LEGAL RECONSTITUTION OF THE WELFARE STATE: A LATENT SOCIAL DEMOCRATIC LEGACY

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A critical review of two recent discussions of problems in the law of the welfare state helps to explain the contemporary appeals of a theory of legal evolution originally developed by social democratic theorists in conjunction with the rise of collective labor law in settings as disparate as Germany and the United States. Influential contemporary formulations treat collective labor law as merely one example of a generalizable decentralization of regulative and constitutive law, taken as a distinguishing feature of a new evolutionary stage. But the question is raised whether the plausibility of this model does not tacitly depend on a positive reading of the labor experience, and consequently whether its present relevance is not seriously put into question by the deep crisis of the labor movement, whose social and political power was acknowledged by the original theorists to underlie the legal structures taken as paradigmatic.

I. THE "CRISIS" OF THE WELFARE STATE AND THE LAW

The great challenge to contemporary political analysis and theoretical reflection is posed by the much-discussed "crisis" of the welfare state in the wealthy nations of Western Europe and North America, by the attendant dramatic reversals of public policy in several of the leading nations, and by the widespread loss of confidence and political initiative among the welfare state's dedicated partisans (Dunn, 1984). Although it is not historically inaccurate to say that "the essence of the welfare state is government-protected minimum standards of income, nutri-

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tion, health, housing, and education, assured to every citizen as a right, not as a charity" (Wilensky, 1975: 1), a broader use of the term seems justified by usage in important parts of the literature (Lowi, 1985) as well as by analytical considerations. The new classes of expenditures and guarantees to which the historical definition refers have been everywhere closely intertwined with regulatory and planning measures as well as with characteristic developments in the organization of government and the constitution of the political process. As Luhmann (1981: 25–32) has pointed out, the welfare state utilizes law as well as money in the attempt to compensate all citizens for disadvantaged interests. Fiscal problems have doubtless fueled the allegations of "crisis," but the debate is by no means limited to issues directly affecting the public budget. The contemporary attack is aimed against the whole complex of developments associated with the great push in the direction of the welfare state, which Habermas (1981) correctly identifies as the central political development of the twentieth century in these nations.

According to many journalistic and merely ideological treatments, this "crisis" of the welfare state refers mainly to the presumed excesses and consequent failures of redistributive fiscal policies and regulatory interventions in autonomous social processes, especially economic ones. The troubling manifestations of "crisis," it is argued, can be readily overcome by replacing the defective policies with ones that restore earlier emphases on nongovernmental mechanisms of distribution and social control. Cutbacks and deregulation are the easy answer. More serious analyses of recent developments, however, recognize that much more than policies are being tested. The disappointment of well-established expectations as a result of fiscal retrenchment, for example, shakes the foundations of complex social interdependencies (Glendon, 1981). Similarly, deregulation implies reallocations of power among organized collective social actors as well as changes in its forms. The progressive dismantling of the "neocorporatist" arrangements, which have only recently been identified as constitutive of the most developed welfare states (Berger, 1981), affects important sources of integration and legitimacy. In sum, the issues raised by the debate concerning the welfare state are constitutional, in a functional sense if not always in a legal one. They affect the forms and contents of the rules that in fact define the norms for authoritative rule-making; they point towards that intersection of legalized standards and publicly effective power which constitute the order of the state.

Correspondingly, welfare state malfunctionings have often been measured by such signs of legitimacy deficit as the surprising dimensions of an "unobserved economy" outside the law (Feige, 1980), the increasing recourse to direct action by hitherto quiescent groups (ranging from blockades by private truckers to strikes by doctors), and—most importantly—selective nonenforcement and extensive disobedience of regulative law (Reidegeld, 1980; Voigt, 1980; Weiler, 1983; Reich, 1983; Teubner, 1986). The welfare state involves more than just an institutionalized complex of priorities and commitments in matters of public policy and a concomitant structure of corporate access to and participation in public power. It also entails some shift in the predominant character of law and in the effective constitutional framework that defines it. Most remarked over the years have been the rising importance of administrative regulatory law governed by statutes laying down only the most general purposive principles and the consequent narrowing of the domain of ordinary judge's law, whether civil or common (Hedemann, 1933; Jones, 1958; Unger, 1976; Nonet and Selznick, 1978; Mitnick, 1980; Hayek, 1973–79; Bernier and Lajoie, 1986). With this attenuation of the older pattern of legalism, which was historically important in the traditional constitutional designs of all these nations (Shklar, 1964), multipartite consultation and negotiation had become an increasingly important underpinning for decisions and adjudications that would otherwise appear one-sidedly politicized. For over a generation, such structures and processes appeared to ground a new constitutional consensus and to provide a framework for a stable legitimation of incrementally rising expectations (Lindblom, 1965). The most recent years, however, have seen a sequence of forceful political challenges to this system, resistance movements, delegitimation, and now claims that earlier legalistic forms of constitutionalism can and must be restored (Lowi, 1979). In the context of legal discussion, issues are often formulated as problems of "(over-)legalization," and countermeasures are presented as steps to deregulate or delegalize so as to restore individual autonomy (Tribe, 1979; Seibel, 1980; Mitnick, 1980; Wilson, 1980; cf. Friedman, 1985).

