseln*, or "general principles," which allow a judge to consider community standards of morality or fair play in making a decision. Such principles embody a "spurious generality," argued Neumann, because in modern class-divided society the community has no unanimous opinion about the nature of moral behavior.

In the early 1970s, Habermas [n28] emphasized the revolutionary component of rationalist natural law: how its normative claims need to be tied to evolving rationality structures that comprise a juridico-discursive order. Habermas and his students sparked a revival of interest in Neumann and Neumann's ultimate recognition that sociologic cannot relieve transcendental logic of what Gillian Rose [n29] calls "the unending trial of reason." Ultimately, categorical questions of jurisprudence cannot be recast in sociologic ones of repetitive interaction, function, and role.

Against the institutionalists' recourse to external community standards and free discretion, Neumann held to a constitutive theory of jurisprudence with internal relations, with an inherent rationale. Jurisprudence enables us to logically and categorically connect principles of law. Sociological analysis was auxiliary to check whether social change had subjected these principles of law to such a change in function that their literal application would no longer make sense. Regardless of the class-bound nature or class-compromise nature of legal norms in their provenance--that is, the social law provisions of the Weimar Constitution--Neumann realized that these norms can be neutral in their effect. The ratio of their legitimation claims can be extracted and countered to the asymmetries of power.

For Habermas, like Neumann before him, emancipatory reason is juridical. Emancipatory practices can be gauged by uncovering the unredeemed claims of civil society. Civil society is understood as the repository of all norms; out of the interactions and reciprocities of civil society, our norms are constituted. The constitution of a rational civil society is depicted in terms of its developed and arrested internal relations. Threshold levels can be discovered. Categorical social philosophy is linked to the problem of institutional development.

Habermas' categorical analysis has an institutional frame. To what extent can we extract universalistic normative principles from their ideological shells? The discursively redemptive claims of our normative traditions are tested (placed on trial, so to speak). Habermas' theory of communicative action points to the link between law and morality that formalist analytical philosophy and positivist sociology of law sought to sever: there is an ultimate foundation, a transcendental ideal speech situation. There is a moral grounding to the law. Actually, Habermas sees his theory as quasi-transcendental, different from traditional Kantian foundationalism. He sees his theory of the ideal speech situation and pragmatics as

providing the grounds not to elucidate all the conditions of possible reflection, but view of the "various conditions for the validity of meaningful expressions and performances." [ n30]

Habermas seeks to preserve the generality of law without reverting to natural law. His is the generality of procedure, as grounded in the rationality of communicative ethics.

Neumann and Habermas seek bulwarks against the disciplining forces of corporatist and statist prerogative associated with 20th century political economy. It is a degree of intervention never fathomed in the liberal Rechtsstaat constitutionalism of the 19th century, a constitutionalism of the 19th century, a constitutionalism that sought solely to neutralize the state. The pluralism pointed to is not a pluralism of endless difference and carnivalesque free play. It is a pluralism of reconciliation and redemption--not in the name of totality but in the name of lawfulness.

Habermas' theory of modernity accepts an irreversible differentiation process, a differentiation into three moments of reason: ( 1) science and technology, ( 2) law and morality, and ( 3) aesthetics. The critical theory of the Frankfurt School seeks to control the development of the first moment with the preservation and evolution of the latter two. Unlike a Marcuse, neither Neumann nor Habermas seeks to aestheticize politics. In their proceduralism they focus on the moment/sphere of law and morality. In their proceduralist turning, they seek to retrieve a foundation for connecting law and morality, and for intersubjectively sustaining our capacity for Rational Autonomy. Discourse is sustained and opened up, a proceeding toward a generalizable and self-disciplinary consensus.

