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Discourse and Argument in Instituting the Governance of Social Law

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IN INSTITUTING THE GOVERNANCE OF SOCIAL LAW

Introduction

Social Rights were initially understood as the rights of a pluralism of instituted associations; and transformed to the rights of distributive justice associated with the politics of access to welfare state corporatism. More recently, they have been understood as the rights of multicultural difference; and now as the rights to complexity (Zolo), and rights to consideration of polycontextural effect vis-à- vis transnational corporations (Teubner). Social rights are no longer subject positions versus political bodies, but also against social institutions, in particular, vis-à-vis centers of economic power.

This article studies the emergence of social rights and social law as an ontology of institutional facts by which actors can be induced to share standards for self governance, and be involved in public reasoning. Institutional space is understood as never being closed; and as always open for argumentation, the novelty and creativity of actors. Historical institutionalist approaches can be tweaked into a focus on the promise of signifiers that have not yet delivered on their promise of order. Emergent institutions/unfolding normativity are understood as constituted not by mythic substance (Schmitt) but by warranted assertions (argument) by which we participate in a promising game of institutional facticity (Habermas).

The architect Daniel Libeskind has written a noted lecture, "Traces of the Unborn." We might add, "Traces of the Stillborn." There is a tendency in historical institutionalism (**HI**) to concentrate on the retrieval of traces of paths taken rather than (1) to consider the processes involved in the selection of paths; and (2) to reflect upon the conditions of institutional emergence and sedimentation of paths, whether taken or untaken. Contrary to the path-dependency obsessed historical institutionalism of a Paul Pierson, this article stresses the significance of historical case studies of institutional emergence in the earlier 20th century and their diremptive role within an unfolding genealogy of knowledge--what Foucault referred to as "effective history/critical history." A more critically oriented historical institutionalism journeys into the interior of institutions beyond "interestedness" toward "committedness," toward the endogenous emergence of the argumentative logic of a mode of legitimation.

The traces of the not yet or not fully born reveal the case of the law creating capacity of autonomous collective associations. They shape their own autonomous domains heteronomously, institutionalizing collective rationalities - -institutionally separated, but recursively and complementarily connected to each other within a network. Such institutional emergence in practice reflects liberalism's inability to grasp the constitutive quality of collective life first provoked at the beginning of the 20th century by organized/monopoly capital, and today under the compression of globalized capital. How does liberalism cope with pluralism? How does it do so beyond the legacy of premodern guild and collegial institutional forms?

I. Institutional Emergence:
   ## The Institutionalizing Discourse of the Governance of Social Law

Post-liberal conceptions of governmentality, jurisprudence and institutional justice emerged capable of providing a new substantive institutional foundation for the new autonomous collective associations that transcended and surpassed the classical liberal values privileging private property. These institutional conceptions supplemented traditional liberal ones, but also built in democratizing institutional practices within the governance autonomous collective associations. Beyond private law welfare jurisprudence, emerged the governance of social law in the experimentation of the Weimar Republic.[1]

Conventional American and British political science have long taught us of the viral shades represented in Weimar Republic efforts at democracy. Any remnants of ghosts of Weimar needed to be exorcised in the building of modern industrial democracy. However, in the past years, English-speaking audiences have been reawakened to those Weimar efforts by histories of political and legal thoughts of the likes of Franz Neumann and Hermann Heller. These have been provided by Bill Scheuerman (1994), David Dyzenhaus (1997) and Peter Caldwell (1997). These historical retrievals suggest an **immanent tradition of social law and social rights** associated with the struggle to develop labor law, complementary institutions of

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[1] This trace of the stillborn was generated out of the violent class struggles of mutinous sailors' councils outside Kiel in 1918 as well as workers' councils springing up in Berlin. Out of these violent struggles, the jurist Hugo Preuss inserted key clauses on social rights, works councils. Labor law and self-constituting social law into the Weimar Republic Constitution. At the end of October 1918, sensing the First World War was lost, sailors of the German High Sea Fleet refused to obey orders to sail against the British Fleet. Their revolutionary insurbordination caught fire. By 4 November, rioting sailors took control of Kiel and together with dockers formed an Workers' and Soldiers' Council with revolutionary powers. By 7 November, the whole fleet joined the Council Movement. On the 10th of November 1918 - - a day after the Kaiser's abdication and the end of imperial rule, a day before the Armistice - - the Berlin Workers' and Soldiers' Council meeting in the Busch Circus and acting as the representatives of all revolutionary workers and soldiers in the Reich, proclaimed a republican system of government. Parliamentary socialist leaders like Friedrich Ebert and Philipp Schneidemann forestalled a proclamation of either a "socialist republic" or a "republic of councils." An Action Committee of the Workers' and Soldiers' Council was named to keep watch over the republican government. Five days later, Hugo Stinnes, leader of the employers' trade association, and Carl Legien, leader of the trade union confederation agreed to establish a "collectivist" system of labor-management arbitration committees, in which trade unions would be given full recognition. The agreement was one of many seen as treaties of the organized versus Bolshevism, against a movement of workers' councils (*Rate)* that challenged employer prerogative and sought a democratic restructuring of capitalism starting from the workplace, and extending throughout the society. It was the time when a social democratic government had the power to decree extensive nationalization, to socialize the mode of production.

In the months following, the future of Germany to a large extent lay in the hands of these conflicting political and industrial organizations of the labor movement. Starting in December, paramilitary groups in Berlin (e.g., The Free Corps) acting in behalf of the republican government engaged in bloody street battles with council supporters. By January 1919, the extreme left-wing of the councils movement led the Spartacus rising for a Republic Council. The revolt was crushed; Spartakist leaders Rosa Luxemburg and Karl Liebknicht were murdered by soldiers of the Free Corps. As the workers' and soldiers' councils were being broken by the government and para-military troops acting on orders of the SPD coalition, focus shifted to factory councils and workers' chambers as transforming agents of workers' control. Such organs were intended to make workers participant in the overseeing and planning of production. An immanent tradition of social rights and social law was developed by what Claus Offe refers to as the "Lawyers Socialism" of Franz Neumann and Herman Heller. This tradition and its advocates met the violent reaction of fascism. Yet under the leadership of Neumann after 1945, the tradition was resurrected in the Bonn Republic Constitution. Today, the tradition confronts the violence of hegemonic NeoLiberalism as the Schroder Coalition Government attempts to maintain social rights and social law amidst the demographic and fiscal pressures of 21st century advanced industrial society that shapes the Berlin Republic.

As Charles S. Maier notes, in *Reshaping Bourgeois Europe* (1975) the dawn of the Weimar Republic was not a socialist recasting of politico-economic forces, but a corporatist one. Leaders of the traditional organizations of German labor, the Social Democratic Party (SPD) and the trade unions, jealous of their newly won privileges, preferred to share their corporate influence with management representatives on parity committees to any sense of proletarian socializing power. For six months in 1919 these newly legitimated social partners sought to contain the unorthodox extra-parliamentary organization and methods of independent movement for direct workers' representation.

collective bargaining, and institutional guarantees regarding education, the family, health, work and codetermination. In an epoch of NeoLiberal undermining of the institutions democratic movements constituted, should these Weimar efforts at creative constructivist and reflexive jurisprudence be exorcised? Or rather adjured to as an act of recommitment? Can these Weimar traces of the commitment to the governance of social law and social rights be seen as traces of the not yet born, rather than of the stillborn?