The legal dimension commands attention because much of the contemporary debate about responses to the "crisis" of the welfare state turns on the precise character of its legal and constitutional features and their consequences. When the welfare state could be taken as established beyond fundamental questioning, several influential writers argued that this development should be legally confirmed by giving the most secure

legal recognition possible to the new "social rights" (Marshall, [1949] 1965; Reich, 1964; Glendon, 1981), which the political settlements of the welfare state had been thought to give social standing equivalent to constitutional rights. As the factual premises of these arguments are undermined by current shifts in policy, supporters of institutionalized welfare guarantees decry the abandonment of essential experiments in social justice, rational planning of social development, and democratization while conceding that there has been something seriously wrong with the constitutional and legal order of established welfare states and that changes can therefore not be avoided (Voigt, 1980, 1986; Mishra, 1984). Many proponents of the welfare state, in short, agree that the contemporary "crisis" is a symptom of substantial shortcomings in the very design of such a state and not merely a function of transitory swings in political opinion or unfavorable economic conjunctures. They often acknowledge that the welfare state poses the problem of the limits of law and that this problem has broad constitutional ramifications, but they will not accept an abandonment of the larger political aspirations (Görliz and Voigt, 1985; Bernier and Lajoie, 1986).

Their opponents, as noted, have no such reservations. They charge that the demands and procedures imposed on the legal system by welfare state developments inevitably disrupt its capacity to function in a way consonant with constitutionalism (Lowi, 1979, 1985). For them the most recent developments substantiate forty-year-old claims that the emerging pattern of state interventions would be antithetical to the legal and constitutional systems presupposed by representative democracy (Hayek, 1944). They accordingly welcome steps away from the welfare state as movement toward the restoration of constitutionalism, and they minimize the social or political cost of such steps.

The primary objections to this position begin with the maldistribution of the ensuing costs and benefits, especially since measures of delegalization cannot but be designed in a highly selective way. Almost fifty years ago, Mannheim (1940; see also Kettler *et al.*, 1984) pointed out that the integration and steering of modern societies have become dependent on highly complex and powerful social techniques. These include methods of organization, communication, and direction whose operations profoundly disturb such mechanisms as the market and parliamentary government, upon which the constitution of social order and the direction of public policy had rested during the classical liberal era. Since these methods are concentrated in

the hands of powerful social actors, a measure of control over the uses of these techniques appears indispensable to the maintenance of a public interest or commonwealth. There must be adequate control over controls. This means, of course, a measure of control over the actors whose power these techniques so greatly enhance. Mannheim imagined that planning provides a master technique that can coordinate and control all these effects for the sake of a common purpose that it is also competent to define and to legitimate. We have good reason not to share his faith in such a universal solvent (Dunn, 1984). But the insufficiencies of the institutional responses projected two generations ago or implemented in the interim do not detract from the soundness of his basic social observation, which has since been repeatedly reaffirmed.

While it is possible and indeed desirable to make shifts and changes—perhaps even quite radical ones—among the steering and allocation mechanisms deployed by governments, it is impossible to suppose that all purposive attempts to orient, coordinate, and steer the enormous social powers generated by contemporary social technology can be simply abandoned. Nor are the proponents of delegalization seriously proposing to do so. Public authority and power are to be realigned so as to make them work in closer accord with institutions of social control that are different from the presently influential neocorporatist and public administrative ones, which are to be weakened. That these alternative institutions, misleadingly apostrophized as "markets" or "spontaneous social order" (Hayek, 1973–79; Loewe, 1935; cf. Schumpeter, 1947; Coe and Wilber, 1985), are more exclusively grounded in the social domain of the "economy" and less susceptible to influences from the "polity" (to adopt Lindblom's [1977] helpful renewal of a still useful simplification) means that vital social interests without weight in the calculus institutionalized in the economy's social technology will be neglected.

For my present purposes, the primary interest at issue is the interest in legality itself, which may be epitomized in the language of the American Constitution as a social interest in due process (Selznick, 1969). The defense of legalism by delegalization results in the subjection of more people to more arbitrariness, quite apart from questions of social justice. While present-day structures of legalization may fail to provide adequately for this interest, the proposals for delegalization would further enhance the power of institutions whose commitments to due process are slight, uncertain, and at present dependent on the operation of the larger regulations and designs proposed

to be dismantled. The measures supposed to reduce undue pressures of law upon certain social actors are likely to subject others to arbitrary powers. The characteristic combination of proposals for the delegalization of some social relationships with neoconservative proposals for the strengthening of criminal and moral policing suggests, moreover, that the changes proposed will not even lead to a society less subject to coercive state control, but rather to a relegalized society that is increasingly dependent on punitive rather than on regulative law (Lukes and Scull, 1983).

