Max Horkheimer on Law's Force of Resistance

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Abstract

The law maintains, rather than challenges, the powers that be – or so it is commonly thought. In 'Rackets and Spirit,' a little known and untranslated essay, Max Horkheimer complicates this notion by attributing to law a 'force of resistance'. He contends that, under certain conditions, the legal process develops a logic of its own, one that can become disjointed from the rationale of power. In this Critical Reflection, I look closely at the paragraph in which Horkheimer introduces the notion of a 'force of resistance'. I argue that Horkheimer develops a theme that he and Theodor W. Adorno return to in the Dialectic of Enlightenment: the spiritual instruments of domination, among them law, have the potential to turn against domination. At the same time, Horkheimer is clear that law does not resist automatically: it takes human agents to put the legal sphere into opposition to the political sphere. I illustrate this thought with respect to the recent history of federal abortion rights in the United States.

Keywords: Max Horkheimer; Frankfurt School; Dialectic of Enlightenment; critical legal theory; resistance; abortion rights

Some months after his native Germany had plunged the world into another World War, the philosopher Max Horkheimer, then in the safety of Columbia University, finished a short essay with the strange title *Die Rackets und der Geist*, 'Rackets and Spirit'. The text paints human history bleakly as the mindless struggle between power-hungry collectives. Yet when Horkheimer turns to the concept of law roughly three pages in, his prose seems to brighten. A 'force of resistance', he writes, inheres within the form of law. In what follows, I will trace this thought and relate it to the recent history of abortion rights in the United States.

'Rackets and Spirit' was only published posthumously and remains untranslated to this day. It belongs to a body of preparatory work for the *Dialectic of Enlightenment*, the seminal critique of civilisation that Horkheimer co-authored with his life-long friend and colleague Theodor W. Adorno. Its central thesis is twofold: 'Myth is already enlightenment, and enlightenment reverts to mythology' (**Horkheimer & Adorno 2002: xviii**).

Myth: that is, the portrayal of the forces that move the universe in terms that stem from our own unreflected experience. Enlightenment: that is, universal disenchantment, animated by the translation of these forces into matter, numbers, and principles. For Horkheimer and Adorno, myth and enlightenment respond to the same need – to submit the world to human intervention – the one by pleading with spirits, the other by devising functional theories and machines. Secular rationality has proved more successful in this respect. By removing all agency from nature, it promised to create a space where humans could exercise their will without inhibition.

However, this promise has not been fulfilled, the book argues, and so mythology prevails. The ever-more-accomplished domination of nature begets the ever-more-intricate rule of people over people. Technology that supposedly liberated its beneficiaries from the hardships of life has been turned against them. The invention of staggeringly destructive weapons, the introduction of mass surveillance, or the regimentation of time at work and, increasingly, at home: these phenomena illustrate, today no less than in the 1940s, the 'destructive side of progress' that Horkheimer and Adorno put their finger on (Horkheimer and Adorno 2002, xvi). If we do not come to terms with the fact that the advancement of rationality systematically produces suffering – that reason itself has an irrational streak – then the world is re-enchanted with the spirits of wealth, security, and the preservation of the status quo, the talismanic values of the modern era that leave little space for individuals to prosper.

At first glance, 'Rackets and Spirit' provides another iteration of this story. Horkheimer uses the term *racket* as shorthand for hierarchically structured collectives that provide safety and a sense of belonging in exchange for uncompromising loyalty, while competing with other groups for money and influence. Horkheimer takes the concept from the domain of organised crime, where it refers to gangs that offer businesses services of protection, mainly against themselves, according to the motto: 'Share your profit with us, or else…' For Horkheimer, racketeering represents the 'elementary form of domination' that invariably underlies any kind of political and economic power (**Horkheimer 1985a: 287** [all translations mine]). In the underworld, it simply appears in its unembellished state. Until today, Horkheimer writes, human history has been the history of rackets. All protective institutions, from the family to the state, carry the mark of domination.

Modern law seems to fit handily into this account. Isn't legality another product of enlightenment that comes back to haunt the 'free and equal' citizens? Isn't it just another tool in the repertoire of rackets, only one that allows them to couch their self-serving schemes in unctuous phrases of rights and justice?

Yet Horkheimer begins to build a more complicated narrative. 'If an organisation is so powerful that it can maintain its will as the permanent rule of conduct for all inhabitants of a geographical area', he writes, 'the domination of people takes on the form of law' (**Ibid: 289**). Here, we still have the standard Marxist idea that the rule of law is an extension of prevailing class relations. But Horkheimer continues:

> *Law fixes the power relations. As a fixed medium, law, like other mediations, acquires a nature of its own and a force of resistance. By becoming a substantive element of Spirit, it absorbs the harmony of universality and particularity as a necessary idea* (**Horkheimer 1985a: 289–290**).