A genealogy of a German critical sociology of law is associated with the governance of social law. Institutions position subjects ideationally. And the institutionalizing of socially accountable private law as well as of social law and social rights occur within an institutional context of the rule of law. Unlike private property rights, these new institutional practices were the result of ongoing negotiated processes. This is what Gerhard Lehmbruch (1996, 1998) labels Negotiated Democracy (*Verhandlungsdemokratie).*

Peter Caldwell notes, in his critique of Scheuerman, that the term Social Rechtsstaat *(Sozialer Rechtsstaat)* was a term used by Hermann Heller; and that it is best translated into English as the Rule of Social Law--or the Governance of Social Law-- rather than the "Social Rule of Law" State. Further, beyond the inter-individual prerogative contract of laissez-faire liberalism, social law covers the collective constitutive contract based on multipartite consultations, bargaining and negotiation-- one which established a scheme of internal governance and autonomous moral/power resources, as well as a capacity for collective action.

A focus on social law centers on the law creating capacity of autonomous collective associations. They shape their own autonomous domains heteronomously, institutionalizing collective rationalities – institutionally separated, but recursively and complementarily connected to each other within a network. Such institutional emergency in practice reflects liberalism's inability to grasp the constitutive quality of collective life first provoked at the beginning of the 20th century by organized /monopoly capital, and today under the compression of globalized capital.

This immanent institutional tradition is described somewhat by **Oliver Gerstenberg** in his recent 2001/2002 articles – "Directly-Deliberative Polyarchy: An Institutional Idea for Europe?" (co-authored with Charles Sabel) in C. Joerges and R. Dehousse, ed. *Good Governance in Europe's Integrated Market.* Oxford University Press, 2002: 289-341; and "Denationalization and the Very Idea of Democratic Constitutionalism: The Case of the European Community, *"Ratio Juris,* v. 14, n. 3 2001 (298-325). Gerstenberg in the latter (p. 320, fn. 21) cites **Harold Laski** and **Georges Gurvitch** in the first half of the 20th century as parallel "social law" sociology with a focus on law "emergent" from a pluralism of groups – a tradition recognized by **Robert Dahl** in his 1950-1990 work on *the heteronomy of polyarchy*, i. e., how a pluralism of groups coordinated its democratically created policies without falling prey to the Michelsian "iron law of oligarchy." The focus is on autonomous subsystems of governance, the decentralized multiplicity of spontaneous communication processes.

The legal theorist **Guenther Teubner** - who has followed his social law predecessors at the London School of Economics, **Otto Kahn Freund** and **Lord Wedderburn** – reflects to such a non-oligarchic horizontal coordination as *hetarchy.* This amounts to a pluralization of deliberative democracy within the autonomous law-making of a

decentered society – either within national borders, or in the case of the European Union across borders. Significantly, a good deal of focus on the governance of social law and polyarchy traditions are in present day European Union studies. Gerstenberg associated the governance of social law tradition with nineteenth century syndicalism (Proudhon, Blanc, Pelletier) and its more functionalist/corporatist reinterpretation in the twentieth century (Durkheim,Gurvitch, Lehmbruch). He tries to move beyond this tradition, associating it with corporatist blockages and oligarchic short-circuiting of grass roots democratic experimentation.

Alongside the social law tradition, Gerstenberg describes Teubner's *polycontexturality* approach as a systems theory approach to emergent "heterchical yet interconnected network-type linkage at the level of organizations and professions." This approach is seen as less functionalist and coordinated than corporatism, but Gerstenberg sees it as focusing more on a created circuitry of path-dependency than on democratic path-shaping. Teubner looks to a multiplicity of *sub-systemic subconstitutions*, where private law is constitutionally constrained to take of its diverse social systemic context (hence polycontexturality). **Danieto Zolo** (1992) adds a new level of social rights--the rights of complexity, the right to preserve practices/processes necessary for social systems to retain pattern maintenance. These can be ethnic or linguistic, community or neighborhood based, craftsman or expert based.

Teubner's approach to the pluralism of non-state regimes/non-state actors--having legal personality as legal subjects--is the successor to the earlier work of Gierke, Maitland and Laski on the legitimated autonomy of collegial formation. This is the autonomy of non-state governance regime--regimes of state-less law-regulating and adjudicating wide areas of social activities. This is the recognition of the emergence of autonomous subsystems of action typical for modern society.[2]

Gerstenberg, along with **Charles Sabel**, eschew both corporatist functionalism and the autopoesis of sub-systems networking for the pragmatism of what they label grass roots *democratic experimentation*. They focus – along with **Archon Fung** and **Michael Dorf** – on *bootstrapping* local autonomous deliberative democracy into a "horizontal" coordination and monitoring procedure that preserves an emphasis on citizen democratic deliberation both within the public sphere and private organizations.

What all approaches share is a commitment to practices producing and reproducing more social egalitarianism, more participatory democracy within economic organizations and the workplace, and more of a pluralistic sensitivity to difference and the social byproducts and consequences of economic life. And these commitments are understood as complementary to liberal notions of contract and property freedoms, but within a context of social choices and social responsibility.

Franz Neumann (1900-1954) used the notion of "the governance of the rule of law" as the form to mediate the convergent genres of his two mentors, **Otto von Gierke**

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[2] Gunther Teubner: "Hybrid Laws: Constitutionalizing Private Governance Networks" in Robert Kagen, M. Krygier and K. Winston, eds. Legality and Community (Berkeley, CA Public Policy Press, 2002), pp. 311-331; and "Coincidentia Oppositorum: Networks and the Law Beyond Contract and Organization, The 2003/04 Storrs Lecture at Yale Law School.

and his London School of Economics (LSE) tutor **Harold Laski.** These are the Continental European traditions of ***Rechsstaat and Genossenschaft*** (fellowship associations) with the Anglo-Saxon tradition of ***"the rule of law."***
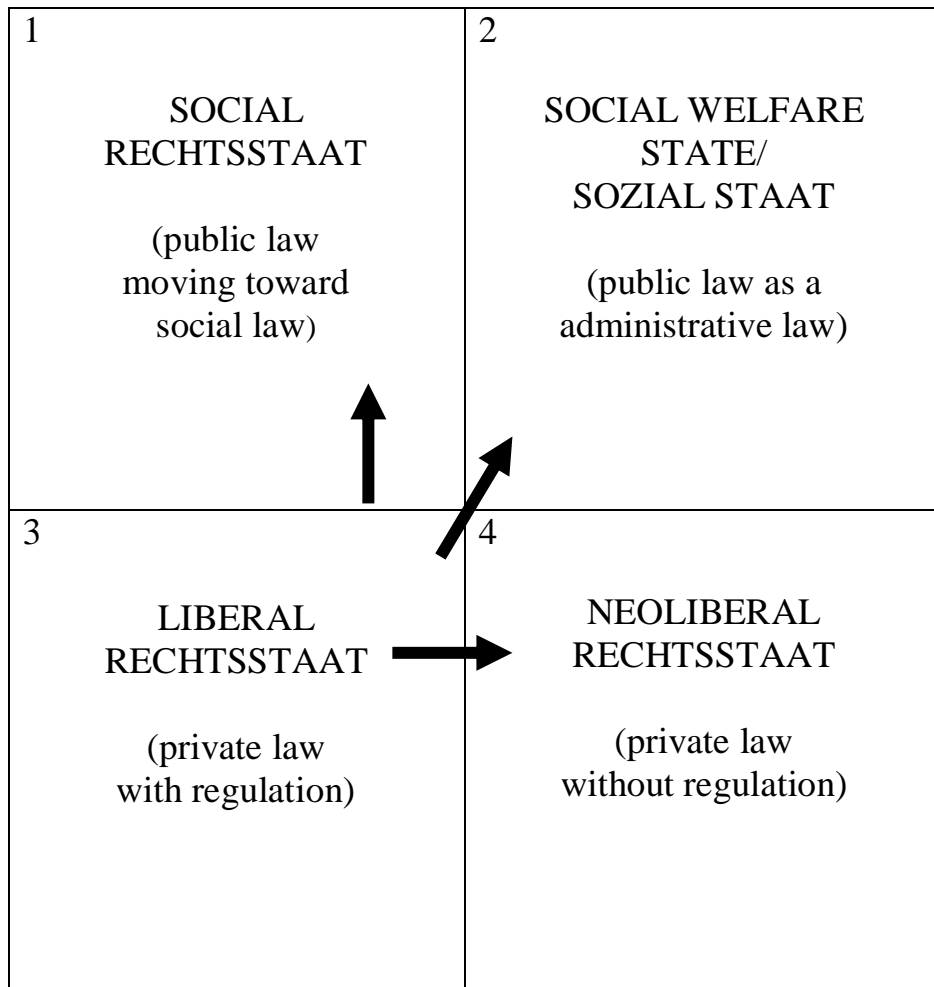
The concept of a ***Social Rechtsstaat*** derives from the collective bargaining agreement's overcoming the prerogative contract associated with the master/servant relation and establishing a framework of internal self-governance herein alternative norms other than the liberal institution of property are understood as supportive of autonomy. It is distinct from the ***Liberal Rechtsstaat*** of Kant and Weber and the ***Social State*** of state-administered social benefits we come to identify with the Keynesian Welfare State. As we have backed into a ***NeoLiberal Rechtsstaat*** notion these past two decades, the path left open is to once more explore the Social *Rechtsstaat*: a relation of state and civil society assuring autonomous institution of self-critical governance for diverse domains, reflexively responsible both within institutional spheres and between institutional spheres. This is the theoretical mission of the present day London School of Economics (LSE) troika of Anthony Giddens, Gunther Teubner and Ulrich Beck, and follows in a less skeptical Michelsian manner the pioneering sociology of Philip Selznick and SM. Lipset.

