Commentary and Debate

THE POVERTY OF EVOLUTIONISM: A CRITIQUE OF TEUBNER'S CASE FOR "REFLEXIVE LAW"

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The concept of "reflexive law" contains two mutually contradictory elements: a doctrine of *legal restraint* and the notion that restraint can be achieved by *procedural* rather than substantive regulation. This critique argues that new procedures have historically not replaced substantive regulation but instead have repeatedly introduced more substantive and more formal regulations. Teubner's thesis that "reflexive law" manifests an "evolutionary tendency" is refuted, just as is the claim that his thesis could be inferred from sociological theories such as those of Luhmann or Habermas. As is so often the case in legal theory, "evolutionism" is used as a mask for the legitimation of presumably "progressive" legal ideas.

A specter is haunting legal theory: its name is Evolution. It comes in different shapes depending on what sort of argument it is to support. Usually these arguments are normative: legal evolutionists typically describe the development of law as the progressive overcoming of more barbarian states of law and draw from their analyses implications for how law will or should be developed in the future. Such normative agendas underlie both Nonet and Selznick's (1978) concept of "responsive law" and Teubner's (1983) concept of "reflexive law," each of which I shall deal with in my critique. Both concepts develop "micro-evolutionary" postulates, as Friedman (1975) rightly characterizes theories on short-run tendencies in the development of law. Both, however, place their argument in the context of macro-evolutionary theories such as those of Kohlberg (1981) and Habermas (1981). The latter two refer to

* This paper was prepared for the German-American Conference on "Reflexive Law and the Regulatory Crisis," July 1983, in Madison, Wisconsin. I am deeply indebted to David Trubek, who facilitated this meeting as well as the written version of my contribution. Cathy Menschievitz and Richard Lempert helped to bring it into decent English.

Max Weber's (1921/1953) thesis of the progressive "rationalization" of law.

I shall not reconstruct the mutual references of these macro-evolutionary theories as the authors I am criticizing do that extensively. Instead I shall point to differences between these theories which exist because they respond to different questions, a fact that may be obscured by similar terminology. Kohlberg (1981) analyzes *individual* socialization processes as they affect the formation of moral judgment, and he draws some analogies to the "growing up" of societies as a whole from his psychological research. Luhmann's (1972) thesis of the progressive separation of law and morals (the "process of positivation of law") deals with internal justifications of legal systems, while Habermas (1981) discusses the external legitimation of legality and its crises. He sees the system that responds to this need for legitimation as overburdened, especially by recent tendencies toward increasing regulation and litigation (called "legalization" and "judicialization").

It is useful to distinguish arguments about the internal justification of law from arguments that focus on problems of external legitimation, and both types of arguments should be distinguished from those that deal with actual tendencies in the use of law. Most interesting are the interrelations between theories at these different levels, such as the claim that the increasing use of regulation in formerly unregulated social arenas leads to legitimation crises (Habermas); or that modes of internal moral justification are correlated with stages of individual and societal growth (Kohlberg). Methodologically, however, it is dangerous to apply theories designed to explain behavior at one level to the problems posed at another level. While it may be possible to test the historical or psychological merits of an evolutionary hypothesis, we usually find that when the theory is transferred to another level, the argument is purely associative.

Teubner's theory of evolution towards "reflexive law" transfers elements of theories that are themselves transferrals and thus is doubly dangerous. Teubner cites work by Nonet and Selznick, by Luhmann, and by Habermas without considering the historical sources on which their theories rely and the fit or lack of fit between them. Teubner's approach is not to integrate these theories at their core but instead to select elements of each, guided by a sometimes distorted view of where they might fit together. Standing on the shoulders of giants, he hardly touches the ground.

By briefly discussing the main elements of the evolutionary theories that Teubner quotes, I shall try to show that his claim to evolutionism is unfounded. While reflexive forms of law might be becoming more common, these forms add to existing legal regulation without replacing them. It is my thesis that any observed increase in the use of reflexive law indicates increasing regulation of formerly unregulated social arenas rather than attempts at deregulation.