The contemporary debate is in fact a debate about the direction that relegalization can take (Galanter, 1976; Voigt, 1980; Simitis, 1983; Willke, 1983; Teubner, 1983, 1986), given the present spreading evasion and selective nonenforcement of law, which must be taken as a sign of the welfare state's real problems. Is there a possibility of solving present pressing difficulties in a way that will actualize the promise of social rights that are made but too often frustrated by present legal designs, or must reordering proceed by suppressing the expectations?

At one important level, both lines of argument concern the impact of the past three generations on the legal and constitutional character of property, which is the central contested concept in discussions of rights, the rule of law, and constitutional order. Both lines eventually move the discussion from the context of private law to that of public law. The issue is increasingly joined over the question whether the achieved complex of regulative and constitutive law can be rendered legally viable and constitutionally coherent or whether its scope and objectives are such that it cannot but render all regulation and adjudication a matter of merely political justice. My primary purpose in this paper is to provide a wider context for considering some recent legal thinking, initiated in America but elaborated in Germany, that projects a strategic conception initially formulated as a theory of legal evolution and that claims to see the emergence or promise of a new type of legalism and constitutionalism adequate to the welfare state (Nonet and Selznick, 1978; Teubner, 1982, 1983; cf. Blankenburg, 1984; Rottleuthner, 1986). It is my contention that this tendency represents an attempt to revive and to elaborate an undercurrent within social democratic thinking, latently present within the stronger statist and regulation-centered socialist mainstream and historically more closely tied to the legal practice associated with the trade union movement than to the ideological or theoretical activities oriented to political parties.

The analysis has three stages: I shall begin by discussing re-

cent questions about property and the order of the socially minded state, specifically two approaches to securing that order by broadening the scope of that best protected legal good to cover the decisive claims and expectations comprising the social rights of contemporary citizenship (Marshall, 1965). The two legal studies selected for review, one Dutch and the other American, converge in tracking the key problems to the structure of public law and thus in denying that the old predominant civil right of property can be adapted so as to make it central to the structures distinguishing the contemporary welfare state. The categories of private law can neither comprehend (in dogmatic legal analysis) nor ground (in normative constitutional theory) the decisive relationships (Raiser, 1977). But the problem is that the predominant public law itself appears to be in crisis, seemingly stretched beyond its technical and legitimating capacities by the overload of judgments it is asked to order. The welfare state regime seems no longer viable. The debate about property must be left behind.

That brings me second to a theory of the public law, substantiated by reference to a key dimension of its effective working, that purports to see an evolutionary way out of the decisive difficulties that are commonly summarized under the heading of "overlegalization" (Teubner, 1982, 1986; Voigt, 1980, 1983). The key dimension of existing law that provides this theory a model and point of reference proves to be collective labor law.

Third, however, I shall argue that this law historically owes its character as much to the organized force of labor as it does to the facilitating framework established by public law (Simitis, 1983). Like other law, which is constitutional in effect, it is intrinsically a compound of power and legality. Because the welfare state as a whole can be understood as being in important measure a complex of responses to the mobilization and organization of labor (Pryor, 1968; Martin, 1986; Hay, 1975; Offe, 1972, 1981; Bureau *et al.*, 1986; Schmitter, 1979; cf. Orloff and Skocpol, 1984), at present no less than in the past, this finding seems to leave the proposed solution to the "crisis" paradoxically dependent on an agent profoundly weakened by the problems that are now to be solved (Huxley *et al.*, 1986). Viewed more theoretically, the model of a new type of law appears founded on analogy to a most uncertain and therefore misleadingly incomplete case (Teubner, 1986; Kettler, 1986). But no conclusion in such general terms can be allowed to dismiss so interesting a theory (Conference on Regulatory Law, 1983). The conclusion of my paper should thus serve as a troubling starting point for more detailed study of historical exper-

iences and present prospects. Its present purpose is less a refutation of the so-called evolutionists' theses than a proposal about the historical and theoretical contexts within which these theses can best be examined.