This is the paragraph where law's 'force of resistance' enters the scene. Horkheimer acknowledges that the agencies of legal justice perpetuate a world that is built on violence and oppression. ('Since there is legality', he pointedly notes later on, 'it bears the trait of the illegal' (**Horkheimer 1985a: 290**). At the same time, however, as he writes in another preparatory essay, 'law, as a means of domination, develops a logic of its own' (**Horkheimer 1985d: 266**). Law is not merely, as the eminent legal philosopher Hans Kelsen believed, 'that specific social technique of a coercive order […] which consists in bringing about the desired social conduct of men through threat of a measure of coercion' (**Kelsen, 1941: 79**). Instead of simply stabilising, facilitating, or concealing the exercise of

power, the instrument of law rests awkwardly in the hand of those who wield it. Law has weight, Horkheimer suggests. Law resists.

What does this mean? Let us stop for a moment to translate some of Horkheimer's Hegelian phrases into more familiar language. The term 'Spirit', *Geist*, invokes a domain of reason and intellect that goes beyond instrumental rationality (think of *Geisteswissenschaften*, which German-speakers call the humanities). Law is 'spiritual' in that legal norms exist in the sphere of language and thought.

'Universality and particularity' are relational terms: something is universal if it separates itself from particular entities that are subsumed within it. Concepts are universal in this sense, since they pick out individual things in the world without being identical to them, as are institutions that constitute more than just the sum of their parts. Think of a university: it is not exhausted by the buildings and people on campus, and the notion of a *university* again transcends any specific institution.

When Horkheimer writes of the 'harmony of universality and particularity', he arguably has society in mind, which is universal in relation to its particular members. The relevant notion of harmony, then, is that of a social arrangement in which the social whole reproduces itself without doing violence to its individual parts. The *Dialectic of Enlightenment* similarly links the 'concordance of general and particular' to the 'idea of a free coexistence, in which human beings organize themselves to form the universal subject' (**Horkheimer & Adorno 2002: 66, 65**). For Horkheimer, society and individual can only be in harmony *in the absence* of domination.

Conversely, in modern society, 'domination confronts the individual as the universal' (**Ibid: 16** [translation modified]). When Horkheimer writes that law 'absorbs' the idea of reconciliation, he implies that there is something about law that repels the 'impenetrable unity of society and domination' (**Ibid: 16** [translation modified]) and thus the disunity between society and the individuals living in it.

With these clarifications in mind, we can reformulate the thought that lies at the bottom of law's force of resistance. When rulers and ruled enter legal relations with one another, social hierarchies are translated into 'permanent rules of conduct'. As such, expressions of political will become manifest in relatively stable, intelligible norms. The intentions of the ruling classes become legal *things*, namely rules, and things endure in time, thus becoming a 'fixed medium'.

The paragraph I quoted above continues with an elaboration of law's force of resistance:

> *The purpose of law is to serve as a guiding standard in social life, and so it takes no account of the specific person and of the past, remaining valid for and against everyone from the day of enactment to its public repeal. The means of domination comes into opposition to domination as the reflection that unmasks it* (**Horkheimer 1985a: 290**).

Horkheimer observes that legal norms typically display a measure of disinterestedness: when the law grants rights or imposes duties, it shows no regard 'to the specific person' that bears these rights and duties. Law extends some of its protections even to the downtrodden and some of its burdens to the elites. Being a thing, law does not care about its effect on the world.

To acknowledge the disinterestedness of law is not to deny that, as a matter of fact, legal rules always take sides. After all, their fundamental purpose is to decide which of two interests shall prevail in cases of conflict. However, while any constitution, any statute, or any court decision benefits some more than others, there is no guarantee that, 'from the day of enactment to [their] public repeal', the norms of law favour those groups that happen to control state-agencies at any given historical moment. Laws often skew towards the dominant factions in society, but sometimes they clash with powerful interests. The letter of the law does not automatically shift its shape in accordance with the changing composition and needs of the ruling classes.

Under the description that Horkheimer offers in the quoted passages, the legal manifestation of political power exhibits an inherent tension: 'The means of domination comes into opposition to domination as the reflection that unmasks it.' On the one hand, the law is, fundamentally, the 'specific social technique of a coercive order', as Kelsen thinks. On the other hand, it potentially disrupts that very order. If law has a force of resistance, it resists from within.