In applying the proceduralist rules of the ideal speech situation, Habermas' critical theorist does not play the role of an ultimate judge but that of a mediating interpreter ensuring that the differentiated cultural moments/spheres communicate with each other without "violating the inner logic of [that sphere's] dominant form of argumentation either in truth, normative correctness, or aesthetic harmony. The logic of the sphere of law and morality is based on legitimation, rather than on scientific validation or authenticity." [ n31] This logic of the sphere of law and morality is beyond the ever encroaching and disenchanting instrumental rationality Max Weber resigned himself to. It is the rationality intrinsic to the form of law itself, that secures the legitimacy of power.

#### REDEEMING THE CLAIMS OF A JURIDICO-DISCURSIVE ORDER

While we cannot nostalgically look backward into the future, the strand of critical theory connecting Neumann to Habermas reveals institutional thresholds in an immanently intelligible tradition of institutionalizing experience, an unfolding project of social rationalization--not the statization of reason, but vice versa. A post-Marxist Newer Left focuses on the dangers threatening the power-scrutinizing traditions of modernity--democratic liberal and democratic socialist aspirations embedded in historical forms of life, aspirations of citizenship rights, access and protection.

To what extent can the normative claims and legacies of civil society persist?," these two movements ask. What links them with the Postmodernists is mutual aversion and struggle to overcome the overextension of systems of instrumentalist rationality that penetrate and "normalize" the lifeworld as steering mechanisms. Foucault's paradigm for such statist disciplinary apparatus was Bentham's plan for

the Panopticon (1791). Otto Kahn-Freund urged the British labor movement to preserve its collective autonomy and resist the corporatist pressures of Prime Minister Harold Wilson's Social Contract of the late 1960s and middle 1970s. A Newer Left seeks to deepen the divide between civil society and the state as a bulwark versus statist and corporatist disciplining, rather than anticipate the abolition of that dichotomy as Marx had argued.

Neither Neumann, Kahn-Freund or Habermas of one tradition, Foucault or Lyotard of another, or a Paul Hirst or Václav Havel of the other look forward to a withering away of the state, a doing away with coercive sovereign power. Their collective focus is on "discipline," but discipline for what? Not a discipline based on fear on the lines of Hobbes or Schmitt, but a discipline based on consent, solidarity, and the pursuit of justice: a normative discipline rather than a statist one. To quote Habermas [ n32]:

Justice conceived deontologically requires solidarity as its reverse. It is a question not so much of two movements that supplement each other as of two aspects of the same thing...Justice concerns the equal freedoms of unique and self-determining individuals, while solidarity concerns the welfare of consociates who are intimately linked in an intersubjectively shared form of life--and thus also to the maintenance of the integrity of this form of life itself. Moral norms cannot protect one without the other: they cannot protect the equal rights and freedoms of the individual without protecting the welfare of one's fellow man and of the community to which the individuals belong.

Ultimately, Habermas' strand of critical theory locates emancipation in a juridico-discursive order, one which Postmodernists--fearful of the imperialism of rationality and the curtailment of the aesthetic--depict as being shot full of domination, of a latent desire to impose an originary and privileged real. But what the allies of Habermas would see is the institutionalization of juridical subjectivity--a project of practical learning of disciplined self-reflection in accordance with the categorical logic of argumentation. What differentiates fin de siècle social theory in the 1990s from last time, is an aversion to messianism--a restraint from designing and imposing some utopian/post-conventional form of life. For the likes of Habermas' the only utopian perspectives we can straightforwardly maintain now are of a procedural nature.[ n33]

Within Postmodernists' own genealogy, one can fit Habermas' project alongside Maurice Merleau-Ponty's methodological strategy of the "instituting subject" as sovereign--a strategy that gets us beyond the "ego-social" predicament of the constituting subject,[ n34] and focuses on our intersubjectivity.

Foucault [ n35] ultimately seeks "power without the King," a deconstruction of the relation between a sovereign and his subjects--the leitmotif characterizing the legal positivist tradition dating from John Bodin and Hobbes' model of Leviathan. "What we need," writes Foucault,[ n36]

. . . is a political philosophy that isn't erected around the problem of sovereignty, nor therefore the problems of law and prohibition. We need to cut off the King's head: in political theory that still has to be done.