The governance of social law is understandably a precondition for the rule of democratic law. Social rights assure individual enjoyment of primordial liberal rights. The Social *Rechtsstaat* is more self-binding than the interventionist *Sozial Staat* (or *Wohlfahrtstaat)*. And it is an institutional precondition for actualizing the Democratic *Rechtsstaat* in modern (or late modern) capitalism. See **Figure 1** below.

A postliberal form such as the Social Rechtsstaat model is oriented to setting up institutions of moral discipline (i.e., governance) which can make us autonomous/self-determining citizens enjoying basic rights. They organize state/civil society relations into a coherent system of normative discourse of constitutive and regulative and institutionalizing practices.

Rechtsstaat denotes law having rational and secular justification associated with a state or sovereign, as distinguished from premodern notions of traditional law, institutes of "organic" orders, or Natural Law. *Rechtsstaat* is a continental European tradition and different from the Anglo-Saxon tradition of the "Rule of Law" associated with parliamentary supremacy and the genesis of law in the representatives of citizens. Neumann used the term "governance of the rule of law" as the form mediating these two convergent genres. And in his own attempts to deal with the pluralist implications of Gierke and his mentor at the London School of Economics Harold Laski, there is a fruitful tension in appreciating the extent to which phenomena called "state" or "sovereign" operates within a realm of legality, accountability, an independent judiciary, and a neutral and predictable set of procedures for applying the law. Law cannot be normless nor cannot be formless. The state is able through its sovereign to create and change the substance of the law. At the same time, the societal sphere is protected against state intervention by (1) rights explicit or implicit constituted by human beings, (2) general norms and (3) the postulate of the "generality of law."

FIGURE 1

1 SOCIAL RECHTSSTAAT (public law moving toward social law)	**2** SOCIAL WELFARE STATE/ SOZIAL STAAT (public law as a administrative law)
3 LIBERAL RECHTSSTAAT (private law with regulation)	**4** NEOLIBERAL RECHTSSTAAT (private law without regulation)

For Neumann, the governance of social law remained the unfinished project of the Rule of Law, the metaphysical functional equivalent of Natural Law, and the vital undercurrent in social democratic thinking latently present within the stronger statist and regulation-centured socialist mainstream. It is historically more closely tied to the legal practices associated with syndicalism and the trade union movement than to the ideological or theoretical activities oriented toward political parties. The generation of collective bargaining agreements, labor courts, and works communities are but a historical instance of the governance of social law. Individual contract-based law is challenged, and private property rights are adapted to "social ordering" - - a constitutional ordering of the economy and society. This is an institutionalizing discourse bent on actualizing the substance of social egalitarianism, and serving as corrective and alternative norms and forms vis-á-vis the liberal institutions of property are not the only ones than can support autonomy.

The social law tradition and concept of Social *Rechtsstaat* captures best the approach of **Hugo Sinzheimer** (1875-1945). Making use of the *Genossenchaft* theory of Otto Gierke, Sinzheimer challenged the "concession theory" of legal groups of German positive and Roman law. Like Frederick Maitland, John Figgis, and Harold Laski in England, Sinzheimer argued that social groups are "organic entities, autonomously

capable of willing and acting rather than legally fictitious personalities as they were understood under Roman law. 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. These groups could speak through their own organs in ways determined by their own internal rules, that is, their own social law takes legal priority over the simple individual labor contract. Beyond the inter-individual prerogative contract of laissez-faire liberalism, social law covers the collective constitutive contract based on multipartite consultations, bargaining and negotiation - - one which established a scheme of internal governance and autonomous moral/power resources, as well as a capacity for collective actions.

This Weimar generated critical sociology of law tradition speaks to an American New Deal context wherein legislation like the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act were written in the language of private law norms. Such legislation was constituted in terms of a sense of entrepreneurial individuals' respective responsibilities, rather than in terms of the political economy of social citizenship connected to Continental European and Skandinavian welfare states.

A neglect of this key difference often blocks the English-speaking from understanding the sensibilities of European social democracy. It is ironic that the perceived failures of New Deal generated social rights - - one tied to a private law welfare jurisprudence rather than to some sense of the governance of social law have been at the heart of the NeoLiberal assertion in the USA and Britain of market rights to choose, and the neoliberal emphasis on personal responsibility and initiative.

II. Understanding Regime Models Beyond the Interest Group Approach/ Relating Institutions to Normative Unfolding

The past three decades have seen a de-socializing of governance--an increasing privatization of risk management and a dismantling of a pluralism reconceived as interest group liberalism in post-Neo Deal America or as a more encapsulated negotiated process of neocorporatism in Western Europe. We move from a Social State *(Sozialer Staat)* of Keynsian welfare state insulated and exclusionary paternalism to a NeoLiberal *Rechtsstaat* and associated Civil society, where we are less a client and more an empowered customer/consumer--armed with powers of choice and contractualism--vis-à-vis health services education and training. "Enterprise yourself" is the NeoLiberal mentality and form of life--the internal normative logic of a new regime reasserting private law notions of entitlements.

NeoLiberalism is a movement to actualize a utopia--the regime model of turn of the twentieth century neoclassical economics with its emphasis on markets. It was a predominant regime model before the onslaught of social theory and its emphasis on social solidarism, social citizenship, social rights. Also threatening was the emerging regime of social law with its challenge to the liberal notion of property, and its development of the negotiated collective bargaining contract beyond the individual prerogative contract.

Generated out of a concern for improving a national economy's competitiveness and flexibility, NeoLiberalism emphasizes a strong focus on the short-term, and neglect of

longer term concerns. There is an emphasis on discrete short term contracts rather than longer term relational contracts creating constellations of trust.[3] Growing privatization of risk cuts into solidarism. Market relations are imposed in spheres (universities, prisons, the caring professions) where classical and neoclassical liberal economics would not go. Further the NeoLiberal utopia imposes a homogenizing effect on the plurality of institutional regimes it confronts. All interactions are reduced to abstracted transaction cost economics. In the effort to move flexibly gear the national economy competitiveness to the emergent globalized economic order. There is a movement from demand-side to supply-side concerns, from centralized neocorporatist bargaining regimes to a proliferation of decentered/decentralized bargaining subsystems. **Figure 1** can be reconfigured as **Figure 2** below. Here we can adapt one of the four-fold tables in Bo Rothstein's *Just Institutions Matter* (1997:201).

