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Liberal Democracy's Crisis.

What a Forgotten "Frankfurter" Can Still Teach Us*

Contemporary liberal democracy is in crisis. Because there is no more pressing task for a critical theory of politics than a systematic analysis of that crisis, we start with a brief analysis of its contours. The ideas of Franz L. Neumann (1900-1954), the unfashionable first-generation Frankfurt School's political theorist, provide a useful starting point for making sense of that crisis. By this I do not mean that we can mechanically apply Neumann's reflections to our present moment. Rather, Neumann's thinking, though sometimes tension-ridden and incomplete, can help identify key features of a critical analysis of the contemporary crisis.¹ With the dramatic growth of authoritarian populism, and the ascendancy of figures like Recep Erdogan, Jaroslaw Kaczynski, Viktor Orban, and Donald Trump, Neumann's gloomy political and theoretical diagnosis from the late 1940s and early 1950s suddenly seems prescient. By selectively revisiting Neumann, we can begin to grasp what a critical theory of politics and law suited to the present historical moment should look like. As I hope to show, that theory, like Neumann's, will need to be positioned, however uneasily, "between liberalism and Marxism".

LIBERAL DEMOCRACY'S CRISIS

Talk of a "crisis of liberal democracy", of course, is nothing new. Partaking in it unavoidably raises fears of playing the role of the little boy who cried wolf. The fact that overheated crisis rhetoric can help generate, or at least exacerbate, democracy's problems – just think of Carl Schmitt's disastrous role in the late Weimar Republic – might lead us sensibly to hesitate before employing to it.

Whatever its limitations and dangers, the term "crisis" nonetheless remains apposite. At present, it would be misguided to anticipate liberal democracy's imminent demise, at least in contexts where its basic preconditions, as laid out by an

* This paper will appear in German in P. SÖRENSEN and U. BOHMANN, *Kritische Theorie der Politik*, Frankfurt, Suhrkamp, 2019.

¹ In a similar vein: C. FUCHS, "The Relevance of Franz L. Neumann's Critical Theory in 2017: 'Anxiety and Politics' in the New Age of Authoritarian Capitalism", *Triple C. Journal for a Global Sustainable Information Society*, 15/2, 2017, pp. 637-650 [<https://doi.org/10.31269/triplec.v15i2.903>]. Also, D. KRIER, "Behemoth Revisited: National Socialism and the Trump Administration", *Logos: A Journal of Modern Society and Culture*, 16/1-2, 2017 [<http://logosjournal.com/2017/behemoth-revisited-national-socialism-and-the-trump-administration/>]. Neumann's ideas have also been used for interpreting recent Brazilian political transformations: J.R. RODRIGUES, "Society Against the State: The Brazilian Crisis Below the Surface", *Logos*, 15/2-3, 2016 [<http://logosjournal.com/2016/rodriguez/>].

impressive body of political science literature, remain relatively secure. However, it would be no less silly to close our eyes to some disturbing novelties. Liberal democracy's crisis *tendencies*, at any rate, are very real.

For example, what the late Robert Dahl identified as an *essential* precondition for democratic stability, i.e., a relatively widespread *belief* in democracy among both leaders and citizens, has now become precarious, at least if we take the public statements of Orbán, Trump, and other populist demagogues seriously.² Polling data from a broad array of liberal democracies, including those deemed by most social scientists to have successfully "consolidated", points not simply to growing dissatisfaction among citizens with their governments and ruling elites, but arguably with liberal democracy itself. In the US, for example, the percentage expressing approval of military rule has risen from 1 in 16 in 1995 to 1 in 6 at present. Among those born before World War II, 72 percent describe living in a democracy as "essential"; among millennials (i.e., those born in the 1980s and after), the number is a mere 30 percent. 46 percent of respondents to an October 2016 US survey declare that they "never had" or have "lost" their faith in democracy. Notwithstanding some national variations, the US pattern, with younger cohorts more frequently expressing skepticism about democracy and favoring "strong leaders" who do not bother with parliaments and elections, tends to be reproduced elsewhere. If we take such data seriously (and there no reason *not* to do so), principled fidelity to liberal democracy, even within "advanced" democracies, seems to be on the decline.³

But perhaps citizens are merely venting to pollsters but in fact continuing to *act* like democratic citizens? Here as well, a growing body of empirical evidence seems unsettling. Even in OECD liberal democracies, since the 1980s we find striking declines in electoral participation, significant disengagement from mainstream political parties, and heightened rates of electoral volatility. Citizens now participate less than their predecessors in those organizations and institutions (most importantly: parties) that are supposed to mediate between society and the state. When they bother to vote, they do so in increasingly unpredictable and inconsistent ways. Party loyalty has declined almost everywhere.⁴

To be sure, we also arguably observe an upsurge in novel types of political activity (for example, "hacktivism") and mass protest (Occupy, for example), both conventional and unconventional. But that uptick, particularly when it takes the form of diffuse populist appeals directed against elites, can obviously serve as a vehicle for expressing profound dissatisfaction with contemporary liberal democracy and its basic operations. Whether new modes of protest politics can effectively supplement, let alone replace, increasingly precarious organizational linkages between citizens and states (e.g., labor unions, parties) remains, at best, an open question. Too often, protest politics seems, in the context of social acceleration, dynamic and fast-moving but also correspondingly transitory and ephemeral, rarely resulting in meaningful policy shifts, in part because those institutional mechanisms that

² R. DAHL, *On Democracy*, 2nd ed., New Haven, Yale University Press, 2015, p. 147.

³ The polling data are usefully collected in R.S. FOA and Y. MOUNK, "The Signs of Deconsolidation", *Journal of Democracy*, 28/1, 2017, pp. 5-15 [<https://www.journalofdemocracy.org/articles/the-signs-of-deconsolidation/>].