II. THE PROBLEM WITH NEW PROPERTY

In connection with the ongoing discussions about a new codification of civil law in the Netherlands (*Burgelijke Wetboek*), Grosheide (1982) has recently reopened the question of extending the legal concept of property to include claims to a variety of powers and entitlements that do for those who claim them many of the things that recognized property does for its possessors and that similarly rest on stable expectations reasonably aroused by long-continued public policy. Grosheide weighs two fields of application. First, he cites claims that inhere in certain legally recognized social positions and are essential to them, like the authority pertaining to a given office (e.g., a professor's power over grades) or the access to indispensable information. Secondly, and more importantly, he considers claims generated by established social policies and other public programs (e.g., welfare, education, health care, and housing subsidies). In the modern welfare state, with its massive transfers and uncertain finances, complex specialization and impenetrable interdependencies, such interests appear as precarious as they are essential since they seem subject to quite arbitrary decisions by public and private bureaucracies.

Indeed, the emphasis on welfare policies in a narrow sense could be somewhat misleading. Much of the planning, regulation, and public funding characteristic of the contemporary welfare state have to do with designs for agriculture, industry, or art as well as with regulatory public care for the social effects of nonpublic actions. The problems turning on security of expectations, that are central to the historical rationale for property, arise here as well. It might well be asked, accordingly, whether some or all of the claims arising in these broader domains might also be construed as property rights, if any expansion in the legal concept is undertaken. Such a question implies, of course, that public and private agencies would have to overcome new kinds of juristic obstacles (or at least entertain new kinds of juristic considerations) before making changes in policy, even in accordance with parliamentary decisions regarding general policy objectives or budgetary allocations, if these changes would prejudice claims that have been transformed into vested property rights. Arising as an issue in technical ju-

ristic inquiry for Grosheide, the possibility of redefining property quickly proves to have wide ramifications for the theory and practice of contemporary politics.

The point of any such reinterpretation of property would be to place the claims affected under the protection of the same legal mechanisms that protect proprietors against arbitrary incursions. The idea of such a doctrine of "new property" was originated by Reich (1964) over twenty years ago in the United States and was actually cited in a few American decisions during the 1970s. But it would mean something quite different, of course, in a legal system like that of the Netherlands.

In the American context, this idea not only promised the superior legal defenses available to property rights in all legal systems based on the common law (Samuel, 1983), but it also seemed to provide quite categorical constitutional protection for the most basic of the interests at stake, in view of the provisions in the American Constitution denying to the federal (U.S. Const. Fifth amendment) as well as to the several state governments (U.S. Const. Fourteenth amendment) the power of depriving individuals of "life, liberty or property" without "due process of law." The proposal gained influence among advocates of expanded protection for social rights by a surprising tendency for the courts of the 1960s and into the 1970s to return to the earlier constitutional doctrine of substantive due process. The courts appeared inclined once again although in an historically novel way, to interpret the constitutional guarantees to mean that some acts are impermissible, even if duly authorized by legislation, if they are found to be incompatible with substantive principles held to be inherent in the concept of due process.

In the late nineteenth and early twentieth centuries, the doctrine of substantive due process had served to deny governments the power to interfere with freedom of contract. This freedom was taken as an absolute and decisive attribute of liberty and property in the sense of the constitutional guarantees, and the constitutional guarantee had been utilized to invalidate social legislation. When the Supreme Court changed direction in 1937, in the so-called constitutional revolution that upheld the constitutionality of a new generation of social legislation, the doctrine was abandoned. But as revived a generation later, substantive due process appeared to promise a defense of quite different social values and even possibilities for new active judicial initiatives on their behalf.

The leading case of the revived doctrine of substantive due process (*Griswold* v. *Connecticut*, 381 U.S. 479 (1965)) invali-

dated laws against the sale of contraceptives on grounds that suggested a new right of privacy and autonomy. The Court's broad reading of the concept of state action, in related contexts, to include actions by private parties that depend on public means for their effects (e.g., the use of the legal sanctions of contract to support a design for racial discrimination, as in "restrictive convenants") promised applications to situations in which powerful nongovernmental actors interfere with protected rights (Cox, 1976). At the extreme was the example of the Alabama judge who was administering all the state mental hospitals in the jurisdiction and legally requiring the state government to fund the improvements he was imposing. He grounded his actions on the argument that this was the only remedy available to secure the constitutional rights of the patients, including a right to treatment in view of their deprivation of liberty (*Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Yale Law Journal*, 1975; *Columbia Law Review*, 1978). This action suggested that the concept of new property might be judicially supported in an active way and not merely defended against interferences deemed to be inherently arbitrary. Such expectations have proved very exaggerated in the United States in the light of the more recent constitutional jurisprudence of the Supreme Court (Funston, 1977).