FIGURE 2

ORIENTATION	SCOPE	
	small	large
communitarian	1 SOCIAL RECHTSSTAAT ENABLING THE SOCIAL emphasis on solidarism, relations of trust & relational contracting	2 PATERNALISTIC SOCIAL STATE'S HIERARCHY insulated and exclusionary ghetto-ized corporatism
liberal	3 LIBERTARIANISM APPROACHING ANARCHY disregard for externalities of human interaction	4 DE-SOCIALIZING NEO-LIBERALISM WITH MINIMAL SAFETY NETS privatization of risk with assessment of transaction costs

Regimes are purposefully created normative frameworks organizing negotiations among a formally specified set of actors - - an institutional setting within which negotiations can take place, and both bonding and blind force can be assured. A **regime** offers

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[3] See Oliver Williamson, The Economics of Capitalism: Firms,Markets, Relational Contracting (New York: The Free Press, 1985) which builds on the work of Ian Macneil, "Contracts: Adjustment of Long Term Economic Relations under Classical, Neoclassical and Relational Contract Law," Northwestern University Law Review 72 (1978): 854-905. Williamson recognizes that between the neoclassical and relational contracting schemes, there is a shift of emphasis from the original agreements in the former to the entire relation as it evolves through time in the latter. The relational nature of the "contracting" becomes more binding than the legal guarantee and enforcement mechanisms. Relational contracts are the informal and unwritten agreements within and between firms. These agreements as to vertical and horizontal integration are sustained by the value of future relationships and can be described in repeated game models. They circumvent difficulties in the formal individuals-based pregotative contract. Thus networks of relational contracting take into account an interactive normative order wherein mutually accepted interpretation emerges.

- a template of normative understandings

- a specific mode of legal discourse corresponding to the logic of argumentative practices for fair negotiations based on discourse specific norms

- a model of institutional justice; and

- a utopian model for re-visioning practices.

A regime is an ensemble of constitutive discourse providing the imaginary framework through which we interpret the symbolic order into which we are drawn, if not thrown. It is a carrier of institutionalizing practices and governance rationales. And, as an internal ensemble of discourse generating both legitimation and truth claims, it is open to interpellation/interrogation. It has been the Right rather than the Left that has managed to articulate a rationality of governance consonant with a new regime of the self. To a large extent, the regime of social democracy, while competing rationality with liberalism, is grounded in a liberal base.

The interest group approach of comparative political sociology in the 1950s and 1960s (David Truman, Gabriel Almond, Earl Latham, Reinhard Bendix, Lewis Coser, Ralf Dahrendorf) made no effort to examine either the objective material conditions or the already regulated or intersubjectively constituting normative conditions relating to the formation of interest groups themselves. Stanley Rothman noted four decades ago (1960; 25) what we want to know, and where David Truman does not help us at all, is why the content of the political culture that these groups transmit assumes certain forms at certain times and not at others.

The interest group approach was effectively challenged at the dawn of the 1970s by the social movement literature of Alain Touraine, Cornelius Castoriadis and Claus Offe - - specifically on the very process of interest group formation and the creation of new norms and values. Institutions are understood as playing a mediating role as mechanisms for regulating conflict - - "mechanisms for arriving at decisions, the application of which is sanctioned by legitimate authority." (Touraine, 1977: 178-79; cf Offe : 54.) This implies that there are operative norms prior to politics, learned legitimations - - so that "all claims are not negotiable" (Offe 1976 : 43). Touraine (1977: 196) anticipates historical institutionalism by denoting how social action is circumscribed by a defined and particular historical context - - one that orients the *field* of social relations as well as the stakes in every kind of conflict or negotiation.

The nature of *path dependency* is heavily influenced by the operative norms set by politically active members of the society - - i.e., an elite. But Touraine and Castoriadis pointed to the differing and contradictory role expectations at work in any instituted configuration - - and that these differences and contradictions do not simply originate in the operative norms themselves. Discursive traces of alternative institutionalizing practices are always at work. And these, Touraine notes (362,311) "overflow the frame in which they appear" and "mobilize demands which cannot be entirely satisfied" within the interior arc of subject positions within a preconfigured regime and its frame of practical reasoning and learning.

Beyond Isaac Balbus's notion of latent groups and class determinism, there is another approaching and veering off from Truman.[4] This is now less in terms of class determinism or epochal/regime periodization - - as in the Regulation Theory approach (Robert Boyer, Michel Aglietta, Alan Lipietz) - - and possibly more in terms of a *transformative discursive modality detectable within the normative categorials of a predicate logic.* Beyond Truman's discussion of potential groups, we can focus on potential norms, emergent institutions.

Beyond the 1970s turning to latent groups, social movements and structured inequality came respectively an institutionalist and a discursive turn, as political sociology focused more and more on normative commitment. As Douglas North noted (1990) institutions were increasingly seen as the missing element in comprehending the normative framework of cooperative and competitive relationships.

For the "new institutionalism"of DiMaggio and Powell (1991 :11), institutions were seen as establishing the very criteria by which people discover their preferences. Institutions were increasingly seen as constitutive of preference-formation, and not just as strategic environments within which actors pursue exogenously-given interests. Much of the new institutionalism was to become preoccupied with a cognitive bedrock of shared normative constructions - - templates and constructionism became the hegemonic buzzwords. For a summary of the new institutionalisms, see **Figure 3** below.

The turn toward normative commitment and normative regulation served to counteract the emphasis on interest aggregation; and - - as Joseph Heath in *Communicative Action and Rational Choice* (2001: 309) notes - - "to counteract the general tendency of human affairs to go very badly when left to self-interest." Legitimation was understood in the communications theory of Habermas as the "warranted assertions of substantive rationality" eschewed by Weber's rationalization theory; and bracketed by Mannheim in *Ideology and Utopia* not as ideational constructions constitutive of knowledge, but as superstructural illusions materially produced and periodized. Critical here is the constructionist reprise of the Sociology of Knowledge approach of Berger and Luckmann as well as of Mannheim. Habermas' ongoing project pushed us to recognize how we are socialized to develop a higher disposition in our practical reasoning, one that enable us to assign normative reasons priority over the institutional ones . One that enables us to appreciate how we can distill underlying norms from the institutional context, from their experience as practices. And in doing so, how to boil off the normative predicate logic of a substantive rationality.

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[4] Isaac Balbus, "The Concept of Interest in Pluralist and Marxist Analysis, Politics and Society, V.1 (1972).

FIGURE 3

	SI	II/CI	HI	RCI
Approach	Cultural case study applying organizational theory; ethno methodology; the "new institutionalism" as "embeddedness" theory	Immanent critique/interpellation of argumentative logic along an internal "arc of subject positions" (path shaping)	Historical sociology case study focusing on "collective agency" (path dependency)	Optimizing strategic behavior as case study (methodological individualism)
Focus	NORMS (conventions, cultural constraints)	IDEAS and their warranted assertions	RULES (path dependency regularities)	PROCEDURES and their opportunity structures
Preference Formation	Endogenous constitution of actors through institutions	Endogenous ideational perceptual and discursive factors	Endogenous preference formation	Exogenous preference formation
Creation of Institutions	Evolutionary with reinterpretation	Diremptive crossing of institutional thresholds	Delegated subinstitutions' potential expansion	Transaction cost
Evolution of institutions	Cognitive / memory culture / mythologizing	The imaginary institution of society (path shaping)	Contingent path dependency with unintended consequences	Bargaining
Theoretical fix	Theory of legitimation	Theory of legitimation	Mix of theory of preference hierarchy with theory of legitimation	Theory of preference hierarchy
Approach to practical reasoning	Logics of appropriateness	Immanent rationality (bounded & unbounded rationality)	Logics of bounded rationality	Logics of bounded rationality
	SOCIOLOGICAL INSTITUTIONALISM	IDEATIONAL/CRITICAL INSTITUTIONALISM	HISTORICAL INSTITUTIONALISM	RATIONAL CHOICE INSTITUTIONALISM

We are unbracketing legitimation forms that Berger and Luckmann as well as Mannheim treat sociologically without considering their ontological and epistemological claims. Legitimations, represent the substance by which our preferences are ordered. And Habermas's legitimation theory involves taking up "warranted assertions" with their "sense of appropriateness" and attendant constitutive "application discourse" - - all of which are ultimately testable in the "transcendent discourse" of universalizability/generalizability. (See Klaus Gunther, 1988).