⁴ On these trends: P. MAIR, *Ruling the Void: The Hollowing of Western Democracy*, Verso, New York, 2013, pp. 17-73.

are supposed to make government accountable seem more and more dysfunctional.⁵

As Peter Mair aptly notes, it is not just democratic citizens who are abandoning conventional types of political participation: political *elites* are giving up on key features of recent liberal democracy as well. They tend to view political parties, for example, as mere steppingstones to successful careers, increasingly defined by the politician's ability (1) to make politically diffuse personalistic appeals to a prospective electoral majority and (2) marshal political resources (e.g., campaign donations) from sources well beyond the party rank-and-file. Many of them favor, or at least condone, *technocracy*, particularly when politically convenient, by passing the buck to unelected institutions, including those operating "beyond the nation state" (e.g., the European Central Bank, WTO, etc.), as part of a strategy of diffusing divisive distributional questions. Significantly, the two major institutions modern democracy has developed for mediating between citizens and state authority – political parties and parliaments – tend to get left at the wayside. The present crisis is a crisis of postwar "party democracy" and parliamentarism.⁶

These trends are probably motored, to a substantial degree, by structural economic forces, and especially the fact that since the 1970s the most important political efforts to navigate basic tensions between capitalism and democracy have shifted the arena for meaningful political conflict "upwards and away from the world of collective action of citizens towards ever more remote decision sites where interests appear as 'problems' in the abstract jargon of technocratic specialists".⁷ With a growing array of policies effectively being determined by institutions (e.g., the ECB) and actors distant from and relatively unchecked by popular electorates, conventional modes of democratic participation tend to wither. Why bother investing time or energy in a nationally based trade union or polity party when its impact seems marginal? Although the story is complex and messy, the present political crisis is ultimately also a crisis of *capitalist* democracy, with political elites still unable to identify a political and social mix capable of successfully integrating broad swaths of the populace to the extent that postwar Keynesianism, however briefly, successfully achieved. On Wolfgang Streeck's provocative account, each attempt to do so since the 1970s (i.e. monetarism, massive public debt, privatized Keynesianism) has turned out to be not only tension-ridden but ultimately unstable, with each eventually driving the shift in decision making away from postwar democracy's core institutions.

Predictably, the political gap is now being filled by right-wing populist movements that promise relief to marginalized groups bearing the heaviest burden of neoliberal policies.⁸ Just as predictably perhaps, given neoliberalism's postnational

⁵ On the challenges posed by social acceleration to liberal democracy, see my *Liberal Democracy and the Social Acceleration of Time*, Baltimore, The John Hopkins University Press, 2004.

⁶ P. MAIR, *Ruling the Void*, *op. cit.*, pp. 75-98.

⁷ W. STREECK, *How Will Capitalism End?*, London, Verso, 2016, p. 20. See also Streeck's *Buying Time: The Delayed Crisis of Democratic Capitalism*, London, Verso, 2014. My partial reliance here on Streeck by no means implies an endorsement of his anti-cosmopolitan political proposals. A persuasive response to Streeck's proposals for a renationalization of currency is offered by C. OFFE, *Europe Entrapped*, Cambridge, Polity, 2015.

⁸ Populism, of course, remains a contested term. See J.-W. MÜLLER, *What is Populism?*, Philadelphia, University of Pennsylvania Press, 2016; also, the astute critical response by J. ISAAC, "Is

(e.g., the EU) and (sometimes) global (e.g., WTO) institutional underpinnings, the populist backlash tends to take nationalistic and even xenophobic forms. Why and how populist movements morph into illiberalism and ultimately authoritarianism remains, of course, a complicated matter, as does the best way to characterize the diverse movements at hand. Yet we can be certain of at least one point: growing skepticism about liberal democracy, in conjunction with the widespread – and by no means altogether unfounded – perception that its usual institutional tools (political parties and parliaments) no longer matter enough, provides fertile ground for authoritarianism. Trump and his doppelgänger elsewhere remind us that demagogues, as so often in political history, are again ready to harvest the fruits.⁹

WHY FRANZ L. NEUMANN?

Franz L. Neumann, the early Frankfurt School's political and legal theorist (and, subsequently, a professor of political theory at Columbia University), is pretty much a forgotten figure today, even among those with some working knowledge of Frankfurt critical theory.¹⁰ Yet Neumann's postwar writings, penned prior to his death in a tragic automobile accident in Switzerland in 1954, speak with striking perspicuity to the contemporary crisis.

The central concern of Neumann's late essays, most of which were posthumously collected and edited by his friend Herbert Marcuse in *The Democratic and the Authoritarian State* (1957), is stated concisely in a crucial (1953) essay, "The Concept of Political Freedom". According to Neumann, there was "no doubt that today the citizen's alienation from democratic political power is increasing", and that the resulting growth of mass political apathy was playing "into the hands of demagogues".¹¹ Indeed, Neumann quickly added, it might easily lead to caesarism, or mass-based authoritarianism. After ascribing to the idea of political freedom three

There Illiberal Democracy? A Problem with No Semantic Solution", *Eurozine*, August 9, 2017 [<https://www.eurozine.com/is-there-illiberal-democracy/>]. Of course, populism can take either left-wing or right-wing variants. My focus here is on the latter because (1) right-wing authoritarian populism presently poses the greatest threat to "advanced" democracies and (2) it was Neumann's main object of inquiry.

⁹ As I write, the US political system has been able to withstand, for the most part, Trump's authoritarian and xenophobic preferences to a greater degree than others elsewhere (e.g., Hungary, Poland, Turkey). Nonetheless, there is no question that Trump's political instincts mesh, in key respects, with those of authoritarian right-wing populists elsewhere.

¹⁰ For some insightful recent engagements, however, see M. ISER and D. STECKER (eds.), *Kritische Theorie der Politik. Eine Bilanz*, Baden-Baden, Nomos, 2003; D. KELLY, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann*, Oxford, Oxford University Press, 2003. B. LADWIG, "Die politische Theorie der Frankfurter Schule", in A. BRODOCZ and G.S. SCHAAL (eds.), *Politische Theorien der Gegenwart*, 4th ed., vol. I, Opladen, Springer, 2016, pp. 33-74.