In a legal system like the Dutch, where the courts cannot invalidate procedurally correct acts of state, hopes could not in any case take this form. Nevertheless, the conception of new property is hardly pointless, because the legal status of property is a strong one. The protection of property by such actions as damage suits against "impermissible conduct" (*onrechtmatige daad*) in private law and by analogous actions for compensation in public law do add up to a more secure and developed complex of legal remedies than anything now available for the protection of personal entitlement claims, the strongest legal status to which the claims sometimes proposed for reclassification as new property can at present pretend. In one respect, indeed, the legal import would be greater under Dutch law than under American, since there would be a considerable strengthening of the claims against "horizontal" challenges, that is, those from other private parties, which would only rarely be a factor in the American case. Under the Dutch civil code, as in common law, property has long had a legal effectiveness denied all other sources of rights or obligations. So, although the stakes are naturally very much lower in the absence of the American legal ground in an activist constitutional jurispru-

dence, the notion of new property is not without its appeals to some Dutch jurists.

Nevertheless, Grosheide (1982) does not believe that it is either feasible or desirable to assimilate the claims comprehended as new property to the old legal concept. The substantive or functional legal criteria for property that have been developed by Dutch courts are clearly not met. Moreover, he finds it hard to imagine alternative juristically sound criteria that would be inclusive enough to cover the new claims and still fit into anything like the old systematization interrelating the law of property with the law of contracts, torts, and so on. If the move to the concept of new property does not work by extending to the new claims the security and standing of the old, the strategy must be altogether reconceived.

Grosheide's main point is that the old concept requires critical analysis and deabsolutizing. Claiming superior social realism and legal subtlety for the doctrine of property as a "bundle of powers," first articulated by Holmes, Grosheide maintains that this concept, although originally at home in the common law, can be adapted to Dutch requirements. He suggests that the multiple functions bundled together in the old substantial property concept should be separately considered. Due weight could then be given to the extent to which a number of these functions have already been socialized in the sense of being put under the regulation and care of public law—as in labor law, for example. Such reanalysis would make it possible, on the one hand, to identify the modes of property that should continue to be treated legally in more or less the old way and, on the other, to connect the other facets of property expressly with their functional counterparts among the claims that some would want to see reformulated as new property, most of which arise under public law (cf. Raiser, 1977).

Grosheide maintains that this would enhance the legal standing of the newer claims while opening the opaque old concept to juristic analysis and ethical assessment (cf. van den Bergh, 1983). He agrees with Reich about the need to show that the justifications that underlie the privileged status of property in the old law now apply to many claims generated in what had been deemed the domain of public law, and to strengthen the legal positions of claimants dependent on the newly "socialized" dimensions of property. Instead of attempting to broaden the scope of private law to cover major constituents of civic status in the welfare state, however, he finds it necessary to reconsider the division between private and public law and to acknowledge that the assumptions underlying their

mutual isolation have been rendered obsolete in important respects by modern developments. Writing in a legal context premised on the welfare state, Grosheide demonstrates the impossibility of escaping from the difficulties of public and constitutional law in such a state to the doctrines and instrumentalities of private law.

This Dutch critique of the new property conception, as it was originally proposed, converges with the argument of the American constitutional theorist, Nedelsky (1982; 1983). Not sharing Grosheide's need to break down an absolute property concept in a codified system of private law, she rather points out that the new property concept is in fact anachronistic, since American courts have long ceased to regard property as a substantially unified legal entity, except in the law of compensation. The categorical protection it is sought to extend by bringing the newer claims within the defenses supposed to safeguard property has actually come to lack a legal object, since property in the sense of the defenses has virtually ceased to have any legal existence (cf. Unger, 1983). Regardless of the isolated returns to substantive due process, the legal developments that broke down the freedom of contract as an obstacle to wages-and-hours legislation fifty years ago also undermine the possibility of depending on the right to welfare concept as security against changes in public policy that might be experienced as arbitrary disappointments of reasonable expectations. The right of property hardly stands in the way of any regulation deemed reasonable by a competent public authority, Nedelsky points out, and the law of property transactions has been adapted to differentiate among the most diverse analytical units. Holmes's conception of property as a bundle of powers, with its implication that different powers merit different legal treatment, has been thoroughly established in American law.

Unlike Grosheide, who would welcome such a development for the Netherlands, Nedelsky views this situation with some alarm. The difference in perspectives has to do with the difference in the larger theoretical frame of reference. While Grosheide is interested in fairly specific questions about the relationship between the law of property and a number of other important justiciable claims within the legal system (i.e., questions of legal dogmatics and legal policy), Nedelsky is preoccupied with fundamental metajuristic questions about constitutionalism and the respect for individual autonomy. This concern brings her work expressly closer to the larger questions of political thought that are only implicit in Grosheide's doctrinal analysis. Her perspective accordingly cautions against

overconfidence about the course of public legislation and policy in welfare states under stress. She contends that if the American constitutional design is to have any structural limitations at all, it requires the postulation of a domain absolutely protected against exercises of public power, as she maintains was once the case with property. The sweep of democratic legitimation provided elsewhere in that design could not be restrained in any other way: A government understood as the embodiment of the people's will cannot be brought otherwise to respect the autonomy of individuals.