I. KOHLBERG'S STAGES OF MORAL JUDGMENT

The dangers of applying a theory designed to make sense of one level of behavior to another are most obvious in the case of Kohlberg. His stages of moral development from "preconventional" to "conventional" to "postconventional" are based on theories of internalization such as those which Piaget (1954) derived from his observations of preliterate children. Kohlberg worked by surveying the moral judgments of school children at different ages. From their responses to his questionnaires he developed a scale of individual "maturity" of moral judgment that correlated to some extent with age. Kohlberg administered the instrument thus developed in different cultural settings and compared scores across cultures. Methodologically, this step is quite precarious. It is difficult to maintain the meaning of questionnaire items when they must be translated for people of different language and cultural backgrounds. The difficulties are compounded if the interviewees are too young to resist the suggestive qualities of questioning. Kohlberg considers methodological problems of reliability with some care, but he seems to have no doubt about the validity of cross-national testing. Further methodological problems are raised by Kohlberg's attempt to scale survey results from different countries by ordering them according to their average scores (Turiel *et al.*, 1978). Thus, if Turkish schoolchildren more often score low and less often score high than American children of comparable ages, their average scores will be lower and their culture classified as "less mature" with regard to its moral judgment. The Turkish children might reach higher maturity at a later age, but if they do not catch up, they will continue to be classified as "less mature." Kohlberg's attempt to define "stages of societal evolution of moral judgment" on the basis of such average scores is a rare example of an ecological fallacy produced by aggregating data (Turiel *et al.*, 1978).

Kohlberg's stages of moral judgment can nevertheless be useful, if only to be falsified. They are obviously ordered according to degrees of sophistication. This is more apparent from Kohlberg's detailed six-step ordering than from his slogan-like, three-step hypothesis. Preconventionalism advances from the mere fear of physical sanction to the hedonistic pleasure of pleasing others. In the first of the conventional stages, positive relations to others take on a value of their own. The second conventional stage shows yet more sophistication as the concepts of "duty," "respect for authority," and "law and order" become valued in their own right. Postconventionalism involves meta-theoretical sophistication. For example, the idea of the social contract emerges. If the contract is conceived in a purely legalistic fashion, thinking is "conventional" and is scored lower, but if the idea is part of a consistent, generalizable, and universal theory, we have postconventional thinking and the highest score is deserved. (To judge from Kohlberg, it seems that evolution aims at a neo-Kantian professor of ethics as its final goal.)

The merits of Kohlberg's six-stage theory can be tested by exposing respondents at different levels of sophistication to observable behavioral choices. The evidence suggests that behavior can only be predicted by the judgmental scores on the two preconventional levels, and even here there is some doubt whether behavioral choices can be ordered by successive stages as Piaget does (cf. Osherson, 1974). I fear that within the conventional stage and from it to the postconventional ones, knowing subjects' stages of moral judgment will be of little aid in predicting behavioral differences (cf. Gibbs and Widaman, 1982). Meta-theories of the kind that characterize Kohlberg's postconventional morality tend to be internal justifications rather than guidelines for behavior. We cannot generalize from such evolutionary theories to the observable practices of law.

II. MICRO-EVOLUTIONARY THEORIES

A. The Inference from Individual to Societal Moral Development

Kohlberg's evolutionism is of special interest to us because it develops a methodology for transferring developmental theories from the individual to the societal level. However, the difficulties which this transfer entails serve as a warning, especially if such transfers cross cultural traditions. Habermas

incorporates Kohlberg's stages in his discussion of legitimation problems:

> Modern law presupposes the moral neutralization of areas of behavior which are subject to legal regulation. The concepts of conventionalization, legalization and the formalization of law all capture the idea that law can no longer be based on the self-evident authority of moral tradition; it instead needs an autonomous justification. Such a condition can be fulfilled by moral judgment only in the postconventional stage . . . the basic concept of postconventionalism, which had earlier been developed in philosophy and legal theory, has penetrated and restructured law at the transition to modern times (Habermas, 1981: 266; my translation).