¹¹ F.L. NEUMANN, "The Concept of Political Freedom", in F.L. NEUMANN, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory*, ed. H. Marcuse, New York, Free Press, 1957, p. 190. The argument's basic outlines already appeared in "Die Wissenschaft der Politik in der Demokratie" (1950), in F.L. NEUMANN, *Wirtschaft, Staat, Demokratie. Aufsätze, 1930-1954*, ed. A. SÖLLNER, Frankfurt, Suhrkamp, 1978, pp. 373-392. One of the demagogues Neumann clearly had in mind was Senator Joseph McCarthy. During the 1940s, Frankfurt School scholars vested substantial energy in empirical studies on right-wing (American) demagogues, for example L. LOWENTHAL and N. GUTERMAN, *Prophets of Deceit*, New York, Harper & Brothers, American Jewish Committee, 1949.

core (judicial, cognitive, and volitional) elements, Neumann diagnosed a “crisis of political freedom”: contemporary liberal democracy’s failure to realize political freedom’s rich normative potential opened the door to authoritarian movements that tapped anxiety and fear, emotions that Neumann interpreted as undergirding irrational conspiracy theories and, ultimately, the construction of an or “enemy” whose very existence allegedly represented a life-or-death threat. Irrational anxiety and exclusionary authoritarian politics directed against a despised “other”, on this account, went hand in hand. For Neumann, “Montesquieu correctly observed that fear is what makes and sustains dictatorships”.¹² Carl Schmitt’s *Concept of the Political* (1952), he added, provided a disturbingly vivid expression of how fascism and its apologists had exploited this destructive exclusionary logic.¹³ Despite fascism’s military defeat, the exclusionary logic of friend vs. foe continued to haunt political and social life.

Neumann’s message in “Concept of Political Freedom” was straightforward enough: unless liberal democracy could provide adequate opportunities for informed, active, and efficacious citizenship, it invited authoritarian responses feeding on fear and anxiety. Fear, he argued in the closely related “Anxiety and Politics” (1954), remained ubiquitous in contemporary society and had “begun to paralyze nations and to make men incapable of free decisions”.¹⁴ Only a political and social order that worked not only to reduce irrational, self-destructive fear, but also give citizens substantial opportunities to *thematize* and *act constructively* on their worries, might ward off caesarism. Novel possibilities for consequential political action, or what Neumann dubbed “volitional” freedom, would have to be identified, even if it was probably unrealistic to expect too much from direct mass participation in government decision-making. Under contemporary conditions, “[t]he [proper] model of a democracy is not Rousseau’s construct of an identity of rulers and ruled, but representative of an electorate by responsible representatives”.¹⁵ Even so, representative democracy, in which elected leaders were supposed to be accountable to an alert electorate, had to do much more to link decision making effectively to citizens.

Of course, fear and anxiety rested on *psychological* and *social* sources. With recourse to Freud, “Anxiety and Politics” explored the social psychology of mass movements whose followers uncritically identified, on the base of libidinally charged ties that promised relief from anxiety but in fact intensified it, with caesaristic leaders. Like Theodor Adorno and other figures within the early Frankfurt School, Neumann too uncritically relied on orthodox Freudianism and some of its most controversial tenets. At the same time, he rightly emphasized its explanatory insufficiency: a proper analysis also required attention to the *social* dynamics by means of which fear “can become a cruel weapon in the hands of irresponsible leaders”.¹⁶ Labor’s alienation, experiences of social decline or degradation, and modern competitive society, were the most likely social and historical culprits.

¹² F.L. NEUMANN, “Concept of Political Freedom”, *op. cit.*, p. 194. See also, in the same volume, “Montesquieu”, pp. 96-148.

¹³ F.L. NEUMANN, “Concept of Political Freedom”, *op. cit.*, p. 193, p. 200, n. 102.

¹⁴ F.L. NEUMANN, “Anxiety and Politics”, in F.L. NEUMANN, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory*, *op. cit.*, p. 270.

¹⁵ F.L. NEUMANN, “Concept of Political Freedom”, *op. cit.*, p. 192.

¹⁶ F.L. NEUMANN, “Anxiety and Politics”, *op. cit.*, p. 288.

With his eyes on racism in South Africa and the US, Neumann observed that it was "not only social classes [that] resist their degradation" via regressive mass movements: the anxieties of dominant whites that they "will be degraded through the economic and political rise of Negroes is used in propagandist fashion for the creation of affective mass movements, which frequently take on a fascist character".¹⁷

In the final analysis, however, *neither* anxiety's psychological *nor* its social sources could fully explain the dangers at hand: "The elements of political alienation must be added" to the causal story.¹⁸ For Neumann, fear and anxiety only became *politically* consequential in the context of *political* alienation, e.g., contemporary democracy's failure to realize adequate possibilities for meaningful political action. As Axel Honneth has observed, Neumann worried about the psychological and sociological roots of anxiety because they threatened to "destroy the conditions of uninhibited will-formation in the public sphere".¹⁹ Even more noteworthy, however, he emphasized the dangers of distinctly political failures to combat mass apathy, disinterest, and cynicism, specifically political phenomena that prepared the ground for caesarist leaders scorning the normal rules of the game and successfully exploiting "the inability of the citizen to make individual decisions".²⁰

On Neumann's account, it would be a terrible mistake to reduce critical theory to psychology or sociology. They helped make sense of fear and anxiety but could only go so far in explaining its dangers: Neumann insisted on advancing a critical *political* theory. "Anxiety and Politics" intimated that it was unrealistic, given modern social complexity, to hope for a *complete disappearance* of irrational anxieties, though social and economic reforms could surely mitigate their perils. Nonetheless, an improved democratic *political* order, providing citizens with a real chance to act on their fears in productive ways, could help carry the burden of counteracting authoritarian trends. If the ambitious ideal of political freedom could be more fully realized in modern democratic states, Neumann suggested, then the "freedom from fear" boldly announced by US President Franklin D. Roosevelt's famous "Four Freedoms" speech *might* gain traction.²¹

A critical theory of contemporary democracy necessarily relied on psychology and sociology. Yet, *political* theory – i.e., a critical minded account of both modern democracy's normative potentials and its real-life failures – remained pivotal. With echoes of Montesquieu, fear had political-institutional roots and relied on an identifiably political dynamic²². Despite the initial overlap between Neumann's diagnosis and that of Adorno and others in the Frankfurt School, he envisioned political

¹⁷ *Ibid.*, p. 290.

¹⁸ *Ibid.* Neumann's critical point about the limitations of theories of social (and psychological) alienation remains, I believe, pertinent in the context of the ongoing revival of interest in alienation among fourth-generation critical theorists (e.g., Rahel Jaeggi, Hartmut Rosa). For a recent attempt to reintroduce the concept of political alienation into contemporary critical theory, see P. SØRENSEN, *Entfremdung als Schlüsselbegriff einer kritischen Theorie der Politik*, Baden-Baden, Nomos, 2015.