This is not to say that Nedelsky imagines that either democracy or the absolutism of property rights, as they were postulated in the American authorizing myth, ever existed in fact. But the practice of the state, and especially the judicial practice of the courts, could be reasonably understood as oriented to the legitimizing constitutional beliefs. Moreover, she maintains, a measure of limitation was actually achieved, albeit at cost to other social values. Now, she contends, the situation has drastically changed. While the absolute concept of property retains its hold on the collective political imagination of the people, perhaps because of its psychologically satisfying concreteness of reference, the judicial dissolution of the legal concept increasingly jeopardizes the integrity of the constitutional myth and consequently threatens unrestricted democratically sanctioned incursions upon individual autonomy, freely taking what is now understood as having been freely given. Nedelsky is far from thinking that the focus on private property ever provided a sufficient basis for a fully adequate doctrine of individual autonomy, but she does insist that it was precisely this inadequate myth that has made constitutionalism possible in America under the conditions of a commercial society, and with it such protection as there has been for the individual.

If the doctrine of new property were more influential in the courts, it could actually increase the danger to autonomy, Nedelsky argues, since it would render the concept of private property still more vague and still more distant from the experiential popular intuition of property as something finite, concrete, and graspable in a literal way. Talk of protecting property in this sense—especially since it is then likely to extend also to goods with regard to which there are deep political divisions, like those at stake in the decriminalization of abortion—can discredit the whole concept. Yet Nedelsky does not think that restoration of the old property concept in law is either feasible or desirable. The social interests invested in the newer welfare state developments are too great. The costs that even a

futile attempt to proceed in this direction would exact in social values are incalculable, since the reassertion of anything like the old property concept, with its concomitant categorical freedom of contract, would call into question, could it be achieved, the very social claims that the proponents of new property mean to strengthen. She calls instead for some functional equivalent to the absolute property right, possessing comparable psychological plausibility, to give legal support to the autonomy of the individual and to satisfy the requirement she deems integral to constitutionalism, a secure reference point for tension between state power and individual rights.

As Nedelsky acknowledges, her position is paradoxical. Like Grosheide, she is glad to see many of the social effects of the legal breakdown of the old property concept, since it has meant some weakening of the often oppressive power of proprietors as well as the legal vindication of certain public counterforces against the frequently destructive human consequences of domination by market processes. The interest that originally brought her to her paradox, in fact, was an inquiry into the extent to which change in the law could bring about far more basic social change in a socialist direction. But she is sufficiently impressed by the historical arguments advanced by Hayek and his followers concerning the constitutional importance of the old property doctrine to inquire anew into the political kernel of truth that she considers to be embedded in their fallacious legal theory.

Nedelsky and Grosheide do not meet at the same level of argument and thus cannot be said to disagree. Nedelsky's analysis is expressly restricted to the American constitutional experience, which has, in her judgment, given distinctive political importance to property rights and which therefore implies the need for a functional equivalent if property rights are recognized as having been in effect legally dismantled, as they rightfully ought to be. She does not address herself to the relationship between property rights and individual autonomy in other constitutional designs. Grosheide, in turn, given the juristic parameters of his argument, does not entertain questions about the constitutional implications of changes in property doctrine. Nor would he be likely to hit upon the broad sense of "constitutional implication" invited by the characteristic functioning of American constitutional law as a pivot between technical issues in private and public law and fundamental questions in the ideological and institutional politics of constituting the republic, since modern Dutch legal thought does not typically link the issues in this way.

Yet there is value in thinking about the two arguments together, quite apart from their converging skepticism about new property. The juxtaposition suggests that the sometimes quite technical uncertainty about the law of property is a sign of a deeper set of internationally shared concerns about the character of law and constitution in the contemporary welfare state. Problems about the security of social rights (i.e., claims upon collectivized goods, services, and responsibilities upon which individual existences and vital social relationships are constructed) as well as their demarcation from claims properly left to the play of political forces and environing conjunctures open questions about the whole system of legalized securities and the place of individual rights within it.

Grosheide's analysis serves as a reminder that the powers that have been legally devolved from property by changed legal doctrine and regulative public law have been subjected to new norms and relocated in other institutional forms. If there are now new interests to be protected that are said to resemble these powers in important respects, as the doctrine of new property points out, then we should scrutinize the protective and empowering capabilities inherent in the new situation with care before despairingly setting out in search of functional equivalents for absolute property rights. Grosheide suggests that claims like those that are proposed for inclusion under the concept of new property might better be assimilated to the appropriate location within this new complex, once its character is made more evident. Complementarily, a prominent Dutch public lawyer has stressed the importance of not treating the new practical assurances and the new provisions for reciprocity and adjustment within the welfare state complex as if they were merely administrative or political devices (Donner, 1979, 1981). He insists on the need to specify their legal character, despite the strain they put on the old categories of public and constitutional law. In a manner reminiscent of American legal theorists early in the present century, Donner calls for a dynamic redefinition of the constitutional limits of public law.