This thesis and its terminology reflect discussions between Habermas and Luhmann. The separation of law from moral justification and the consequences this has for restructuring the systematics of law are among the central topics of Luhmann's thesis of the "positivation of law." Luhmann is concerned with the internal justification of law. It is from this perspective that he views the consequences of the evolutionary idea that legal codes and their justifications can be changed. Luhmann regards both the demise of the natural law justification for rights (*subjektive Rechte*) and the development of procedures that, in his view, legitimate legal decisions without reference to any extra-legal truth as important achievements. Habermas, in contrast, argues for substantive legitimation. Pure legality leads to legitimation crises because it is ultimately a formal justification. For Habermas substantive rationality is essential for legitimation. Because he believes that legal procedures have only a limited capacity for legitimation, Habermas favors self-regulation without law.

Because Kohlberg, Luhmann, and Habermas use similar language and sometimes adopt each other's terminology, it is easy for the reader to overlook important differences in what their theories refer to. Individual moral judgment of the kind that is operationalized by Kohlberg's test has been part of the language of legal theory from the early nineteenth-century Pandektists up to today. Luhmann's treatise on "subjective law" deals with internal justifications of law, while Habermas is concerned with people's beliefs in legitimacy which, in principle, can be measured independently of the legal system. Habermas argues that the willingness to accord legitimacy to ongoing institutional arrangements suffers as legal regulation penetrates into areas of everyday social life. He is especially

concerned with socializing institutions such as the school and the family, which he describes as "colonized" by increasing legal regulation. Habermas also refers to the well-known complaints about the depersonalization of the care accorded the poor and needy; once charitable benefices, they are now transformed into legally enforceable claims. His concern is not the internal restructuring of concepts such as "rights," but rather the external effects of claims consciousness on the social relations of personal care. Habermas believes that legal regulation obliterates the essential qualities of humanitarian and socializing relationships.

Clearly, the tendencies Habermas identifies are of current interest. Examples of "colonial rule" by legal regulations are abundant. However, there are also areas in which the law has become less important as a mechanism of social control. For example, there has been a cross-national tendency to deregulate sexual behavior and a sharp decrease in disputes over "honor" and status, an important category in the caseloads of arbiters and the penal codes in Europe throughout the nineteenth century. In other areas of social life law remains, but peculiarly legal concepts grow less important. In some areas formal legal procedures are less frequently invoked as, for example, with the rise of techniques for avoiding probate. In other areas the substantive law has changed so as to limit the legal issues that must be considered to resolve certain conflicts. Modern no fault divorce and traffic accident laws, for example, make evidence of "guilt" irrelevant.

Our ability to identify areas in which the penetration of law has diminished as well as areas where it has increased suggests that we not use terms, such as "evolution," which imply unidirectionality nor such loaded words as "progress" for the sorts of legal change that we observe within our lifetime. We should more modestly talk of "tendencies." Among other advantages, this would encourage us to search more seriously for "countertendencies" and to weigh these in relation to what might be considered "main tendencies."

B. Changing Models of Legal Theories

Such modesty could have been learned from Max Weber. He was careful to distinguish between developments in *legal theories* (which he could largely trace back to the legitimation interests of the legal profession) and developments in *legal practice*. Recent theories of legal evolution have some validity

only as legal (meta-)theories. They are not true to what we know of legal practice.

In order to characterize the substantive legal developments of the twentieth century as evolutionary, one must argue that at some earlier stage law was essentially formalistic. The argument that this was the case is commonly rooted in citations to Puchta (1841/69) and Windscheid (1862), who allegedly saw jurisprudence as based purely on a system of terminology regardless of substantive ends. Yet the treatises of both these legal scholars make it clear that their terminological systems rest on the assumption that the code provisions are *reasonable* (Puchta, 1841/69), that any interpretation of the law has to consider the *goals of that law (ratio legis*), and that those interpreting the law must look "at the *value of the outcome*" of a decision (Winscheid, 1862: para 21). Why are such "material" elements in the allegedly "formalistic" legal theories of the Pandektists overlooked? One reason is that the current characterizations of nineteenth-century law draw heavily on scholarly reconstructions of the legal system. This can be misleading unless one also takes into account the social distance of German university jurisprudence from the everyday jurisdiction of courts. Judges around the time of the introduction of the new civil code referred to the teachings of Pandektism because they were in need of guidelines after the thorough codification and harmonization of civil law in the German Reich. But in practice with the introduction of the new code came the use of standard clauses and the development of a precedent-oriented jurisprudence that "softened" the intended formalism (see Frommel, 1981: 1699 ff.).