¹⁹ A. HONNETH, "Anxiety and Politics': The Strengths and Weaknesses of Franz L. Neumann's Diagnosis of a Social Pathology", *Constellations*, 10/2, 2003, p. 253 [<https://doi.org/10.1111/1467-8675.00327>].

²⁰ F.L. NEUMANN, "Anxiety and Politics", *op. cit.*, p. 290.

²¹ *Ibid.*, p. 270.

²² See also Neumann's unfinished "Notes on the Theory of Dictatorship", in F.L. NEUMANN, *The Democratic and the Authoritarian State*, *op. cit.*, pp. 233-256.

theory as fundamentally constitutive of critical theory in a way they never did. One reason, as we have emphasized, was basically diagnostic: the “malfunctioning of the democratic state”, whose symptoms and causes included “the growing complexity of government; the growth of bureaucracies in public and private life; the concentration of private social power; the hardening of political parties into machines which [...] tend to exclude newcomers”, generated political cynicism and the commonplace view that politics was nothing but “a struggle between small cliques”, with parties reduced to “machines without mass participation”.²³ In some contrast to Adorno and others within first-generation Frankfurt critical theory, Neumann’s late writings took political and legal institutions – as relatively autonomous sources of dangerous forms of political alienation – seriously: without proper attention to them, critical theory could not make sense of the authoritarian perils faced by contemporary society.

Some limitations notwithstanding, Neumann’s account captures central features of our contemporary situation, where cynicism is fueled by a political system that no longer seems responsive to citizens, many of whom are now embracing more-or-less authoritarian leaders promising relief from their worries, irrational or otherwise. Neumann would not have been surprised to learn that such movements claim popular credentials while making mincemeat of democracy, or that they *cultivate* and, when gaining power, *institutionalize* irrational fear and anxiety, by an exclusionary, oftentimes xenophobic brand of friend vs. foe politics. At times, they even seem to be following Schmitt’s playbook. Some of their key figures, at any rate, are in fact admirers of Schmitt and his brand of radically nationalistic and authoritarian plebiscitarianism.²⁴ Racialized appeals to social groups facing stagnation or decline – in the US, the white male working class – make up a key part of the story. Yet those social factors only take us so far in understanding populism: they need to be supplemented with a hard-headed critical analysis of the democratic state’s failings. As Neumann presciently anticipated, we now need a critical-minded political theory that situates the reemergence of mass-based authoritarianism in the context of contemporary democracy’s crisis tendencies. Without such an approach, we simply cannot do justice to what ultimately remains a *political* phenomenon.

Astute commentators have noted Neumann’s growing appreciation in the late 1940s and early 1950s for liberal political philosophers (e.g., John Stuart Mill) and social theorists (especially Max Weber); some have interpreted the trend as evidence of a certain de-radicalization.²⁵ Much can be said in defense of this reading. Yet, it risks obscuring the shift’s sound rationale: though it would be wrong “to

²³ F.L. NEUMANN, “Concept of Political Freedom”, *op. cit.*, p. 190; A. HONNETH, “Anxiety and Politics”, *op. cit.*, p. 290.

²⁴ For example, one of Putin’s recent political advisers, Alexander Dugin, is a well-known Schmitt connoisseur.

²⁵ H. BUCHSTEIN, “A Heroic Reconciliation of Freedom and Power: On the Tension Between Democratic and Social Theory in the Late Work of Franz L. Neumann”, *Constellations*, 10/2, 2003, pp. 228-246 [<https://doi.org/10.1111/1467-8675.00326>]; H.S. HUGHES, “Franz Neumann Between Marxism and Liberal Democracy”, in D. FLEMING and B. BAILYN (eds.), *The Intellectual Migration: Europe and America, 1930-1960*, Cambridge, Harvard University Press, 1969, pp. 446-462.

reject Marxism root and branch", Marxism was inadequate as both a theory of *political action* and a theory of *political institutions*.²⁶ To make sense of liberal democracy's dysfunctions, however, critical theory needed both, and from Neumann's perspective, the liberal political tradition provided a useful starting point. Marxist theory suffered "from a misunderstanding: the confusion of sociological analysis with the theory of political action".²⁷ Despite some overlap with Judith N. Sklar's more recent "liberalism of fear", Neumann never tethered his postwar theoretical reflections to a minimalist, overly cautious brand of liberalism.²⁸ On the contrary, as we have seen, on his view only a more robust realization of political freedom's three (legal, cognitive, and volitional) moments could ward off authoritarianism. In other words: the rule of law and civil liberties, and ultimately only a flexible and dynamic version of representative democracy offering enhanced possibilities for meaningful political action, could get the job done. Situated between "Marxism and liberalism", Neumann's final writings recognized that Marxism needed to be supplemented – and, in some cases, significantly amended – by a forward-looking political liberalism that could help interpret and then counter political alienation.

Although Neumann died before he could pursue this project satisfactorily, many of its key features are found in major second-generation Frankfurt School figures – most prominently, the young Jürgen Habermas.²⁹ In Habermas' early writings (for example, the landmark *Structural Transformation of the Public Sphere* [1962]), as in Neumann's post-1945 contributions, we encounter a Neo-Marxist account of capitalism fused with a deep appreciation for the latent normative potentials of modern liberal democracy.

The mature Neumann's extensive engagement with Weber's political sociology is probably one reason why a strong streak of *etatism* characterizes his postwar writings, which sometimes pointedly rejected orthodox Marxist ideas of the «primacy of production»: "[t]he primacy of politics over economics was always a fact, which was at times glossed over, at times openly recognized".³⁰ Like other leftists

²⁶ F.L. NEUMANN, "Approaches to the Study of Political Power" (1950), in F.L. NEUMANN, *The Democratic and the Authoritarian State*, *op. cit.*, p. 11. On Mill, see F.L. NEUMANN, "Intellectual and Political Freedom" (1954), in H. MARCUSE (ed.), *The Democratic and the Authoritarian State*, *op. cit.*, pp. 201-215.

²⁷ F.L. NEUMANN, "Economic and Politics in the Twentieth Century" (1951), in F.L. NEUMANN, *The Democratic and the Authoritarian State*, *op. cit.*, p. 263. In other words, Marxists mistakenly think they can deduce a theory of political action from "sociological" claims (about the state's class nature, for example). Neumann's engagement with interwar Marxists (e.g., Hilferding) is discussed at length by J. BAST, *Totalitärer Pluralismus*, Tübingen, Mohr, 1999.

