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Traces of the Stillborn?

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TRACES OF THE STILLBORN?:
THE GOVERNANCE OF THE RULE OF SOCIAL LAW

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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 paper 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

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.

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, David Dyzenhaus and Peter Caldwell. These historical retrievals suggest an **immanent tradition of social law and social rights** associated with the struggle to develop labor law, complementary institutions of 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?

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.

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.

As Charles S. Maier notes, in *Reshaping Bourgeois Europe* (1975) what would result 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 these newly legitimated social partners sought to contain the unorthodox extra-parliamentary organization and methods of independent movement for direct workers' representation.

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 Neumann and 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.

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. How does liberalism cope with pluralism? How does it do so beyond the legacy of premodern guild and collegial institutional forms?

The genealogy of a German critical sociology of law 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. What Lehmbruch (1996, 1998) labels Negotiated Democracy (*Verhandlungsdemokratie).*

This focus 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) forthcoming in *Academy of Law, XIth Session,* Oxford Univ. Press; 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 nodded at 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).

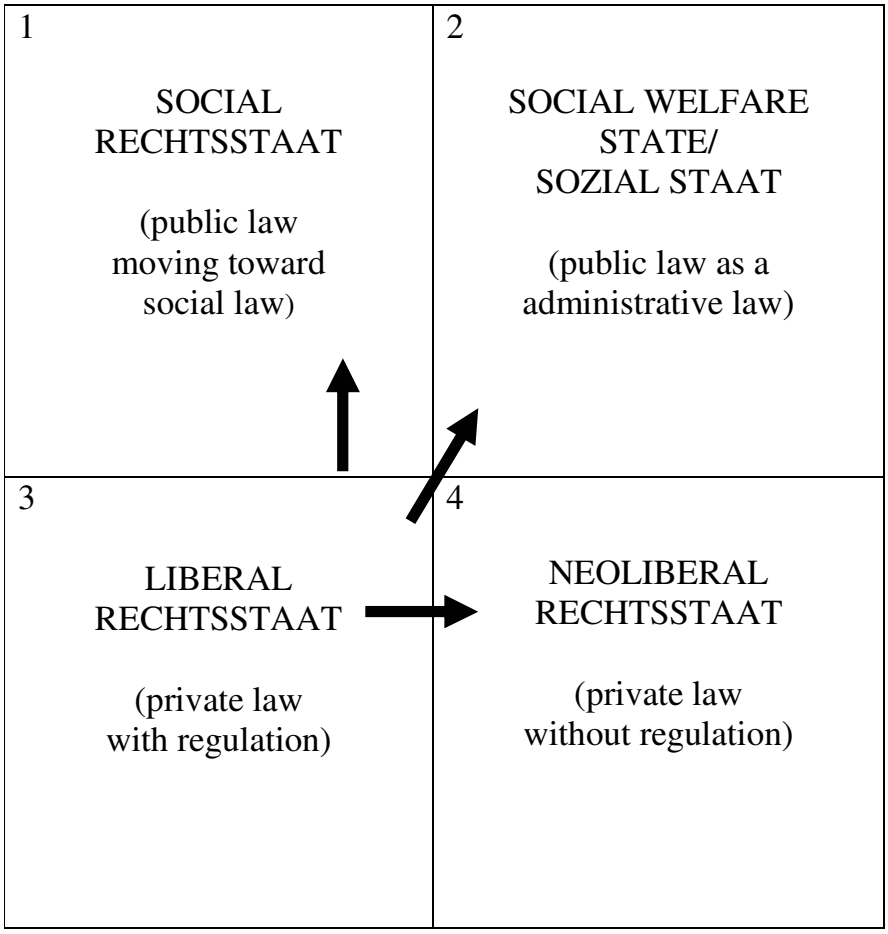
Gerstenberg, along with **Charles Sabel**, eschew both corporatist functionalism and the autopoesis of sub-systems networking for the pragmatism of what they label grass roots ***democratic experimentation***. They focus – along with Archon Fung and Michael Dorf – on ***"bootstrapping"*** local autonomous 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** and his London School of Economics (LSE) tutor **Harold Laski**: i.e. 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 directly below.

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)

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."

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

The interest group approach of comparative political sociology in the 1950s and 1960s (Truman, Almond, Latham, Bendix, Coser, 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. This is now less in terms of class determinism or epochal/regime periodization - - as in the Regulation Theory approach (Boyer, Aglietta, 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.

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.

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. (See Bernhard Peters, 1996). 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. (See Weinberger, 1991).

The commitments - - i.e., justifications in discoursive 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 (2000a:34) reminds us, "(T)he political discourse exists as it is regardless of whether I study it and whatever I think of it." The dynamic of the constellation of discourse is something acting subjects internally (endogenously) participate in and constitute as they go along. As Judith Butler notes, 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. (See here Cornelius Castoriadis, 1987 and David Runciman, 1997). 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 (Joas, 200A, 200b, 1993). 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 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"* (Hay 2001: Chapter 5). The subject actors' point of access to their densely structured context is irreducibly ideational - - and discursive.