Legal history has seen repeated attempts at formalization followed by a return to more substantive standards. Such developments look more like cyclic behavior than evolutionary transformation. The dominant German view that there has been a development from "formal" to "material rationality" disguises the cyclic pattern under a rhetoric of "progress." Teubner's additional step towards "reflexive law" continues this progressive rhetoric but adds some cautions. "Reflexive law" is claimed to be "merely hypothetical in nature" (Teubner, 1983: 276), for its outline is not yet clearly recognizable. What is recognizable is that Teubner uses his concept of reflexive law to propagate a policy of legal restraint which he hopes to achieve by various kinds of "proceduralism." Legal regulation, Teubner argues, should refrain from substantive codification and instead prescribe ways of arriving

at decisions that leave the content of the decisions reached to the participants involved in the prescribed procedures.

Teubner sees in reflexive law a "new type of legal rationality" (1983: 251). The term suggests that reflexive law is in some sense rational, but the context makes it clear that Teubner is referring to different rationales for law. The three rationales which he distinguishes might be found in any type of law.[1]

Legal theory continually emphasizes the need to distinguish the rhetoric of lawmakers, the text of their codes, and the way laws are implemented. German law school teaching, traditionally resting in splendid isolation from (especially lower) courts, assigns to legal theory the task of disguising the social interests behind legislative rhetoric with some seemingly neutral meta-theory. The construction of an evolutionary sequence from "formal" to "material rationality" is an example of such theorizing. Treating "reflexive law" as a special type of "rationality" is another example.

Indeed, we find elements of these three types of rationality in all continental legal traditions as well as in the English Common Law. Bearing in mind that formal, material, and procedural elements of law historically exist in different combinations and relations to each other, one might see Teubner's thesis as focusing on changing tendencies in the way these elements relate to each other. This thesis then could be interpreted to mean that contemporary legal regulation should, whenever possible, increase the self-regulatory capacity of

[1] Even the Prussian General Law (which Frederick the Great, in his order of 1780, meant to be so precise that "entire groups of former advocates should become unnecessary") codified an extensive system of decentralized decision-making. But the Prussian General Law also allocated power to constituent groups and thus meets exactly the criteria for "reflexive law" that Teubner formulates. Not necessarily being "rational," it nevertheless was very wise from the point of view of implementation for the Prussian King to devise a "graded immediacy of dependence on the state." The Prussian General Law reinforced the status of traditional guilds and their privileges. At the same time it offered the possibility of an immediate citizenship relation to the rising proletarian workers as well as a privileged relation to the state for the emerging powerful class of civil servants. The Prussian General Law was to be implemented at different levels. To this end, the rules of traditional domination of the rural population by the gentry were considered to be "local public law." Although not codified, the traditional rules became "part and source of constitutional rights" claiming the "same authority as codified laws" (Rochow, quoted in Koselleck, 1975: 48). The combination of the rights and duties of immediate citizenship with obligations based on traditional status and privilege used "reflexive" mechanisms: it left regulations to decentralized powerholders and referred to realistic chances of implementation. Koselleck (1975: 143-62) shows in detail how jurists and administrators in Prussia from 1807 to 1821 used the reflexivities of never-quite-systematized royal programs, declarations of intent, and royal edicts to transform administration and law according to their interest. The era of formally precise law had been announced, but it had never really begun.

those concerned with some matter rather than resort to substantive rule-making.