²⁸ J.N. SHKLAR, "The Liberalism of Fear", in J.N. SHKLAR, *Political Thought and Political Thinkers*, ed. S. Hoffmann, Chicago, University of Chicago Press, 1998, pp. 3-21. Montesquieu, for example, is an inspiration for both Neumann and Shklar. Shklar co-directed my dissertation on Neumann and Otto Kirchheimer (later published as *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, Cambridge, MIT Press, 1994): Shklar admired Neumann and much of his work, though she could not abide his Marxism.

²⁹ And also, I would add, in some writings of Ingeborg Maus, Claus Offe, and Ulrich Preuss.

³⁰ F.L. NEUMANN, "Economics and Politics in the Twentieth Century", *op. cit.*, p. 268. On Neumann's "left-etatism", see H. BUCHSTEIN, "A Heroic Reconciliation of Freedom and Power: On the Tension Between Democratic and Social Theory in the Late Work of Franz L. Neumann", *op. cit.*, pp. 231-233.

of his generation, Neumann shared the widespread faith in the potentially rationalizing force of organized political power as an instrument of liberation. Unlike orthodox Marxists, however, he thought Weber provided useful conceptual tools for understanding the state and political power, which he defined, in a conventionally Weberian spirit, as “social power focused on the state. It involves control of other men [sic] for the purpose of influencing the behavior of the state, its legislative, administrative and judicial activities”.³¹

Today, Neumann’s old-fashioned (leftist) statism seems out-of-date wherever libertarians and neoliberals have successfully delegitimized the state, and even many on the left have become uncomfortable with conventional notions of state power as encapsulating a “monopoly on legitimate coercion”. This is not the place to debate the merits and demerits of the mature Neumann’s Weberian-Marxist state theory. Nonetheless, it potentially provides a useful corrective to fashionable notions of “governance”, notions that often, as Claus Offe has astutely observed, refer to “diverse and contradictory semantic contents and associations” and function to veil power and domination.³² Too often, ideas of governance rest on crude and caricatured concepts of the state, concepts that tend *a priori* to reduce it to little more than hierarchical, organized *violence*; Neumann probably would have expressed skepticism. To the extent that the present political crisis can be interpreted as a backlash against so-called “global governance”, operating in conjunction with a reassertion of state sovereignty (and the modern state’s coercive instruments), Neumann’s unfashionable ideas about the modern state perhaps deserve a second look.

In conversations with students and friends, Neumann expressed frustration that the creative turn his postwar writings had taken, as evinced especially by “The Concept of Political Freedom”, was being ignored by colleagues.³³ In hindsight, it is easy to see why not only Neumann’s contemporaries, but many subsequent democratic theorists, neglected them: they clashed with the relatively self-satisfied stories about postwar democracy that soon flourished among scholars and pundits amid decades of pretty much uninterrupted economic growth. The relatively brief intellectual hegemony of “elite” and “pluralist” theories of democracy overlaps, interestingly, with what in hindsight looks like a brief “golden age” of OECD capitalism. Yet, the once seemingly permanent equilibrium between capitalism and democracy now appears as an historical exception: the relationship between capitalism and democracy remains basically tension-ridden and unstable, a fact that would hardly have surprised Neumann.³⁴ Despite his legitimate skepticism about Marxism as both normative theory and empirical political sociology, Neumann never rejected Marxism “root and branch”. It remained an important toolkit, in part because no analysis of *capitalist* liberal democracy could fully dispense with it.

Revealingly, the main reason for Neumann’s much-discussed antipathy to his fellow Frankfurter Friedrich Pollock’s theory of state capitalism was *not* per se the major role Pollock attributed to political or state institutions; Neumann conceded

³¹ F.L. NEUMANN, “Approaches to the Study of Political Power”, *op. cit.*, p. 3.

³² C. OFFE, “Governance: An ‘Empty Signifier?’”, *Constellations*, vol. 16, n° 4, 2009, p. 551.

³³ R. ERD (ed.), *Reform und Resignation: Gespräche über Franz L. Neumann*, Frankfurt, Suhrkamp 1985, pp. 183-236.

³⁴ W. STREECK, *How Will Capitalism End?*, *op. cit.*

that the state played a pivotal role in contemporary capitalism. Instead, what irritated him was the empirically tendentious implication that state capitalism represented a more-or-less perfectly integrated social and political formation, one in which material conflicts could be successfully suppressed.³⁵ Neumann was right to reject that thesis when it first emerged in the early Frankfurt School and was quickly embraced by Pollock, Max Horkheimer, Adorno, and others. In the shadows of the global 2008 financial crisis and recent "Euro crisis" (at the very latest!), his skepticism seems even more prophetic.

Despite many theoretical and political affinities with Neumann, Habermas's view of postwar capitalism, unfortunately, occasionally echoed Pollock and Horkheimer. In *Legitimation Crisis* (1973) and then his magnum opus, *Theory of Communicative Action* (1981), Habermas pictured the state's administrative system as successfully defusing traditional forms of economic and class-based social conflict, by means of a series of bureaucratically achieved welfare compensations and rewards. Even if class inequality remained a feature of capitalism, the postwar administrative apparatus had efficaciously pacified class conflict to such an extent that "the unequal distribution of social rewards" could "no longer be traced back to class positions in any unqualified way". Class conflict was losing its "structure-forming power for the lifeworlds of social groups", with new types of class-unspecific reification apparently gaining in significance.³⁶ Economic crisis tendencies were not merely "processed, flattened out, and intercepted, but also [...] inadvertently displaced into the administrative system".³⁷

Ironically, just as Habermas was putting the final touches on *Theory of Communicative Action*, the postwar Keynesian class compromise was coming undone in the UK, USA, and elsewhere. To the extent that the "legal institutionalization of collective bargaining" constituted the basis for the "pacification of class conflict in the social-welfare state", for example, a dramatically decreasing number of workers even in "advanced" capitalist countries are subject to union contracts.³⁸ Not surprisingly, we find massive evidence of the alarming degree to which capitalist-based economic inequality directly shapes social existence. Just to mention one example: between the Second World War and the 1980s, men's incomes in the US could only be explained to a decreasing degree by their fathers' income. By 2000, following twenty years of attacks on the welfare state, the number matched pre-New Deal levels and was well over twice what it had been in 1950. 36 % of US children whose parents find themselves in the bottom fifth in terms of wealth distribution will remain there; those born into upper income brackets are also much more likely to remain there than just a few decades ago. Like other developed capitalist societies, the US assuredly remains one in which the category of social class

³⁵ For a discussion, see: W.E. SCHEUERMAN, *Between the Norm and the Exception. The Frankfurt School and the Rule of Law*, Cambridge, MIT Press, 1994, pp. 149-53.