Foucault may label too much as power/resistance. There are constraints requiring a variety of normative responses. Habermas questions how Foucault can explain--without normative criteria--the ebb and flow

of domination/struggle and its consolidation into institutionalized power. How can Foucault expose arbitrariness, differentiate between better or worse, between Solidarity and Nazis, between S.O.S. Racisme and LePen's National Front? There is the freedom to act in concert--reconciling one's freedom with others--to transform old realities and both constitute and institutionalize new ones. This is the self-constitution of society by social movements that Alain Touraine has written of (*The Voice and the Eye*, 1977/81; and *Return of the Actor*, 1984/88); it results in new collective identity, new collective experience, and its juridification as law.[ n37]

Habermas[ n38] points to the increasingly constitutive nature of modern law--constituting new spheres of action, rather than merely regulating preexisting institutional life. And thus, Habermas locates the self-constitution of society, the critical theory of the tradition of civil society, and the emancipatory project of practical reason in the juridico-discursive order. He does so in the name of lawfulness, in a grounded manner that preserves a sense of critique rather than in a non-reflective aesthetic, i.e., in an expressive sensibility which constantly questions its own being.

The tradition of a critical sociology of law is both sustained and renewed by Habermas. This involves a reconstruction, not a deconstruction. This is a reconstruction of procedures involved in communicative interaction, in a juridico-discursive order that grounds our continuing sociality.

A juridico-discursive order is a tradition of practical moral reflection that is neither the outmoded natural law that constrained reflection as to our social identity, nor the positivist/functionalist reduction of law to state codification that threatens our social identity. A juridico-discursive order presupposes a collective ethic of responsibility rooted in our mutual recognition of Rational Autonomy, beyond the instrumentalism of social contract thinking.[ n39] It presupposes and evokes normative understandings that enable us to take on our responsibility, to paradoxically increase disciplinary power--albeit, a self-disciplinary power--and ward off coercive authoritarian state power.

Habermas' strand of critical theory preserves the appeal to universal principles of a depth normative structure in the modern Western experience, to a hoped for solidarity in which commonality emerges in the force of a broad orientation of shared claims.

Beyond the contextualists' rationality of particular traditions and the Postmodernist celebration of entropy, localism and relativism, Habermas works to preserve the persistence of an independent logic of normative questions, the potential consensual rules for conflict regulation--if not resolution--and the idea of social justice.

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## NOTES

[n1.] Reiner Mueller, "Reflections on Post-Modernism," *New German Critique*, n. 16 (1979):56.

[n2.] Robert Hughes, *The Shock Of the New* (New York: Knopf, 1980), p. 375.

[n3.] Susan Sontag, *Under the Sign of Saturn* (New York: Farrar, Straus and Giroux, 1980), p.164.

[n4.] Charles Jencks, *What is Post-Modernism?* (New York: St. Martin's Press, 1986), p. 7.

[n5.] See, e.g. Roman Jakobson, "Relations Entre la Science du Langage et les Autres Sciences," *Essais de Linguistique Generale, II* (Paris: Minuit, 1973), pp. 23--31; Zygmunt Bauman, *Culture as Praxis* (London: Routledge and Kegan Paul, 1973); John Langshaw Austin, *How to do Things with Words* (Cambridge: Harvard University Press, 1968); and John Searle, *Speech Acts* (Cambridge: Cambridge University Press, 1976).

[n6.] See George Steiner, "The Retreat from the Word," *Kenyon Review*, 23 (1961); and *The Language of Silence* (New York: Atheneum, 1967).

[n7.] Jean-Francois Lyotard, *La Condition postmoderne: rapport sur le savoir* (Paris: Minuit, 1979), p. 107, as translated by Rainer Nagele, "Modernism and Postmodernism," *Studies in Twentieth Century Literature* 5(1980):10.