A contemporary Dutch illustration of the approach that Grosheide thinks can be usefully comprehended within doctrinal legal analysis, instead of being taken as nothing more than positive legal or administrative enactment or mere political fact, is the linkage between the procedure for negotiating the annual framework for collective wage agreements and the determination of levels and policies with regard to welfare programs (van Peijpe, 1985). The former is the repository of deductions from property rights achieved over several generations

by the judicial recognition of collective agreements and by labor law; the latter is the result of fairly recent social legislation and ministerial practice. Precisely because the powers and functions originating in property affect important interests most directly and visibly, the connection established in practice tends to take welfare benefits out of the unilateral and discretionary control of bureaucratic or even parliamentary authority. By virtue of established arrangements, the comparatively strong organizations oriented to the regulative process affecting wage levels cannot disregard the process concerned with welfare levels. While it is impossible to speak of guaranteed rights, in the sense associated with judicial process, it is nevertheless equally implausible to speak of the structure of institutionalized constraints as if it were a mere political conjuncture. Constitutional usages seem to be emerging; a new regime appears to have been taking shape in this domain; and Dutch press reports show that the parties on the defensive with regard to this design at the time of writing clearly state their claim as a constitutional one, as is also the case in comparable controversies raging at the moment in France and Italy.

If the example is fairly chosen, it suggests that the development projected in Grosheide's analysis may have its own constitutional consequences, even though its legal meaning has not been thoroughly assimilated by the legal doctrine of the civil code or public law. The powers abstracted from private property are not simply—or at least not necessarily—taken over by the existing and ordinary organs of "the state." In this case, and in some others at least, they involve a measure of "collegiality," in Weber's sense,[1] with intermediate organizations and other institutional forms. These in turn, as in the example, may importantly influence the exercise of other powers that had belonged to government alone, and they may generate and protect new functions. This is the development that has been widely studied from a different point of view as the emergence of neocorporatism (Schmitter and Lehmbruch, 1979; Berger, 1981; Lehmbruch and Schmitter, 1981; Streek and Schmitter, 1985; cf. Mishra, 1984).

It is not my present concern to inquire into the dynamics of such a development or the difficult questions it raises about parliamentary and other constituents of political democracy.

[1] Weber omits a general definition of the concept, but he uses this heading to classify a variety of special social relationships and groups that have the function of limiting authority, with all varieties displaying mechanisms for reaching decisions by mutual adjustment among actors with an important measure of autonomy (see Weber, 1978: 271–282).

Nor am I about to engage in a debate about the economic wisdom of the policies generated by such structures. The question now is whether Nedelsky's reading of the American "paradox of property" has overlooked comparable reconstitutive trends, with their own deep roots in American political consciousness, hidden complexities within the general phenomenon that was characterized as pluralism in the debates of the 1960s and early 1970s (Connolly, 1969). If so, such trends would not solve the basic problem she raises concerning the dangers to individual autonomy. But attention would properly shift from the contemplation of paradoxes to an assessment of strengths and weaknesses, trends and possibilities within an emergent constitutional order that limits and channels state power by powers that are not decisively dependent on either the law of property or its myth.

III. WELFARE STATES AS A RESPONSE TO LABOR MOVEMENTS

The example derived from the linkage between Dutch industrial relations and welfare policy was not randomly chosen, because the history of reflections on the possibility of such constitutional evolution in both the United States and Western Europe largely coincides with attempts to think through the implications of the labor movements that have so strongly influenced the public agenda during the past century. For more than half of that century, much of that thinking had to do with either fears or hopes of social revolution. Financial or regulatory welfare state measures were promoted as prophylactic devices by the one side and as strategic transitional stages by the other (Preller, 1949; Adams, 1966). Then came several decades during which the large questions appeared obsolete but the institutionalization of welfare state programs was widely accepted as the price for such a cooling of social threat and conflict. In the debate over the presumed crisis of the welfare state in the past decade, there has been grave unease about the adjustments that were then made. The compromises between the "conservative" and "progressive" designs that were embodied in the welfare state are everywhere threatened with a loss of legitimacy (Habermas, 1969; Luhmann, 1981; Mishra, 1984).