³⁶ J. HABERMAS, *Theory of Communicative Action*, vol. 1, trans. T. McCarthy, Boston, Beacon Press, 1984 [1981], pp. 348-49.

³⁷ J. HABERMAS, *Theory of Communicative Action*, vol. 2, trans. T. McCarthy, Boston, Beacon Press, 1984 [1981], p. 344.

³⁸ *Ibid.*, p. 347. In the US, about 11 % of wage and salary workers are now union members, with the number being even lower in the private sector. The numbers are higher in Western Europe, of course, but there as well they have declined substantially since the 1970s.

remains not only disturbingly central, but where class inequalities are growing dramatically.³⁹

Neumann's prescient postwar political diagnosis, in short, is once again pertinent. The "malfunctioning of the democratic state" seems even more manifest today, and just as Neumann predicted, authoritarian mass movements are ready to pick up the slack by exploiting fears and anxieties. Tensions between capitalism and democracy remain a key part of that story.

CRITICAL THEORY AND THE RULE OF LAW

Among authoritarian populism's most ominous tendencies is its disdain for the rule of law, or what Neumann in "Concept of Political Freedom" dubbed legal or "judicial liberty". When in power, right-wing populists tend to remodel legal and constitutional practice according to the adage "for my friends everything, for my enemies, the law". That is, they transform law and courts into a discriminatory weapon against their political "enemies", while looking the other way when allies and "friends" skirt the law's boundaries.⁴⁰ Authoritarian populists tout their fidelity to constitutional government and the rule of law, when in fact crudely instrumentalizing both as part of the struggle against some "other" (e.g., immigrants, racial minorities, or the "liberal elite"). Conveniently, that strategy masks the stunning facts of elite-level corruption and the hollowing-out of the liberal democratic state's most valuable social achievements.

In this vein, Donald Trump scored points among otherwise skeptical anti-statist US conservatives during his 2016 campaign by attacking then President Obama's supposedly "lawless" executive orders defending immigrants, vigorous environmental protections, and a full-bodied interpretation of the Affordable Care Act ("Obamacare"). After winning the presidency, President Trump rapidly reversed course by issuing a volley of executive decrees, including his controversial "Muslim ban" prohibiting entry to the US by refugees and visitors from majority Muslim countries. Trump pays lip service to the rule of law, when in fact reducing it to nothing more than *authoritarian legalism*, i.e., "law and order", with its main targets being black protestors (i.e., Black Lives Matter), undocumented immigrants, and others whom Trump apparently considers a threat to "real Americans". While insisting on a strict and repressive enforcement of existing statutes when it aids his assault on marginalized groups and political opponents, he simultaneously views his own efforts – and those of allies – as above the law. Flagrant corruption and conflicts-of-interest within his Administration are pushed aside; Trump has actively resisted – and probably obstructed – efforts to investigate Russian collusion in the 2016 election; he pardons those (e.g., the racist, xenophobic Sheriff Arpaio) whom courts have determined to have acted illegally; he views the US Department of Justice and Attorney General as extensions of his own army of personal lawyers. Most ominously perhaps, he has "unchained" customs and border agents, as well as local police departments, from general rules and federal legal directives that have functioned, with some success, to check their substantial discretionary powers.

³⁹ R. WILKINSON and K. PICKETT, *The Spirit Level: Why Greater Equality Makes Societies Stronger*, New York, Bloomsbury, 2009, pp. 160-161.

⁴⁰ J.-W. MÜLLER, *What is Populism?*, *op. cit.*, pp. 60-68.

Massive official discretion, it seems, is acceptable so long as it serves the regime's political agenda and Trump's "friends". Not surprisingly, general law also goes out the window in the context of Trump's White House "deals" with large corporations. His widely publicized wrangling with the Carrier Corp., concessions from Boeing over Air Force One's price tag, threats to penalize automakers for moving production abroad, high-profile deal making with corporate leaders at White House meetings: none of this coheres with the rule of law.

If contemporary critical theory is going to make sense of – and help resist – the ongoing attack on law-based government, it needs a sufficiently supple account of the rule of law. Here as well, Neumann's writings offer a useful springboard.

In the US, libertarians and liberals have responded vocally to Trump's anti-legalism. Their retort, unfortunately, tends to rest on a view of the rule of law as necessarily married to "market economies".⁴¹ On the left, the response has been somewhat muted. Mark Tushnet, Harvard law professor and dean of US-based critical legal scholarship, refuses to criticize Trump's anti-legalism. Why? The idea of the rule of law is "almost entirely without content". Trump, it seems, cannot be coherently accused of expressing contempt for the rule of law: "if there's no there there [i.e., regarding the concept of the rule of law], I can't see how you could be contemptuous of 'it'". Tushnet's anti-formalist jurisprudence and legal skepticism necessarily prohibit him from preserving even a modest version of the rule of law. By day's end, Tushnet deems it naïve – and potentially counterproductive – to criticize Trump for his (alleged) hostility to law-based government.⁴²

For its part, the leftist political journal *Jacobin* digs up the carcass of orthodox Marxism to attack liberals worried about Trump's legal infidelities. The "'rule of law' and other bourgeois norms", we are told, "are hardly a good check on presidential mischief". Offering nothing but a "thin veneer of legal formality", the rule of law functions to mask capitalist injustices, not potentially check or restrain them. All Trump has done is peel back the superficial legal façade "to reveal the ugly, rotten germ of authoritarianism that was latent all along" in the liberal capitalist state.⁴³

The fatal problem with this position, as we should recognize from the debris of orthodox Marxist legal theory, is that it cannot distinguish sufficiently between liberal-democratic and authoritarian "bourgeois" states; the latter apparently represents the former's hidden face, a face that reveals its true features during dire emergencies. Because of its economic reductionism, this position simply ignores familiar ways in which the rule of law provides legal security and personal freedom not only to privileged but also socially subordinate groups: "As compromised as the Rule of Law is and always has been", the radical lawyer Chase Madar rightly

⁴¹ P. GOWDER, "The Trump Threat to the Rule of Law and the Constitution", *Niskanen Center*, February 3, 2017 [<https://www.niskanencenter.org/trump-threat-rule-law-constitution/>].