III. THE SO-CALLED "EVOLUTION TOWARDS RESPONSIVE LAW"

Before testing the thesis that there is a tendency to replace "autonomous law" with more "responsive" or more "reflexive" types of law, we have to discuss the claim that such a tendency is evidenced by evolutionary theories and in empirical research. Nonet and Selznick, who introduced the term "responsive law," claim a "social science strategy" in arriving at their thesis, but in an epilogue they reduce their claim to one of "sociological awareness" (1978: 115). They emphasize that the regime of "responsive law" is a "precarious ideal" (1978: 116) whose dominance is not necessarily in the order of things. They acknowledge that the imagery of a "development" towards responsive law might be misleading and note the possibility that "repressive law" might re-emerge.[2] Teubner builds on Nonet and Selznick's vision as if it had survived an empirical test and links it to Habermas' thesis of the increasing legal regulation of formerly unregulated social areas. But the latter's thesis is also unable to provide the social science evidence that Teubner requires. Habermas postulates the desirability of keeping legal regulation out of interactions that require spontaneous social communication (1981: 535-47). Teubner reads this as a mandate for some legal "institution which confines itself to regulating some external constitution but leaves the areas of socialization, social integration and cultural reproduction unregulated in substance in order not to

[2] Nonet and Selznick are careful to claim that their evolutionary "vision" merely represents "abstract conceptions whose empirical referents are necessarily somewhat elusive" (1978: 17). However, such elusiveness is not only true of their projections into the future; it also restricts the validity of their characterization of former stages of legal evolution. Only the conception of "autonomous law" seems historically valid. It is based on analyses of American legal developments during the first half of the nineteenth century. Horwitz (1977: 253-66), for example, provides evidence that judges and courts during this period attempted to establish their autonomy from political involvement. Democratic recruitment to judgeships made the composition of the bench in local as well as federal courts dependent on political machines and so created a need for ideological foundations that would allow the bench to withstand political pressures. From this nineteenth-century conception of "autonomous law," Nonet and Selznick project into the past as well as into the future. While "autonomous law" clearly refers to the American "legal formalism," the historical location of "repressive law" is less concrete: If they seriously mean to claim that "repressive domination is sharply highlighted in the archaic and the totalitarian states," and that it appears wherever law serves to keep order and not to guarantee individual rights (1978: 36), this projection is clearly a moral ordering. Nobody could maintain that every law before a legal profession gains autonomy is in principle "repressive."

jeopardize their self-regulatory learning and communication processes" (Habermas, 1981: 44).

Nonet and Selznick, Habermas, and Teubner postulate similar goals. But what is a "vision" for the first becomes "social science evidence" for the latter. What is a concern for direct social communication with Habermas turns into a prescription for some legal form of "enabling self-regulation" with Teubner. Habermas' theory is "critical" in that it generates prescriptions to counter existing tendencies, while Teubner mixes normative expectations and empirical trends in a way that does not allow the two to become untangled. He seems to be aware of his overstatements when he qualifies the term "evolution" by acknowledging its "highly speculative and debatable theoretical assumptions" (1983: 276), or notes that aspects of his analysis are "merely hypothetical in nature," or says that he is only "sketch[ing] lines of argumentation" (1983: 279).

The misunderstanding we may attribute to Nonet and Selznick—that their moral ordering could be a description of historical evolution—is deepened when Teubner proposes to "enlarge the typology backwards" by adding an earlier stage of "archaic laws." This he maintains is based on concepts of "reciprocity and revenge" and is predominantly "ritualistic" in procedure (1983: 264-65). Teubner takes the notion from Luhmann (1972: 154-58), but neither author specifies the early societies to which such legal conceptions might refer.[3] They cannot mean the very early societies of hunters and gatherers who form the prime example of acephalous societies. Tribes that specialize in hunting and gathering usually de-emphasize "revenge" in the interest of maintaining reciprocity between lineages, and disputes in such societies are more often handled by informal procedures such as palavering than they are by ritualistic ones (Turnbull, 1961; Sigrist, 1967; Clastres, 1974). The features which Luhmann points to are more characteristic of early clientage forms of domination such as those typically