Habermas' legitimation theory breaks as well with *rational choice institutionalism* (**RCI**) and its preference-hierarchy, transaction cost minimizing behavior and utility calculi - - which Hall and Soskice (2000) might yield too much ground to. RCI starts with preferences that are exogenous to a model where all factors are held constant. Nothing is prior to individual utility calculi. And institutions are understood as merely vehicles for respective utility maximizations. RCI cannot account for the social, only what is at base intentional - - only what is strategic pursuant to exogenously given interests. Again, we return to the counterpoint - - the discursive approach to the substantive rationale of legitimating conduct, and its engagement of the instrumental rationale of strategy and preference. Crucial is the former's focus on

an internalist conception of legitimation.[5]   The constellation of positions within a legitimating argument is internal to the argument itself. It is an endogenous constellation of positions that a subject discursively takes in order to redeem normative commitments boiled-off in unbracketed form from their institutional husks.[6]

The commitments - - i.e., justifications in discursive theoretical terms - - make claims upon acting subjects. They exist independently of the acting subjects. Not just as a legacy or an institutional supply of justification, but as a trajectory with semblances and traces along an arc of subject positions. This internalist trajectory is itself a contingent byproduct of accumulating social conflict and cooperation. The trajectory and its arc - - which characterize the endogenous constellation of subject positions within normative argument - - moves us to an evaluation of possible normative alternatives.

Thinking in terms of constellations, trajectories and arcs enable us to see how legitimating claims and strategies exist independently of actors and are drawn upon by actors. As Andrew Sayer reminds us, "(T)he political discourse exists as it is regardless of whether I study it and whatever I think of it."[7] The dynamic of the constellation of discourse is something acting subjects internally (endogenously) participate in and constitute as they go along. The constellation is constituted as we interrogate it. Our contingent articulation involves less a functional playing of roles, and more of an authorial interpreting and infusing of roles with our instituting imaginary.[8] The constellation comprises a predicate logic - - with warrant predicates and truth predicates; with assertoric claims and validity claims; and with application discourse and generalizability discourse. (See Heath, 2001, and Gunther, 1988). Beyond Truman, the nature of our on-going willingness to "play by the rules" is subject to positioned criteria of warranted assertability. These criteria, claims of rightness and their propositional content are reflexively reconstructable - - rationally reconstructable - - as Habermas labels this internal constellation of normative commitment and attendant argument. They are rationally reconstructable as unfolding normativity.

This is not just a bounded rationality of recombinatory elements, but an imaginative projecting of a growing rationality.[9] This is an imaginative projecting and reconstructing that enables us to recognize the new - - that is, the "novel" - - within an institutional trajectory. It is also an explaining of (1) either institutional stability; or (2) how ideas about institutional change or transformation fit into a hermeneutical

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[5] Bernhard Peters, "On Reconstructive Legal and Political Theory" in Mathieu Deflem, ed. Habermas, Modernity and Law (London: Sage, 1996),: pp. 101-134.

[6] Ota Weinberger: "Habermas on Democracy and Justice: Limits of a sound conception," Ratio Juris (1994), pp. 239-253; and Law, Institution and Legal Politics (Boston: Reidel, 1991). See also Neil MacCormick and O. Weinberger, An Institutional Theory of Law (Boston: Reidel/Klawer, 1986).

[7] Andrew Sayer, Realism and Social Science. (London: Sage, 2000) p. 34.

[8] See Cornelius Castoriadis, The Imaginary Institution of Society, trans. K. Blarney. (Cambridge, MA: MIT Press 1987). First published in France, 1975: cf. David Runciman. Pluralism and the Personality of the State. (Cambridge: Cambridge University Press, 1997).

[9] Hans Joas: "On Articulation," paper presented at the "Conference on Cornelius Castoriadis: Rethinking Autonomy" at Columbia University, 1 December 2000; The Genesis of Values. (Chicago: University of Chicago Press, 2000; and "Institutionalization as a Creative Process: The Sociological Importance of Cornelius Castoridias' Political Philosophy," American Journal of Sociology. 94 (1993), pp. 1184-1199.

circle of argumentation and interpretation - - an endogenous source of change within a constellation of discourse. They do not merely fit within pre-existing institutions - - their tree-like roots, and their capillary growth of outcome paths. *"Ideas provide the point of mediation between actors and their environment."*[10] (Hay 2001: Chapter 5). The subject actors' point of access to their densely structured context is irreducibly ideational - - and discursive.

Bob Jessop's "strategic-relational approach" (Jessop: 1997, 2000) melds well with path dependency HI. Within a given specific context, there is an unevenly distributed configuration of opportunity and constraint for subject actors. And along with it a structural *"strategic selectivity,"* that is, only certain specific paths of strategic action are available, and only some of these are likely to be actualized in actors' intentionality. As in RCI, only some actors "read" the paths effectively - - but this is so as a result of there not being the perfect information assumption "all things being equal" in much neoclassical economics and rational choice theory. Hay modifies Jessop, by stressing how actors without complete information need to interpret the world on the basis of a constellation of ideas in order to orient themselves strategically, to reflexively monitor both the context and consequences of their actions. Thus there is as well a *"discursive selectivity"* derived not from material structure, but from the claims and frames yielded in an interrogation of the constellations of interpretation and argumentation that function as cognitive filters, embedded and growing within institutions - - that function as the language of a text, a narrative about structured material inequality, latent groups as well as normative commitment. The claims and frames are yielded in the strategies which subject actors devise as a means to: (1) realize their intentions upon a material context which favors ("selects") certain strategies; and (2) accommodate their normative commitments in so doing. This is not idealism, but an ideational accessing with both the material and normative context. This is not the longings of desire or the imposition of cognition; rather, it is an engaging of the discursive with the material environment, not a dissolving.

This is a relating of a theory of institutions to a theory of normative unfolding. This is as a substantive theory and not merely a proceduralist formalism, not as an essentialist mythic/mystic narrative of some inherent national ordering. Two decades of sympathetic critics - - such as Klaus Hartmann, Ota Weinberger and Ottfried Hoffe - - have urged Habermas to grasp the need for a theory of institutions which he could ground his discourse theory in - - as a theory of Institutional Normativism (**IN**).

III. Critical Theory as Critical Institutionalism

What historical institutional (HI) finds in the institutional trajectory of unfolding normativity and its arc of subject positions is not idealism but discursive selectivity - - one which remains in dialectical tension with the exogenous structural selectivity of material incentive and opportunity structures. This results in a constant dialogic tension confronting the discursive theoretical terms of an HI modified by communications theory into a theory of legitimation we will call Critical Institutionalism (**CI**). This is a dialogic tension with the strategic opportunism inherent in RCI and evolutionary institutional economics. Habermas helps HI with its persistent troubles with ideas, the constellation of legitimating, and normative

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[10] Colin Hay, <u>Political Analysis</u> (Basingstoke: Palgrave, 2002), Chapter 5.

commitment. On the other hand, HI poses a final "way out:" to Habermas's persistent and unnecessarily confining problem of equating strategy with ultimately utility-based technique and purely instrumental reasoning; and second to his separating the realm of normativity and law from institutional facts. See **Figure 4** below.