⁴² The comments come from Tushnet's blog, "Scholars Across the Political Spectrum", June 4, 2016 on the « Balkinization » blog [<https://balkin.blogspot.com>]: M. TUSHNET, "Scholars Across the Political Spectrum", Blog *Balkinization*, June 4, 2016 [<https://balkin.blogspot.com/2016/06/scholars-across-political-spectrum.html>].

⁴³ J. VON MANALASTAS, "The Rule of Law Won't Save Us", *Jacobin*, April 26, 2016 [<https://www.jacobinmag.com/2017/04/law-constitution-trump-president-abuse-power/?curator=MediaREDEF>].

notes, “we would be wrong to discard it entirely”.⁴⁴ The rule of law constitutes more than a thin veneer for capitalist (and other forms of) domination: it potentially checks and counters their myriad dangers.

Neumann can help us sketch out an alternative, more nuanced vision of the rule of law. Like contemporary radicals, Neumann never denied the rule of law’s role in masking illegitimate power and social inequality. Unlike them, he allied with liberals who highlight its protective functions and normative merits. He parted with mainstream liberals, of course, by refusing to close his ideas to the rule of law’s more troublesome political and economic uses. His approach, which ably fuses social critique with the requisite normative sensibilities, is precisely what we need today.

On Neumann’s view, the modern rule of law always demanded that state action only transpire when based on clearly promulgated, public, general norms; everything government did had to be traceable to general statutes announced in advance. This simple intuition only carried sufficient weight, however, if law offered adequate checks on state officials. “It is the most important and perhaps the decisive demand of liberalism that interference with the rights reserved to the individual is not permitted on the basis of individual but only on the basis of general laws”.⁴⁵ When instead imprecisely defined to permit *any* conceivable activity by state officials, as Neumann accused legal positivists (for example, Hans Kelsen) of condoning, legal statutes became empty: they could no longer restrain officials in minimally necessary ways. Generality required that “the essential facts to which the norm refers are clearly defined” and references to vague or controversial moral standards (e.g., “in good faith”, “unconscionable”) minimized.⁴⁶ Generality was also indispensable to judicial independence, a crucial feature of legal liberty. When statutes ceased to constitute “a hypothetical judgment of the state regarding the future conduct of its subjects”, but instead were retroactive, or so vaguely formulated as to invite judges to single out individuals without reference to some rule, judges became nothing more than ad hoc administrators.⁴⁷

When so conceived, the rule of law performed a key politico-ideological function: “[t]o say that laws rule and not men [*sic*] may [...] signify that the fact is to be hidden that men rule over other men”.⁴⁸ The rule of law’s seeming impartiality veiled the political (and social) power of those groups – most importantly, privileged bourgeois groups – that tended to dominate state decision making. The rule of law also performed basic economic functions. Classical capitalism demanded “general laws as the highest form of purposive rationality, for such a society [was] composed of entrepreneurs of about equal value”.⁴⁹ Equal treatment before the law went hand in hand with a competitive economy whose key players were roughly

⁴⁴ C. MADAR, *The Passion of Bradley Manning*, London, Verso, 2013, p. 123.

⁴⁵ F.L. NEUMANN, “The Change in the Function of Law in Modern Society” (1937), in F.L. NEUMANN, *Democratic and Authoritarian State*, *op. cit.*, p. 31.

⁴⁶ *Ibid.*, p. 28.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p. 168.

⁴⁹ *Ibid.*

equal.⁵⁰ For Neumann, the main dilemma at hand was that the rule of law's economic presuppositions vanished with the unavoidable transition from competitive to organized or monopoly capitalism. Although legal reality during competitive capitalism never seamlessly meshed with strict models of the rule of law, contemporary monopoly capitalism demanded, in both qualitatively and quantitatively unprecedented ways, discretionary and increasingly specialized legal interventions or "individual measures", inconsonant with conventional ideas of general or formal law. When facing a large firm or bank, governments necessarily pursued, either *de jure* or *de facto*, individual measures, often doing so simply to stabilize a crisis-prone economy.

In other words, legal generality – for Neumann, the mainstay of the rule of law – increasingly *clashed with* contemporary capitalism. Accordingly, Neumann would *not* have been surprised by the dramatic demotion of general rules of law during the recent 2008 financial and subsequent "Euro" crises, a demotion that entailed a vast increase in discretionary decision making disproportionately favoring large banks and corporations.⁵¹ Nor would he be startled by the striking preference among Trump and his business allies for ad hoc wheeling-and-dealing: economic policy via individualized executive branch deal making, with noncompliant firms facing the President's twitter crossfire, not only makes political sense for Trump, but it meshes well with globalizing capitalism's seeming "elective affinity" with anti-formal law and non-traditional modes of legal decision making. Under contemporary social and economic conditions, capitalism's once erstwhile dependence on strict general rules undergoes decay.⁵²

To his credit, Neumann also underscored the rule of law's ethical or moral functions, functions that operated even amid injustice and inequality. Though a product of bourgeois-liberalism, the rule of law provided basic protections potentially enjoyed by a broad array of social groups:

The generality of laws and the independence of the judge guarantee a minimum of personal and political liberty [...] Generality of the laws and independence of the judge, as well as the doctrine of the separation of powers, have therefore purposes that transcend the requirements of free competition [...] Equality before the law is, to be sure, "formal", that is, negative. But Hegel, who clearly performed the purely-formal nature of liberty, already warned of the consequences of discarding it.⁵³

Judicial liberty, Neumann similarly asserted in "Concept of Political Freedom", helped guarantee "a minimum of freedom, equality, and security", and its ethical or moral function should be viewed as ultimately transcending its political-ideological and economic functions.⁵⁴

⁵⁰ A view shared by Friedrich Hayek, except that Hayek believed that a return to classical capitalism was both possible and desirable; Neumann obviously did not.