Now, what is the nature of this subversive potential? In the *Dialectic of Enlightenment*, Horkheimer and Adorno offer a tentative answer:

> *Domination, in becoming reified as law and organization, has had to limit itself. […] The instruments of power – language, weapons, and finally machines – which are meant to hold everyone in their grasp, must in their turn be grasped by everyone. In this way, the moment of rationality asserts itself as something which is also different from domination. The thing-like quality of the means, which makes the means universally available, its 'objectivity' for everyone, implies the criticism of the domination from which thought has arisen as its means* (**Horkheimer & Adorno 2002: 29**).

Law 'implies the criticism of domination' because there is a 'moment of rationality' in legal norms that does not necessarily coincide with the logic of power. Juridical thinking always involves an act of rational reconstruction, of sense-making. For example, what does the constitution mean when it proclaims the equality of all citizens before the law? Does it mean that the laws 'forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal bread' (**France 1910: 91**)? Or is there a richer notion of equality at play that courts are called upon to recognise? And if there is, how is it possible to reconcile the world of law, with its robust idea of equality, with an economic and political world that is rife with inequality?

Law strives to make sense: to be valid, justified, and reasonable. But what if the society maintained by law lacks validity, justification, and reason? For Horkheimer, legal relations provide a 'reflection', and not just a duplication, of power-relations because law does not simply reproduce and formalise social facts. In virtue of being legalised, social facts are transformed into a matter for debate, into *things* that can become the object of awareness, scrutiny, even rejection. By demanding that the interactions between people satisfy some publicly ascertainable normative standard, law has the potential to make visible what is otherwise hidden in plain sight: that society is built on suffering, exploitation, and oppressive hierarchies; maybe also that, in its current constitution, political power lacks an ethical ground altogether.

In short, law has a 'force of resistance' because the ruling groups lose some of their autonomy to the means through which they claim legal authority. Like Frankenstein's monster, law can detach itself from, even oppose its master's will. As a category of Spirit, as a specimen of thought, it 'is the servant which the master cannot control at will' (**Horkheimer & Adorno 2002: 29**). It can document relations of domination. And it can reach for the mask of its creator, as if to ask: Who are you? And who are you to hide behind the language of justice?

I have analysed these aspects of the normative potential of law in more detail elsewhere (**see Gansinger, 2023**). Here, I want to conclude by offering some thoughts on how Horkheimer's argument might guide our own attitude to law as a vehicle of social resistance. What is the practical relevance of law's force of resistance? How can we experience or even harness it in our own lives?

Let us explore these questions with the help of an example. In the 1973 landmark case *Roe v. Wade* (410 U.S. 113 (1973)), the US Supreme Court established that women enjoy the fundamental right to have an abortion prior to foetal viability.[i] Two years ago, the Court reversed itself in *Dobbs v. Jackson's Women's Health Organization* (142 S. Ct. 2228 (2022)), holding

that the decision in *Roe* was 'egregiously wrong from the start'. It is now up to individual states to determine the legal status of abortion, which, for millions of women, has made it significantly harder and, in some states, impossible to safely terminate a pregnancy.

At first glance, the journey from *Roe* to *Dobbs* sits uneasily with the idea that the law has any force of resistance. After all, the widespread rollback of abortion rights looks like a moral tale about the fragility of legal norms when they stand in the way of a well-oiled, uncompromising political machine. But if we look a little closer, a different narrative unfolds. Since the 1980s, anti-abortion activists had been trying hard to reverse the outcome of *Roe*, either by pushing likeminded judges onto federal courts or by amending the constitution altogether (**see Ziegler 2022a**). Their initial efforts collapsed spectacularly when a Supreme Court stacked with Republican nominees upheld the right to have an abortion in 1992. It would take another thirty years and the confluence of unfortunate circumstances – specifically, an unusually high turnover of Justices during the presidency of Donald Trump – for the 'pro-life' movement to finally find an amenable majority on the Court.

Thus told, the rise and demise of federal abortion rights in the United States is *also* a story about the strength of law in the face of adversity. For half a century, the legal system withstood the concerted effort to return the constitution to its pre-1973 interpretation. It would be possible to tell a richer story about how this force of resistance expresses itself, or at other times dissipates, in the practice of courts, legislatures, executive agencies, and advocacy groups (**see, e.g., Dutra 2010; Ziegler 2022b**). Here, it suffices to note that anti-abortion activists struggled to transform their preferences into policies as long as they were faced with the obstacle of constitutionally entrenched legal doctrine.

I should dispel two natural worries about the suitability of this example to illustrate Horkheimer's force of resistance. First, Horkheimer is not concerned with specific areas of the law (arguably except for labour law, see Horkheimer 1943), and he nowhere addresses abortion rights (though his views on reproductive health appear to be rather conservative, see Horkheimer 1985b). Instead, he is interested in law in general. Aren't I committing a category error, then, if I turn to individual court cases to illustrate law's force of resistance? After all, it is the *form* of law that Horkheimer contrasts with domination, not any particular content that this form may take.