HI has been open to acknowledging exposure ideas, but tends not to see ideas as normative contents within institutional practices. Conceptualizing HI as a legitimation theory enables us to conceive of the ordering of preferences less structurally, and more endogenously within a constellation of discourse/argument-- where institutional commitments "ghost the future" in traces and semblances of the unborn, or not yet actualized.

Institutions contain within them a normative core--a chain of practical reasoning/a constellation of action-related argumentation. Jurgen Habermas offers HI procedural normative models by which the cognitive (i.e., validity) claims within such argumentation can be made meaningful--in terms of the legitimation they immanently project. Neil MacCormick and Ota Weinberger sympathetically modify Habermas. They refer to two modification as Institutional Normativism (**IN**), ideas are not to be bracketed, but are to be subject to reflexive reconstruction as a form of discourse (practical reasoning) so that normative potentialities made available by collective learning processes are scanned for realizability.

In contrast to either the *"brute facticity"* of empiricism or the counterfactual chimera of procedural normativisism, (**IN**) focuses on normative contents within institutional or institutionalizing practices, *"institutional facticity"*--i.e., the nature of our participation in the promising game and obligation game inherent in legitimation. Ideational structures that are the byproduct of the rearticulation of bargaining power within conflict become institutionalized and normalized as "facts," and their warranted assertions as "immanent forms." **IN** is rationally reconstructive of the institutionalizing *"warranted assertions"* involved in our participation within emergent forms of life.

"Critical Theory redeems past hope in the name of the future by revealing the as yet unrealized potentials of the present."[11] It asks to what extent sedimented and floating signifiers have not yet delivered on their promise of a substantive order. Unlike the Sociology of Knowledge of Karl Mannheim or Berger and Luckmann, critical theory does not deny the immanent development and affirmation of changed and new forms - - changed and new conceptual mediations of social reality - -- as a process of knowledge driven by an inner dialectic, as an unfolding of categorial analysis whose immanent predicate logic provides the basis for critique.

Critical Theory is a theory of legitimation as rational aspiration. It uncovers and measures its utopian content - - the substance of the organizing principles embedded within its worldview *(Weltanschaung)*, its mental model. Critical Theory tests the warranted assertions and truth claims of legitimations inherent within an institutional legacy, an institutional trajectory, and the arc of an institution's anticipated horizon (or constellation). It is a form of self-reflective knowledge in itself.[12]

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[11] Seyla Benhabib, "Modernity and the Aporias of Critical Theory," Telos, n.49 (1981), pp. 58-59.
[12] Raymond Geuss, The Idea of a Critical Theory (Cambridge: Cambridge University Press, 1981). Pp. 59, 88, 95.

A theory of legitimation is grounded in actors' valuation of what is right. And the more ideational institutionalism we have posed reflects the tradition of institutionalism as institutional embodiment of normative substance, rather than the tradition of evolutionary institutional economics. It is legitimated intersubjectivity as a substance with its own internal principles - - its own entelechies. (See Massimo LaTorre, 1999).

Historical institutionalism (**HI**) conceptualized as a theory of legitimation can account for this ideational foundation of institutions.[13] Part of the gap in HI results from the fact that practicing political sociologists - - often by training - - skeptical or dismissive of the possibility of any rational grounding for unfolding normativity.

A substantive understanding of institutionalism is one that fills gaps, aporias (in both Derrida's and Benhabib's terms), and situations of undecidability with semblances (Adorno), iterable traces or spectral presences (Derrida). And a *Critical Institutionalism* (**CI**) resulting from the grounding of Habermas's brand of critical theory as discourse theory in a theory of institutional facts resists the gapless normativism of a Kelsen or a Langdell, it as well resists the equally positivist imprinting of the black letter law without recourse to Natural Law. And for that matter, Habermas's surrogate for Natural Law--a proceduralist transcendental formalism known as the Theory of Communicative Competence with its test n the court of the Ideal Speech Situation. Note **Figure 4** below.

FIGURE 4

LAW AND MORALITY	LAW AND FACT	
	SEPARABILITY OF LAW AND FACT	INSEPARABILITY OF LAW AND FACT
INSEPARABILITY OF LAW AND MORALITY	1a NATURAL LAW THEORY Otto Gierke / COMMUNI-CATIVE COMPETANCY THEORY Jurgen Habermas **1b**	2 INSTITUTIONALIST THEORY OF LAW (law as institutional fact) Neil MacCormick &Ota Weinberger beyond Emile Durkheim
SEPARABILITY OF LAWAND MORALITY	3 JURISPRUDENTIAL AUTONOMY Hans Kelsen's Pure Nomological Theory of Law	4 EMPIRICO-POSITIVIST THEORY OF LAW John Austin & H.L.A. Hart

In confronting the NeoLiberal challenge to all forms of sociality/solidarity, such a critical institutionalism would follow the jurisprudence of Richard Fallon in probing the inherent intelligibility within the fluidity of constructivist norm creation beyond the narrower interpretive mode of Richard Epstein and Antonin Scalia. Substantive

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[13] Thelen

design by constituting interpretive communities displaces individualist formalized law.

The **CI** developed here evaluates the forms by which societies evaluate themselves, that is, the formal ordering of what Ottfried Hoffe has referred to as "Institutional Justice." Hoffe understands a juridico-discursive--like Bo Rothstein--order in the "discourse theoretical terms" of argumentative forms, rather than in an engagement with chimerical counterfactuals. These argumentative forms serve as the vehicles by which we extend the institutionalizing dialogue of deliberative justification into the marketplace and civil law as ***governmentality - - governance rationales used in practices***, rather than idealizations (chimera). This involves discourses answering practical questions--and with it a discursive selectivity testing for the dialogic claims of an unredeemed predicate logic, beyond the functional sociological compliance and justification of a strategic selectivity.

Critical institutionalism as a capstone to historical institutionalism (**HI**) can be understood as an internalist principled game, a language game

- wherein norms rather than some mythic/mystic substance is experienced as inner institutional morality (Hermann Heller),

- wherein deliberation defines its own guiding norms and practices as an institutionalizing governance rationale (Jurgen Habermas),

- wherein norms are not understood as objects of pure cognition, but as values we commit ourselves to in our practices: (Georges Gurvitch); and

- wherein norms emerge as the socially shared solutions to problems and as byproducts of repeated social conflicts - - from which they are transformed into a constellation of learned normative commitments, revealed as promises.[14]

Here the "institutional" represents the non-contractual dimension of obligation - - the shared standards of self-governance, and valuation, the normative commitments and promises of a "promising game constituted in and through discourse theoretical terms.[15]

Criticial institutionalism like the *"critical history"* posed by Michel Foucault and Mitchell Dean goes beyond posing critical junctures of contingent emergence.[16] It involves a capacity to engage in interrogation of the internalist principled/promising game - - wherein discourse is ontologically prior to identity-formation, and legitimacy is prior to legality. "No individual can choose to stand outside the totality of the interpretive frameworks of discourse written into our very human condition."[17] Institutional Justice involves the legitimated ordering of regimes - - substantively and procedurally - - in terms of formal models of law and political economy.

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[14] Jack Knight, Institutions and Social Conflict. (Cambridge MA: Harvard University Press, 1992).
[15] John Searle: The Construction of Social Reality. (New York: The Free Press, 1995); Speech Acts (Cambridge: Cambridge Univeristy Press, 1969).
[16] Mitchell Dean, Governmentality (London: Sage, 1999).
[17] A.M. Smith, Laclau and Mouffe; The Radical Democratic Imaginary (London: Routledge, 1998).

Subject positions - - themselves constituted discursively - - are an ensemble of interpretative schema responsive to structural positions.[18] They are drawn upon as legitimating strategies and mark how we experience our structural position within the social. (Here see the development of this concept from Gramsci through Althusser through Laclau and Mouffe.[19]) Thus we are not just bearers of supports, but actors who draw upon a repertoire of discourse resources - - within a discursive structure of signifiers - - interpretive schema, rights, claims and collective identities tied to subject positions. We are actors who draw on legitimations of purposive and substantive argumentation.