[3] If Teubner means to imply that Luhmann's description represents a universal stage of legal evolution, he is contradicted by the ethnographic evidence. Luhmann himself makes no claim to such universalism: "nonintegration and variety of forms, and the lack of any uniform world society or world law have to be seen as the essential conditions of development at the very beginning. It is not the few communalities which one could find out—if one could find any—, but it is the disparity of early systems of law which we must emphasize" (1972: 246; my translation). Teubner himself cites Luhmann for the proposition that: "evolution presupposes . . . an overproduction of possibilities in regard to which systems can be selectively maintained by structures . . ." (Teubner, 1983: 263).

found in pasturalist societies (Mühlmann, 1938; Mair, 1962: esp. 234 ff.; Popitz, 1968).

The ethnographic evidence is too varied to support any thesis that posits a necessary sequence of types of law, be it from "reciprocal" to "repressive" or in any other order, however psychologically plausible. At best we might order dominant modes of production in a temporal sequence. If we did so, we would find that hunting and gathering is the earliest mode of production, for it appears that at one time every human society was based on it (Lee and DeVore, 1968). Pasturalism seems to be the next earliest basis for socio-economic organizations, and other kinds of agricultural societies follow.

Were we to order societies in this way, we might find different modes of production to be linked to special needs for regulation and so find a correlation between different stages of socio-economic development and certain forms of law. Such a "correlation" does not entail any necessary sequence but instead reflects patterns of association that are by no means perfect. The correlation between modes of production and legal characteristics might be explained sociologically by normative needs that inhere in different modes of production. Hunters and gatherers tend to stress norms of equality. This may be a result of their continuous movement, which gives them good reason to distribute rather than to store food, to forgo claiming property, and to defend freedom of access within a rather large and thinly populated region. It may also be associated with the cooperative strategies that successful hunting and fishing require. Pasturalists, on the other hand, are continually threatened by cattle robbery and therefore often develop protective clientage systems. Agriculture carries with it new normative needs because property rights in land have to be defined, the investment in future crops has to be secured, and some system of storage is necessary to safeguard food between crops.[4]

If we look at historical sequences of the frequency of different modes of production, we see that earlier modes may coexist with later ones. If we search for correlations between changing modes of production and legal forms, we similarly find that new forms of law often add to without replacing older

[4] For an illuminating summary of distinctions between agricultural societies and their relations to types of law, see Roberts (1979). Further differentiation might get us into the conditions under which very elaborate systems of regulation are developed, such as those necessitated by the need for irrigation (Wittfogel, 1957).

ones. Thus, the only general pattern of legal evolution we can identify is that of the increasing differentiation of law's forms. Legal evolutionism appears not as a stepwise maturation, but rather as a selection of regulatory modes fit to survive under changing socio-economic conditions. Overproduction of legal forms and the selection of satisfactory (not necessarily "optimal") regulatory modes appear to be the pattern. Adaptation, not "progress," is the mechanism.

Legal theory has taken on the task of giving a less contingent portrait than this one. As any laws require some claim to legitimacy, we might conclude that the more differentiated systems of law become, the more they will tend to develop patterned arrangements by virtue of their internal systematics that are to some extent self-justifying. Finally, the more systematized (i.e., "rationalized") law becomes, the more one might expect autonomous lines of development to occur. Thus, autonomous legal development such as that proposed by Nonet and Selznick or by Teubner might characterize modern times and so limit our capacity to predict from modes of production to the differentiated changes of legal systems.

IV. REFLEXIVE LAW AS A STRATEGY OF INCREASING REGULATION

The evolutionism of Nonet and Selznick and Teubner does not rely on specific ethnographic information. Their conceptualizations of "repressive law" as a predecessor of "autonomous law" and of "formal rationality" as a predecessor of "material rationality" are projections similar to others that legal theorists in this century have used to describe legal change over the last hundred years. Such projections are very often offered in order to prove that law is increasingly well-adapted to the realities of modern social life. Only by appreciating this normative purpose can we understand Nonet and Selznick's vision of a "responsive law" and Teubner's "features of a new type of rationality" of "reflexive law."