⁵¹ On the US response to the 2008 crisis, and its extensive reliance on open-ended emergency-economic discretion, see P.A. WALLACH, *To the Edge: Legality, Legitimacy, and the Response to the 2008 Financial Crisis*, Washington, D.C., Brookings Institution Press, 2015. On similar trends in Europe, J. WHITE, "Emergency Europe", *Political Studies*, 63/2, 2015, pp. 300-318.

⁵² Inspired by Neumann, I pursue this line of inquiry in my *Frankfurt School Perspectives on Globalization, Democracy, and the Law*, London, Routledge, 2008, pp. 13-46.

⁵³ F.L. NEUMANN, "Change in the Function of Law", *op. cit.*, p. 42.

⁵⁴ F.L. NEUMANN, "Concept of Political Freedom", *op. cit.*, p. 170.

“The Concept of Political Freedom” *both* highlighted the rule of law’s indispensable role in buttressing political freedom *and* law’s limitations: “power cannot be dissolved in legal relationships”.⁵⁵ The liberal-legalist utopia of a political and social order seamlessly regulated by perfectly calculable, predictable, strict general rules “does not work. It never did and never could”.⁵⁶ Partly because of juridical liberty’s limits, a free society would have to help maximize opportunities for cognitive and volitional freedom, in other words: significant possibilities for a well-informed, active citizenry. In this manner, Neumann effectively circumvented one possible criticism of his version of critical theory, namely that he had offered an overly “legalistic” vision of freedom that failed to do justice to its other attributes. Although a free society should strive to realize a robust instantiation of the rule of law, he acknowledged that there might be legitimate reasons for compromising it. The rule of law has been widely associated with constancy and stability in the law, for example, yet “[n]o political system is satisfied with simply maintaining acquired rights [...] [N]o system, even the most conservative one (in the literal meaning of the term) can merely preserve; even to preserve it must change”.⁵⁷ Legal constancy stood, unavoidably, in tension with of social change and dynamism.

Just as legal liberty constituted a necessary yet insufficient condition for political freedom, so too did *legal* theory represent a crucial, yet limited, element of a broader *political* theory of contemporary democracy. The widespread tendency to quarantine legal from political theory simply made no sense partly because the “crisis of political freedom” was, in part, a crisis of juridical liberty – in other words, a failure institutionalize the rule of law and basic rights in sufficiently satisfactory ways. While noting the necessary limits of legal liberty, “Concept of Political Freedom” accordingly expressed anxieties about contemporary democracy’s failure to secure a sufficient modicum of it. Unless liberal society could figure out how to preserve the rule of law in creative and novel ways, democratic citizens would have legitimate grounds for concern. Liberal democracy needed to live up to the untapped potential of modern ideas of freedom. It would likely fail to do so, however, if it sacrificed too much of the rule of law.

With the rule of law now facing direct attacks from Trump and others, here Neumann’s postwar agenda seems pertinent as well. If we are to ward off the specter of authoritarian populism and the crisis of democracy, we could do worse than by determining how the rule of law can and should be realized under the conditions of globalizing capitalism.

CONCLUDING REFLECTIONS

Based on my discussion, it should be clear why I cannot endorse the criticism, recently voiced by Nancy Fraser and perhaps shared by Axel Honneth, that the ongoing revival of interest in political and legal theory among contemporary

⁵⁵ *Ibid.*, p. 170.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p. 172. On legal constancy as constitutive of the rule of law, see L.L. FULLER, *The Morality of Law*, New Haven, Yale University Press, 1964, pp. 79-81.

Frankfurt critical theorists represents a troublesome "kind of politicism [...] or legalism", or "philosophy of law, political theory disconnected from social theory".⁵⁸ Nor can I embrace the deep hostility to law now being endorsed by some third and fourth generation critical theorists, a deep hostility that strikes this author as politically misconceived given the reemergence of right-wing authoritarianism.⁵⁹ As the neglected figure of Franz Neumann helps recall, political and legal theory needs to go hand in hand with the critique of capitalism; critical theory also needs an appropriately nuanced view of modern law. If serious about developing a response to democracy's present crisis, critical theory also has little to gain by borrowing heavily from fashionable variants of poststructuralism. Although I cannot fully defend this claim here, my impression is that when we scratch below poststructuralism's shiny veneer, we generally encounter a warmed-over legal skepticism, incapacity to do proper justice to the normative core of modern liberal democracy (and especially the key idea of *freedom*), and a kneejerk antistatism.⁶⁰

Contemporary critical theorists face tough questions about its philosophical bearings. Should its basic contours, for example, be Kantian, Hegelian, or Marxist? And how should they relate to political and legal theory, as well as social theory and the empirical social sciences? The original Frankfurt School's political theorist, Franz L. Neumann, will only take us so far in answering those deep and difficult questions. As a starting point for tackling the ongoing crisis of liberal democracy, however, Neumann's version of critical theory, situated "between Marxism and liberalism", offers an impressive start.

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⁵⁸ N. FRASER, "An Astonishing time of Great Boldness: On the Politics of Recognition and Redistribution", *Eurozine*, August 15, 2015 [<https://www.eurozine.com/an-astonishing-time-of-great-boldness/>]. For my response, see: W.E. SCHEUERMAN, "Recognition, Redistribution, and Participatory Parity: Where's the Law?", in B. BARGU and C. BOTTICI, *Feminism, Capitalism, and Critique: Essays in Honor of Nancy Fraser*, New York, Palgrave Macmillan, 2017, pp. 139-156. On Honeth's worries about legalism, my "Recent Frankfurt Critical Theory: Down on Law?", *Constellations*, 24/1, 2017, pp. 113-126 [<https://doi.org/10.1111/1467-8675.12218>], along with Honneth's response in the same issue: A. HONNETH, "Beyond the Law: A Response to William Scheuerman", 24/1, pp. 126-132 [<https://doi.org/10.1111/1467-8675.12272>].

⁵⁹ D. LOICK, *Juridismus. Konturen einer Kritischen Theorie des Rechts*, Frankfurt, Suhrkamp, 2017; C. MENKE, *Kritik der Rechte*, Frankfurt, Suhrkamp, p. 205.

⁶⁰ On Foucault's antistatism, see M. DEAN and K. VILLADSEN, *State Phobia and Civil Society. The Political Legacy of Michel Foucault*, Stanford, Stanford University Press, 2016.