Subject position within respective regimes of law and political economy can be rationally reconstructed in discourse. In doing so the internal relations of an immanent normative unfolding or a projected re-institutionalizing of practices can be gauged - - in the discourse theoretical terms of argumentative forms, i.e., discursive selectivity. *Subject positions are more in a condition of floating signifiers that have not yet delivered on its promises, on its normative commitments, on its reflected visions. And moving along the interior arc of a regime's subject positions, we move beyond the configurative paths, junctures and practices of "effective history" practiced by **HI**, toward a "critical history" associated with **CI**.* The latter employs more of a *diremptive* approach - - a key phrase from Habermas and ironically Georges Sorel before him. The diremptive approach attempts to reflect reality at more than one moment, one instance.

Legitimations are positioned in narratives and worldviews/world picture - - not as static snapshots, but as panning shots of a regime in motion - - with social movement, swelling beyond thresholds, and institutional emergence. A diremptive approach scans a constellation of instances that open up to montage-like presentation

- where genres return to haunt us not just as memory, but also as possibility of uncanny actualization; and

- wherein the future is never either fully determinable or fathomable, but only grasped and recognized as traces or semblances - - moved by the necessity of truth, rather than the arbitrariness of ideology - -within the gaps among the intermittent rhythms, sequences and jumpcuts.

Critical instiutionalism (CI) complements historical institutionalism by keeping us aware that the swelling of historical movement and change is an instance of displacement, as much as it is path-dependent. This is the displacement of one threshold for another. History, Walter Benjamin advised us, is never wrapped into a specific moment of a fixed juncture. Rather, it flows in a *passage* that *swells* beyond the limits of its epoch, of its period. It confronts a gap - - or aporia - - and makes up for it by constituting a canal for the displacement of the swelling (*schwelle*), a superim**position** of a threshold.[20]

[18] See Jacob Torfing, New Theories of Discourse: Laclau, Mouffe and Zizek (London: Basil Blackwell, 1999).

[19] Ernesto Laclau and Chantal Mouffe, "Post-Marxism without Apologies," in E. Laclau, New Reflections on the Revolution of Our Time (London: Verso, 1990).

[20] Howard Eiland. "Reception in Distraction," paper presented at the "Benjamin Now Symposium: Critical Encounters with Walter Benjamin's Arcades Project" at the Forbes Center for Research in Culture and Media Studies, Brown University, 6 April 2001.

IV. The Argumentative Turn: Categorically Grasping the Signifiers within Pluralist Social Subjects of Rights

The promise of the signifiers of the Governance of Social Law have only partially delivered in their promise of a new institutional order. As Adorno notes, the democratic imaginary seeks traces of a prospect of utopia within a society that continually betrays it, tracing its own claims which ghost the future.

To what extent can liberalism offer a convincing account of the democratic citizenship adaptable to the provocation of non-statist institutions? Following Laski rather than Schmitt, sovereignty in the past century reflects social compacts rather than separate state apparatuses per se. A regime of the Autonomous Social uncoupled from the State and linked through complementary institutions within civil society is bent on institutionalizing itself as a form of life, as a postliberal governance rationale.

Following Laski rather than Schmitt, we need to accommodate rather than exorcise a pluralism of heteronomous regulatives and constitutives. Out of the accelerating pluralism of the past century, emerges a plan of signifiers in the practical and discursive struggles of pluralist Social Subjects of Rights rather than the Marxist monist Social Subject of Rights - - another sense of sovereignty eclipsed.[21] The Governance of Autonomous Social Law derives from deliberation as an effect - - as a discourse finds its own subjects. Such pluralist deliberation is the source of its legitimation, rather than some higher law or some gapless system of norms. This trace of a tradition of discourse associated with an emergent practice and juridification draws on the categorical framing of a democratic imaginary in its historical struggles and in its immanent potential.

The practices and forms of the Governance of Social Law can be grasped categorically as assertional commitments (Brandom), and not counterfactually as chimera (G.A. Kelly). Chimera are anti-historical. The issue of immanent historical warrants - - rather than visions of order - - are immanent within the core of practices, immanent within a regime of discourse whose claims are interrogated/interpellated. This immanence is inherent in what George Hendrik von Wright[22] would call a quasi-teleology of normic statements - - that is, legitimating, propositional claims. A Critical Institutionalism (**CI**) goes beyond the Sociology of Knowledge in unbracketing normative commitments from practices, from their institutional husks.

Categorial form is created in historical time but attains independent validity as the argument behind an institutionalizing practice is interpellated and gauged. Beyond the Sociology of Knowledge, Institutional Normativism (**IN**) starts with a genealogical study of the evolution of institutional practices as reworkable traces of affirmative substance, the substance of an emergent form of legitimation. Then IN is transformed into **CI** in its interpellation of the legitimating argument itself, which guides the "imaginary institution of society."

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[21] Kirsti McClure: "Taking Liberties in Foucault's Triangle: Sovereignty, Discipline, Governmentality and the Subject of Rights in Austin Sarat and T. Kearns, eds. Politics, Identities and Rights (Ann Arbor: University of Michigan Press, 1996); and "On the Subject of Rights: Pluralism, Plurality and the Politics of Identity" in Chantal Mouffe, ed. Dimensions of Radical Democracy (London: Verso, 1996).
[22] Georg Hendrick Von Wright, Explanation and Understanding (Ithaca: Cornell University Press, 1971). Pp. 58-60, 84-86.

Beyond **HI**, and its focus on path dependency, Critical Theory as **CI** and "critical history" understands a process of self-clarification and emergent possibility internal to a historical process, internal to the argument of normative principles that are the core of institutional/institutionalizing subjects. Following the anthropologist Mary Douglas in *How Institutions Think* (1986), institutions can be conceptualized as subjects of action, as bearer of practices and their normative claims/commitments. A Critical Institutionalism looks beyond the "discursive selectivity" of some logic of appropriateness and the interestedness of actors' application of that logic, what Schattschneider once called the "mobilization of bias." **CI** looks beyond "interestedness" toward "commitedness." In this way **CI** may have more in common with Philip Selznick's "old institutionalism" with its focus on the affirmativity of institutional commitments as an ontology of institutional facts, rather than the focus of **RCI** on "contracting."

Beyond interestedness and discursive selectivity, we are moved to focus on discursive commitment itself rather than merely the application of the commitment. We are moved to a theory of legitimation rather than of interest groups, to a commitedness to rights and procedures.

Rational Reconstruction can be understood externally/explicitly as the process tracing of the contingent interaction, the discursive selectivity of policy-makers' performance and claims within a path dependent institutional context.

Rational Reconstruction can also be understood as a more internalist/implicit interpellation of the commitments themselves: their warrants, their propositions, the arguments immanent within path shaping/institutionalizing practice "boiled off from their institutional husks."

Figure 5 below, describes the dialectical relationship between the explicit performative practices and norms and the more depth-level implicit values and warranted assertions. Rational reconstruction is more than retrieval--it is the reconstruction of a set of practices we have come to learn, and the underlying values by which legitimation claims are evalualed.

Social Subjects of Rights are inscribed in material practice - - not as a system of ideas in people's heads, but as material practices existing in people's conduct according to their commitments. These material practices can be understood not only in terms of an ordinary causal emergence reducible to micro-properties, and path dependency within predetermined paths of appropriateness. These practices can also be conceptualized in terms of a novel path-shaping and holistic emergency wherein a set of properties (such as the Governance of Social Law) may be determined by and dependent on other properties, but not reducible to those others.[23]

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[23] See William Hasker, <u>The Emergent Self</u> (Ithaca: Cornell University Press, 1999), pp. 171-78; and Jagwon Kim, <u>Supervenience and Mind</u> Cambridge; Cambridge University Press, 1993). Cf. Joas <u>Supra</u>.