Nonet and Selznick refer in their vision to management theories of the 1960s, which somewhat messianically characterized "democracy, collaboration and science" as motors of an "evolutionary organizational progress" (Bennis, 1973).[5] I do not deny their vision insofar as all postindustrial countries have witnessed an increase of participatory and goal-

[5] Selznick (1949) developed a much more balanced view of "postbureaucratic" organizations in his study of the Tennessee Valley Authority.

oriented, as opposed to rule-oriented, organizations. But I maintain that in most cases such "postbureaucratic" organizations did not replace strictly rule-bound bureaucracies; instead they added to them. It is not unequivocally good that new regulations are merely procedural. Participation within organizations, for example, has been procedurally regulated to such a degree that the cumbersomeness of the resulting decision-making processes—best measured by the steps a decision must pass through—leads many to long for old-fashioned hierarchical bureaucracies.

In a similar vein, the goal-oriented governmental and quasi-governmental agencies which sprang up during the wave of optimism about the potentialities of the planned society usually increased the realm and scope of regulation without reducing any of the traditional administrative rigidity. The "postbureaucratic phase" of public law seems to be a strategy for increasing social control rather than for reducing it. The social control of "sensible" social organizations such as school, institutions of higher learning, and professional service groups could only be implemented by using "responsive" types of bureaucracy. What is hailed as "progress" in legal development seems to be a means toward further legalization and judicialization of matters that can be organized in a socially adequate way only if we can resist pressures to enmesh them in legal regulations. Habermas' critique (1981) in his "Theory of Communicative Action" is directed against the tendency to judicialize such areas of life.

"Reflexive" regulations, it seems to me, have a wider scope and a longer tradition than Teubner acknowledges. Regulating by procedure and leaving substantive rules to be worked out over time has always been the technique of the wise legislator when entering new fields of regulation. It might be especially prevalent today, as we are in the middle of an attempt to regulate heretofore unregulated areas of social life. I shall restrict my evidence to the examples used by Teubner to illustrate his concept of reflexive law.

A. Labor Law

The first example Teubner gives is that of labor law: "the legal regulation of collective bargaining operates principally by shaping the organization of collective bargaining, . . . and limiting or expanding the competencies of the collective actors. Law attempts to balance bargaining power, but this only indirectly controls specific results" (1983: 276). Putting aside

substantial cross-national differences in the degree to which collective bargaining is legally regulated, the argument seems to turn reality on its head. Collective bargaining was not invented by legal regulation, but it developed as workers, often acting contrary to the law, organized and used the powers of the strike, the slow-down, and the boycott to force management to the table. Modern efforts to mold industrial relations by legal procedures can be seen as the attempted domestication of the power struggle between management and labor. The failure of the Industrial Relations Act of 1970 in Great Britain illustrates the nature of what is involved. British trade unions were so strongly opposed to the national legislation that they were willing to boycott its procedures. Ultimately, the Industrial Relations Act had to be withdrawn and minor innovations that it contained, such as the introduction of industrial tribunals, could be implemented only after a new accord had been reached (Weekes *et al.*, 1975). The recent development of British Industrial Tribunals, together with the mediation agency ACAS, can be seen as a major limitation on the bargaining power of trade unions. It is a prime example of the judicialization of a formerly unregulated area of social strife (Kahn-Freund, 1972).

German labor relations became judicialized in the 1920s. The Social Democrats and trade unions, in tune with German legalism, created labor courts as one element of an encompassing "economic constitution" (*Wirtschaftsverfassung*; Sinzheimer, 1930/1976). Recent studies of German labor courts (Blankenburg *et al.*, 1979; Falke *et al.*, 1982) show that they function in a more limited way than that which was foreseen by their inventors. Their caseload consists largely of cases brought by dismissed employees, and their remedies usually relate to the financial consequences of dismissal. Thus, they do not directly fulfill the job-protective goal of the legislation, which was to prevent unjust dismissals. However, they do throw a regulatory shadow. At least in the larger firms, the potential threat of a lawsuit helps to enforce labor laws, and the desire to avoid the courts fosters the more detailed production of rules and regulations within companies.