Jessop's "strategic-relational approach" 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 s 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**).

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 commitment. On the other hand, HI poses a final "way out" to Habernas's persistent and unnecessarily confining problem of equating strategy with ultimately utility-based technique and purely instrumental reasoning.

III

"Critical Theory redeems past hope in the name of the future by revealing the as yet unrealized potentials of the present" (Benhabib, 1981: 58-59). 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.

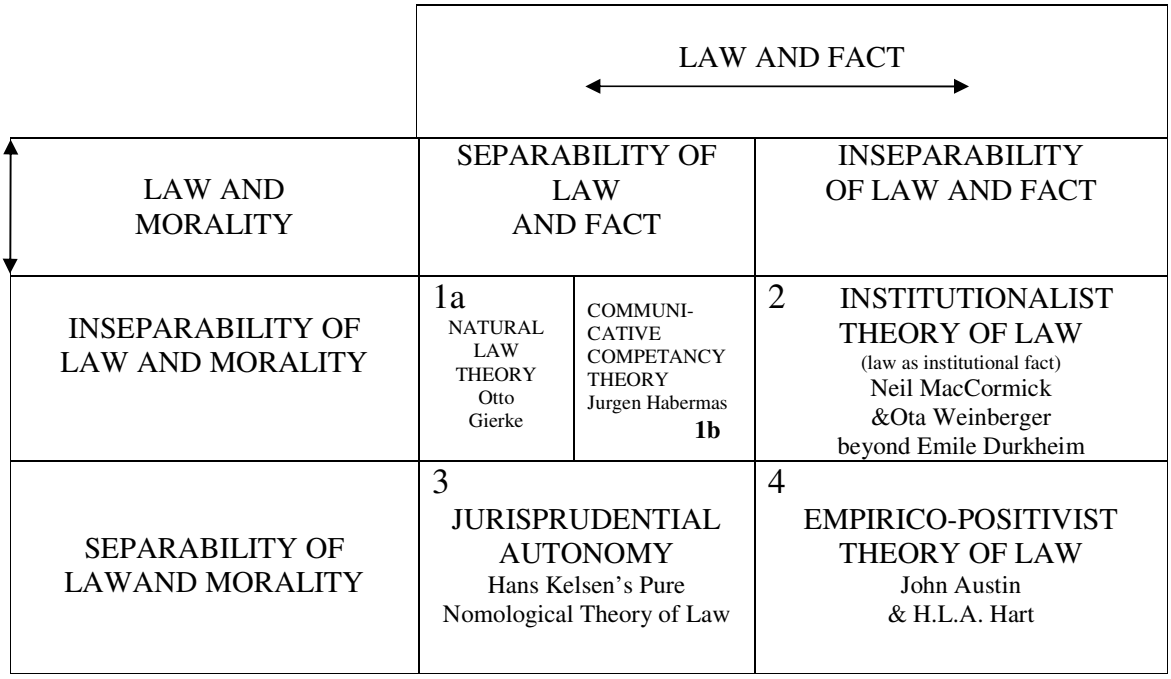
Critical Theory is a theory of legitimation as rational aspiration. It uncovers and measures its utopian content - - the substance of the organizing principles embedded within its worldview *(Weltanschaung)*, its mental model. Critical Theory tests the warranted assertions and truth claims of legitimations 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. (See Geuss, 1981: 95, 88, 59).

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) complemented by the theory of legitimation can account for this ideational foundation of institutions (Thelan). 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 (Beetham).

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 institutions resists the gapless normativismof a Kelsen or a Langdell, it as well resists the equally positivist imprinting of the black letter law without recourse to Natural Law. Note Figure 2 below, as adapted from Paulson (1992).

FIGURE 2



In confronting the NeoLiberal challenge to all forms of sociality/solidarity, such a critical institutionalism would follow 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 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 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.
  (Jack Knight).

Here the "institutional" represents the not-contractual dimension of obligation - - the shared standards of self-governance, and valuation, the normative commitments and promises of a "promising game (John Searle) constituted in and through discourse theoretical terms.

Criticial institutionalism like the *"critical history"* posed by Michel Foucault and Mitchell Dean goes beyond posing critical junctures of contingent emergence. 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." (See A.M. Smith, 1998) Institutional Justice involves the legitimated ordering of regimes - - substantively and procedurally - - in terms of formal models of law and political economy.

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

- 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. And as Niklas Rose (1996: 60) has noted, 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.

Subject positions - - themselves constituted discursively - - are an ensemble of interpretative schema responsive to structural positions. 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). 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.

IV

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. (See McClure: 1992,1996). 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. (See Castoriadis).

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.

The practices and forms of the Governance of Social Law can be grasped categorically as assertional commitments (Brandon), 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 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."

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."

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. (See Joas, 1993, 2000a, 2000b; Hasker, 1999: 171-78; Kim, 1993).

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