FIGURE 5

5A.   The EXPLICIT/External (realm of contingency)

- **empirico – sociological level of practical reasoning**
- assertion as action/conduct
- **performative derived from interestedness**
- action – related argumentation

    o **regimes of argumentative practices having "discursive selectivity"**
    o the arguments of policy makers
    o the coherence of a policy program as carried out by elite actors

- **External Rational Reconstruction**
    as a process-tracing of the contingent interaction within a path dependent institutional context

mediated by an internal dialectic
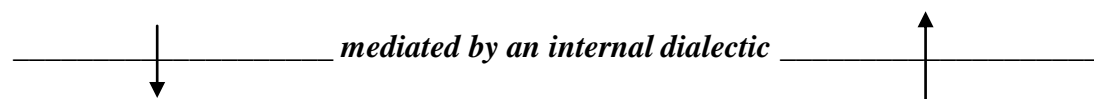
5B.   The IMPLICIT/internal (realm of necessity)

- **Grammatological, juridico-discursive order with "internal relations"**
- Assertion as normativity
- **Epistemological claim/warranted assertion derived from committedness ("self-referring")**

    o **the argument itself: commitments as normative core**
    o interpellation of propositions
    o resonance with value form categorials
    o immanent with legitimation arguments

- **Rational Reconstraction of the Internal Relations** of the immanent and emergent normativity "boiled off from its institutional husk" **as an "arc of subject positions" within an immanent rationale.**

Following Campbell and Pedersen[24], **CI** can be seen as a strand of *discursive institutinalism* (**DI**). By DI, Campbell and Pedersen denote what we called **IN**, institutional normativism (**IN**). **DI** focuses on perceptions and meanings in "discourse

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[24] J. L. Campbell and Ove Pedersen: "Introduction: The Rise of NeoLiberalism and Institutional Analysis;" and "The Second Movement in Institutional Analysis' in J. L. Campbell and Ove Pedersen, eds. TheRise of NeoLiberalism and Institutional Analysis (Princeton: Princeton University Press, 2001).

theoretical terms" (dtt's), but not in terms of *apriori* categorials of legitimation that precede cultural perceptions and legal meanings. **DI's** principal concern is to trace the process by which an ensemble of ideas, concepts and categorizations are translated into institutional patterns--how we are discursively structured, and the ways in which policy debate is conducted.

Kjaer [25] understands **DI** as the relationship between discourse and institution as the outcome of historically specified ways of situating and organizing practices in a society with horizons of meaning. Hay (2001) defines a strand of **DI** as the *"ideational institutionalist* approach" (**II**) as a process-tracing of the way people position one another through the use of a widely employed discourse; as a sociology of practical knowledge detailing the application of dominant ideas/legitimations by policy-makers.[26]

DI involves "normic statements."[27] This is the level of theory "which leaves open the question whether people are doing what people invariably do in those uniquely complicated circumstances or are doing one of the comparatively few things which people…choose to do in such circumstances."

The **II** strand of **DI/IN** focuses on performatives of learning and problem-solving--practical judgments wherein intuitions, understandings, commitments and pragmatic actions align and combine. In so doing, **II** details a regime of propositionally differentiated speech acts, emerging out of institutional facticity. And it identifies the compelling reasons for what we say or do in concrete situations.

Beyond policy-makers' application of ideas, **CI** is the strand of **DI/IN** that turns to the ideas themselves, and to the argumentative logic of a legitimation. It also turns to the experience of that argumentative logic. This is what is referred to in policy analysis as *"the argumentative turn."* [28] This "argumentative turn" opens up the commitments implicit in the decision-making of governance, and captures the endogenous emergence of argumentative logic that breaks with hegemonic patterns of legitimizing thinking associated with a regime.

Argumentative propositions are defined which problematize hegemonic normative statements--which counter justifying assertions of regime leaders. Thus, **CI** can elucidate ideas and actions which are not readily predicted by the rational reconstruction of interest-based behavior--and which do not necessarily follow from historical path dependencies. Rather, these ideas and actions may resonate with either forgotten long standing values, like those of reflexive labor law and the governance of social law--or with newly emerging values.

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[25] Peter Kjaer and Ove Pedersen. "Translating Liberalization: NeoLiberalism in the Danish Negotiated economy" in Campbell and Pedesen, pp. 219-218.
[26] Hay, Political Analysis, 1981.
[27] Hugh Stretton. The Politivcal Sciences (London: Routledge & Kegan Paul, 1969), p. 327.
[28] Note here Frank Fischer and John Forester, eds. The Argumentative Turn in Policy Analysis and Planning. Durham: Duke University Press, 1983. Giandomenico Majone. Evidence, Argument and Persuasion in the Policy Process (New Haven: Yale University Press, 1989). Maarten Hajer, The Politics of Environmental Discourse Oxford Clarendon Press, 1995); Martin Hajer and Hendrik Wagenaar, eds., Deliberative Policy Analysis: Understanding Governance in the Networked Society (Cambridge: Cambridge University Press, 2002).

The "argumentative turn" is influenced by the *poststructural* focus on the practices in which humans engage--not the humans themselves, nor the structures by which they are constrained. Such focus centers on the way arguments are made--within a discursive ensemble--and can be read as a "text." How does a group of people creatively bring a "self-referential" model of practices into existence, how they think about, how they talk about it, how they transubstantiate it, maintain and reform it.[29]

The argumentative turn follows the discursive turn in developing the study of institutional normativism beyond a sociology of practical knowledge of iterated games described by Gicondomenico Majone (1989).

Geoffrey Hawthorn[30] noted that Karl Mannheim's sociology of knowledge "never approach[ed] a resolution to the very difficult question of the relation between "the internal and external interpretations of ideas." **CI** extends the critical theory of Habermas to a focus on the internal relations of argument, and beyond the external relationism of applied practical knowledge that characterizes **II**. Whereas **HI's** focus is causality and capacity, **II's** focus is how ideas are constituted (constructed) and framed. **CI's** internalism transcends historicism and sociology with a focus on principles and the immanence of their argument. **HI** and **II** operate on the level of institutional facticity, whereas **CI** operates on the level of principles, value-form categorials that historicism and sociology bracket out.

The autonomies of relational contracting and private law regimes reflect the pluralism of instituted associations and instituting associations that motivated Maitland, Laski, Heller and Neuman to understand that pluralism as the central of post-liberal contract law and labor law as well as political theory. Twentieth century contract law and labor law sought to institutionalize social reflection and regulation of enduring class conflict, group conflict and corporate conflict.

Social rights and social law can be understood in terms of the "polycontextuality" of autonomous non-staff regimes legislating, regulating and adjudicating within their own subsystems; as well as in relating to each other. Such as approach studies the contextual space between such regimes as a space for the collision of discourses, language games, textualities and projects.

Within this hierarchy of these subsystems, contract appears no longer as merely an economic exchange between respective individual persons, but as a space for finding differently contracting discursive projects with emerging discursive rights--i.e., rights to interpret competing claims. Networks of relational contracting sustained by the value of future relationships take into account an autonomous interactive normative order wherein mutually accepted interpretation emerges. Each network has its own autonomous path dependent institutional trajectories.

Institutions matter. And institutionalisms matter. And further to follow Bo Rothstein, just institutions matter. Critical institutionalism (**C1**) focuses on the claims of justice inherent in institutional/institutionalizing practices. Out of the immanent tradition of

[29] Barry Barnes "Social Life as Bootstrapped Induction," Sociology, v.4 (1983), pp. 524-545; and David Bloor, Wittgenstein, Rules and Institutions (London Routeldge, 1997).
[30] Geoffrey Hawthorn. Enlightenment and Dispair: a History of Sociology (Cambridge: Cambridge University Press, 1976), p. 181.

social law and social rights such a critical institutionalism can be understood and made explicit, as we comprehend implicit normative commitments.

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