B. Consumer Protection

The second example Teubner gives is that of consumer protection. Teubner mentions consumer ombudsman institutions (like the German *Stiftung Warentest*) which do extensive testing of new products and publicize their results. I

fail to see how such institutions are facilitated by reflexive law. Instead it seems that the law requires them to be particularly careful in order to remain within the bounds of fair trade regulations. Ombudsmen concerned with consumer protection rely in most cases on the power of publicity, not on legal powers. If they occasionally use courts for test cases, they must be very selective in choosing what to litigate so that they are not thwarted by inadequate evidence. Threatening to take a case to court frightens producers (to the extent that it does) because they fear adverse publicity, not because they fear they might lose the case (Macaulay, 1983). Thus, consumer protection law, in Teubner's own words, "provides a shaky example of reflexive law at work" (1983: 277).

C. Private Organizations

Finally, we have to deal with Teubner's "law of private organizations." For Teubner, this does not refer to the internal democratization of private organizations but rather (like Nonet and Selznick's "postbureaucratic responsiveness") to the capacities of organizations to " 'internalize' outside conflicts in . . . [their] own decision structure" (1983: 278). In both cases I fail to see how law facilitates an internalization of "outside conflicts." The development of an "organizational conscience" which Teubner wants to foster can be stimulated by forces in the environment. Organizations that feel pressure in this direction can attempt to internalize it to some extent by forming participatory and advisory boards. The degree to which such bodies increase the flexibility and responsiveness of organizations, rather than merely absorbing protests, depends on how people are recruited to such bodies and on what their powers are. The critique of the legal regulation of schools in Germany maintains that in the area of education efforts designed to internalize a critical conscience serve, in fact, only to deflect protest.

V. CONCLUSION

The attempt to regulate by procedure aspects of social and economic life that were formerly self-regulated appears to involve a legislative attempt to exert some control in areas where *ex ante* substantive regulation seemed particularly difficult or inappropriate. The technique is similar to that of delegating administrative discretion, for in both cases substantive regulation grows out of the process of implementation. But procedural regulation opens up

possibilities for contesting decisions in courts, and thus part of the substantive regulation may be given over to development by judicial precedent. There is nothing "responsive" about the reflexive technique of procedural regulation. In our examples it serves instead as a step in the door for legalization and judicialization. "Reflexive" legislation often means allocating discretion to lower levels. Participatory bodies and supervising agencies have been eager to fill the gaps of discretion by producing detailed rules and regulations.[6] Overproduction of bureaucratic rules is a consequence not only of the enactment of too many laws but also of too many lower-level regulators adding to them.

Trusting Darwinistic patterns of extinction, I assume that a society which achieves legal regulation of all walks of life will eventually suffocate. However, overregulation also, if unintentionally, opens new ways of not implementing or of avoiding law (Treiber, 1983). Overregulation only leads to suffocation if regulation works as effectively as it is intended to work. Wisdom, in any case, counsels restraint in extending legislation, but if we fail to restrain ourselves, as we have so far, there is some consolation. The greater the overregulation, the less complete will be the efficacy of our rules. Avoidance of law and apathetic resistance are the likely social responses to overregulation. Looking at many of the recent innovations in reflexive regulation suggests that the effects of the "reflective" approach might lie in stimulating new ways of avoiding laws rather than in enhancing compliance with them.

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[6] A sad example of reflexive law resulting in overcriminalization is that of American Indian Tribal Courts (cf. Brakel, 1978). Here we meet with all of the elements of "reflexive law": leaving substantive regulation to indigenous judges while stimulating through subsidies the increase of a legal infrastructure and forcing through federal law the use of an imposed legal procedure. The result is a "colonial" rule of law implemented by indigenous personnel. The colonial nature of the law is not changed by the fact that those who administer it often do so with the best of subjective intentions toward their community.

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