[n8.] K.H. Ilting, "Hegel's Concept of the State and Marx's Early Critique," Pp. 114--136 in *The State and Civil Society: Studies in Hegel's Political Philosophy*, edited by Z.A. Pelczyaski (Cambridge: Cambridge University Press, 1984). See also Raymond Plant, "Hirsch, Hayek and Habermas," Pp. 45-63 in *Dilemmas of Liberal Democracies* edited by A. Ellis and K. Kumar (London: Tavistock, 1983).

[n9.] Andrew Arato and Jean Cohen, "Social Movements, Civil Society and the Problem of Sovereignty," *Praxis International* 4(1984): 266--283.

[n10.] See, e.g., Paul Hirst, *Law, Socialism and Democracy* (London: Allen and Unwin, 1986); Paul Hirst and Phil Jones, "The Critical Responses of Established Jurisprudence," *Journal of Law and Society* 14(1987): 21--37; John Keane, *Public Life and Late Capitalism: Toward a Socialist Theory of Democracy* (Cambridge: Cambridge University Press, 1984); John Keane, ea., *Democracy and Civil Society* (London; Verso, 1988), David Held, *Models of Democracy* (Stanford: Stanford University Press, 1987); David Held, *Political Theory and the Modern State*, (Stanford: Stanford University Press, 1989). Arato and Cohen, op. cit.; Andrew Arato, "Civil Society vs. the State: Poland 1980--1981," *Telos* 47 (1981): 23--47; Jean Cohen, *Class and Civil Society: The Limits of Marxian Critical Theory* (Amherst: University of Massachusetts Press, 1982).

[n11.] See, e.g., John Austin, *Lectures on Jurisprudence*, ed. B.H. Cambell (London: Longmans, 1885); John Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (1832; rpt. London: Longmans, 1954); Carl Schmitt, *The Concept of the Political*, trans. G. Schwab (New Brunswick: Rutgers University Press, 1976); Carl Schmitt, "The Plight of European Jurisprudence," trans. G.L. Ulmen, *Telos* 83(1990): 35--70. Cf. P. Piccone and G.L. Ulmen, "Schmitt's 'Testament' and the Future of Europe," *Telos* 83(1990):3--34.

[n12.] Jurgen Habermas, "Modernity versus Postmodernity," *New German Critique* 22(1981): 10.

[n13.] See, e.g., Otto Kirchheimer, *Politics, Law and Social Change*, ed. and trans. F.S. Burin and K.L. Schell (New York: Columbia University Press, 1969).

[n14.] See, e.g., the "Introduction" of Keith Tribe to Otto Kirchheimer and Franz Neumann, *Social Democracy and the Rule of Law*, edited and translated by Keith Tribe (London: Allen and Unwin, 1987).

[n15.] Franz Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986). Originally titled "The Governance of the Rule of Law," Ph.D. diss., London School of Economics, 1935, supervised by Harold Laski and Karl Mannheim; translated into German as *Die Herrschaft des Gesetzes* (Frankfurt A.M.: Suhrkamp, 1980).

[n16.] Roger Cotterrell, "The Rule of Law in Corporate Society: Neumann, Kirchheimer, and the Lessons of Weimar," *Modern Law Review* 51(1988): 126--140.

[n17.] F. Neumann, *Behemoth* (New York: Oxford University Press, 1942).

[n18.] See, e.g., F. Neumann, "The social significance of the basic laws in the Weimar Constitution," *Economy and Society* 10(1981): 329-347. (Originally published as *Die Politische and Soziale Bedeutung der Arbeitsgerichtlichen Rechtsprechung* [Berlin, 1979].)

[n19.] Hugo Sinzheimer, *Arbeitsrecht und Soziologie*, ed. Otto Kahn-Freund, 2 vols. (Munich: Europäische Verlagsanstalt, 1976). Cf. O. Kahn-Freund, *Labor Law and Politics in the Weimar Republic* (Oxford: Basil Blackwell, 1981), chapter 2.