However, note that I do not think that there is anything in the substance of abortion rights that puts them at odds with the exercise of political power. Moral questions are not at issue here. My claim is not that 'pro-choice' activists represent law's force of resistance because they are

fighting for a noble cause.[ii] My claim is, rather, that the simple fact of the lawfulness of abortion mattered – to the judiciary, which is trivial, but crucially also to legislators, the executive, and civil society at large. It mattered *politically*, not just legally, that the federal constitution was authoritatively declared to contain a right that was hitherto denied to many Americans. What mattered was the 'thing-like quality' of law, its 'objectivity for everyone', its demand to 'be grasped by everyone'. Before *Roe*, the right to have an abortion was a thought that some agreed with and others did not. After *Roe*, it was a fact that impressed itself on people's minds, lives, and relationships. Once in existence, a thing, more than a mere thought, takes energy to destroy: it resists. And this is a claim about the form of law, not about its content.

But now a second worry might rear its head. Isn't it domination, *tout court*, that Horkheimer opposes the form of law to? And whatever we think of anti-abortion activists, it is a bit rich to see in them the apogee of domination.

Yet, again, I do not intend to make a strong claim about the political campaign against abortion rights in the US. Recall that, for Horkheimer, the racket is the 'elementary form of domination'. All that is needed, then, to vindicate the connection between the fight over abortion rights and 'Rackets and Spirit' is that the conservative movement, like many others, consists of rackets, of power-hungry groups that take no prisoners in the pursuit of their agenda. Thus understood, the campaign against *Roe* is indicative of a society that disintegrates into self-interested factions: a society built on the elementary units of domination.

With this in mind, and with the two worries allayed, *Roe* also provides a good opportunity to reflect on the limits of law's force of resistance. The decisive reason that *Roe* eventually succumbed to conservative pressure is not, as Justice Samuel Alito put it in the *Dobbs* decision, that '*Roe*'s reasoning was exceedingly weak' (though it was, **see Ginsburg 1985**), nor that Republicans have been hellbent on destroying the legacy of the liberal jurisprudence of the 1970s and 1980s (though they have, see Kaufman 2023). The reason is more mundane. The law, to reiterate, is an 'instrument of domination', albeit one that can come 'into opposition to domination'. An instrument might multiply the strength of the agent who uses it. But it cannot generate power by itself.

From Reagan to Trump, anti-abortion activists were working to unite a diverse coalition of religious groups, non-profit interest groups, large donors, and, crucially, the Republican Party behind the cause of toppling *Roe v. Wade*. The intensity of the effort was not mirrored among liberals (**see Bentele et al., 2018; Greenhouse & Siegel 2010**). Arguably, the fact that legal doctrine reflected their beliefs gave them a treacherous sense

of security. After all, they had the US Constitution, ordained by 'We the People' (or rather, by the personnel of the US Supreme Court), on their side! Liberals were in a position to nonchalantly identify with, rely on, and celebrate the law whereas their opponents knew that they had to work proactively to make their interests count.

In an earlier text, Horkheimer gestured towards the danger of overestimating the emancipatory promise of the law. The 'force of resistance' of cultural spheres, such as law, is always 'mediated through the behaviour of the people who make it up, a behaviour that is characteristic for a certain society' (**Horkheimer 1972: 65** [translation modified]). The legal process requires constant social propulsion; otherwise, it comes to a halt. It takes human agency to turn the potential energy stored in law into kinetic energy that repels the incursions of rackets. If people are not habituated into defending the law against hostile challenges, the law itself has no alternative but to submit.

Horkheimer returns to this thought in a speech given some years after drafting 'Rackets and Spirit'. '[C]onstitutions […] don't have any meaning in themselves', he reminds an audience mainly of public officials, 'you have to breathe life into them' (**Horkheimer 1985c: 46**). The law is a *thing*: it is disinterested, not only in the mark it leaves on the world and its inhabitants, but also in its own fate. Above all, it does not exist separately from the people who administer it and from the political conflicts they participate in.

It matters, of course, what the law *says*. Yet what the law *is* – how it is enforced, what it does to our lives, whether it persists or perishes – depends, to a large degree, on what social groups make of it. If this is a truism, it is one that we forget at our own peril. Law's force of resistance is the force of people, mediated and amplified.

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[i] See: https://supreme.justia.com/cases/federal/us/410/113/.

[ii] See: https://casetext.com/case/dobbs-v-jackson-womens-health-organization