[n20.] See, e.g., Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Munich and Leipzig, 1913); Rudolph von Ihering, *Der Geist des römischen Rechts* (Berlin: 1866--1871) and *Der Zweck im Recht*, 3rd ed. (Berlin: 1892); Karl Renner, *The Institution of Private Law*, trans. Agnes Schwarzschild (London: Routledge and Kegan Paul, 1949); Hans Kelsen, *Allgemeine Staatslehre* (Leipzig and Vienna: 1925) and *Reine Rechtslehre* (Leipzig and Vienna: 1934); George Jellinek, *Gesetz und Verordnung* (Freiburg: 1887); Otto Bauer, *The Austrian Revolution*, trans. H.J. Stenning (London: L. Parsons, 1925).

[n21.] See, e.g., Ernst Frankel: "Des Dritte Reich als Doppelstaat," *Reformismus und Pluralismus*, edited by F. Esche and F. Grube (Hamburg: 1973), originally published in 1937; *The Dual State*, trans. Edward Shils, E. Lowenstein, Klaus Knorr (Garden City: Doubleday, 1966); and *Zur Soziologie der Klassenjustiz und Aufsätze zur Verfassungskrise 1931--1932* (Darmstadt: 1968).

[n22.] Otto Kahn-Freund, *Labor Law and Politics in the Weimar Republic* (Oxford: Basil Blackwell, 1981).

[n23.] Hermann Heller, *Recht und Staat in Geschichte und Gegenwart*, vol. 68 (Tübingen, 1930). Cf. Klaus Meyer, "Hermann Heller--Eine biographische Skizze," in *Politische Vierteljahresschrift* 8(1967).

[n24.] Otto von Guericke, *Natural Law and the Theory of Society, 1500--1800*, trans. Ernest Barker (Cambridge: Cambridge University Press / Boston: Beacon Press, 1957). Originally published 1934.

[n25.] Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89(1976): 1685; "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28(1979):205.

[n26.] See, e.g., the later writings of Franz Neumann, *The Democratic and the Authoritarian State* (New York: Free Press, 1957).

[n27.] Jürgen Habermas, "Law and Morality: Two Lectures," *The Tanner Lectures* (Cambridge: Harvard University Press, 1986); *The Theory of Communicative Action*, vol. 2, trans. T. McCarthy (Boston: Beacon Press, 1987); *The Philosophical Discourse of Modernity*, trans. F. Lawrence (Oxford: Polity, 1987).

[n28.] J. Habermas, *Theory and Practice*, trans. J. Viertel (Boston: Beacon Press, 1973), chapter 6.

[n29.] Gillian Rose, *The Dialectic of Nihilism* (Oxford: Basil Blackwell, 1984), p. 211.

[n30.] Stephen V. White, *The Recent Work of Jürgen Habermas* (Cambridge: Cambridge University Press, 1988), p. 128.

[n31.] *Ibid.*, p. 135.

[n32.] J. Habermas, "Justice and Solidarity: On the Discussion Concerning 'Stage 6,'" trans. Sherry Weber Nicholsen, *Philosophical Forum* 21(1989): 32-52.

[n33.] Martin Jay, *Fin de Siècle Socialism* (Boston: Routledge, 1988), chapters 1, 9-10.

[n34.] See, e.g., Anthony Giddens, *The Constitution of Society* (Oxford: Polity, 1984), pp. 28--34, 147--57, *passim*.

[n35.] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972--1977*, ed. Colin Gordon (New York: Pantheon, 1980), Chapter 6, "Truth and Power."

[n36.] *Ibid.*, p. 121.

[n37.] See, e.g., Giddens, *op. cit.*

[n38.] Habermas, *Theory of Communication*, vol. 2, pp. 536--539. Cf. White, *op. cit.*

[n39.] See Mark Warren, "When Does Reason Become Power? Weber and Nietzsche," paper presented at 1988 Annual Meeting of Southern Political Science Association (Atlanta, GA: November 3--5, 1988).

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