Not coincidentally, the most recent period has also seen a weakening of organized labor (Roberts, 1984; Panitch and Swartz, 1985; Wedderburn *et al.*, 1983; Block and McLennan, 1985; Troy and Sheflin, 1985). The unions themselves have suffered from sustained unfavorable market conditions in their ar-

eas of greatest concentration, from increasingly restrictive regulation, from effective resistances to organization in the newer areas of employment growth, and from declining memberships (Kochan, 1985; Lipset, 1986). Where social democratic parties have not lost greatly in electoral strength, they have increasingly shifted their orientations away from the symbols and designs that bound them to the labor movement, as witness the political developments in France and Spain during the early 1980s. These trends have profound implications for the political prospects of the welfare state. The reciprocal interdependencies between organized labor and the complex of laws, policies, and institutions comprising the welfare state are well established, although the direction of causality with regard to new spending programs has been the subject of an interesting debate (Pryor, 1968; Orloff and Skocpol, 1984). If due regard is paid to the intricacies of actions and reactions, not to speak of anticipatory and preemptive actions, there is little doubt that trade union movements and the political parties close to them have been the major initiators or targets or both at the initiation of the program in question. And there is no doubt at all that these organizations have been decisive in the subsequent institutionalization of many of the programs.

At one level, the correlation between the strength of labor and the elaboration of the welfare state seems easily accounted for. Both developments appear to be dependent on the strength of social democratic or laborist political movements. High levels of trade union membership and loyalty are then seen as an expression of the same class consciousness that sustains parties with revolutionary or radically reformist programs. The institutionalization of welfare state programs and the neocorporatist political arrangements that have sustained them has been recognized as a direct or indirect result of the influence of those parties (Aaron, 1982; Schmitter and Lehmbruch, 1979; Lipset, 1983). Political labor movements themselves did not necessarily originate the eventually implemented designs for welfare, security, public health, industrial democracy, environmental protection, social and regional equalization, and economic planning that are variously comprehended by the term "welfare state" as it is used here. Much in these designs embodies resistance to labor's claims to political power. There is something absurd about the debate concerning the "real" social and political meaning of the welfare state, whether it represents a design for "social welfare" or "social control." The welfare state forms a contested complex of compromises and arbitral resolutions, often in fact initiated by religious parties or

secular social reformers in and out of state office who were expressly aiming at a "third way" between socialist-oriented organized labor and its opponents, and its meanings are perpetually in contest (Trattner, 1983). In any case, the striking general feature in the political formations under consideration remains the high correlation between the strength of organized labor and the extent to which public agencies honor the claims and expectations comprising the social rights of contemporary citizenship (Martin, 1986), as these have been given a status plausibly construed as functionally equivalent to constitutional guarantees (Marshall, 1965; Preuss, 1973, 1983).

For the labor movement, as for many of the other state and nonstate actors involved in the formation and institutionalization of the welfare state, the concerns around which all others revolve are naturally centered in the labor market (Offe, 1985). The interrelationship between the actions of labor (or expectations concerning them) and the welfare state is accordingly most evident in the domain of labor law. I maintain that developments in this sphere are, first of all, influential in shaping the other aspects of the welfare state and, second, representative of constitutional patterns and alternative possibilities for the design as a whole.

A striking indicator of the link between labor law and the broader changes under discussion is the extent to which purposive, sociological approaches to law—without which the law of welfare states can hardly be imagined—receive their paradigmatic judicial formulations in labor law cases within legal systems as disparate as the American and the German. If Holmes, Brandeis, and Frankfurter are taken as the principal practical representatives of this tendency in the United States, the formative importance of labor issues on their jurisprudence is evident from the record (Mason, 1956; Frankfurter, 1961; Hirsch, 1981; Irons, 1982). In the German case, the interplay can conveniently be studied in connection with the social-legal doctrine of works community (Kettler, 1984; Simitis, 1957).

Especially important for reflections on the paradigmatic significance of labor law are the developments in the sphere of collective labor law—the law of labor organization, collective agreements, and collective actions. Because such developments commonly reflect or react to actions (and litigation) by unions and are not limited to changes in legislation, they also point to a line of connection between labor movements and the legal constitution of the welfare state that is interestingly separate from the line through political parties and parliaments (cf. Simitis, 1983). The standpoint of comparative collective labor

law helps to bring into focus the distinction between the predominant social democratic themes of welfare-oriented regulation by the democratic state and the often latent themes of nonstate collective interactions, which are sometimes discussed as the syndicalist dimension of the labor movement. It was the composite (and not rarely discordant) effects of both these elements that comprised labor's stimulus to and mode of integration into the welfare state.

In the history of collective labor law, the main theme is the struggles of trade union movements for some form of legal recognition (or acknowledgment) of their characteristic modes and forms of social power. Of special interest here are the contested legal ramifications of the recognition variously gained, the implications of the diverse collective labor regime for the constitutional designs of the various welfare states.

Without denying that the initial designs of these regimes were often out of the hands of the labor movements, which were in any case frequently divided among themselves on key issues, I am especially interested here in the aims and achievements of what German political analysis would call the "legal and constitutional policy" (Martiny, 1976) of the trade union wings of a number of labor movements because certain common features in those achievements provide a model that bears on problems more fundamental than those to which those policies were primarily addressed.

During much of the history of organized labor, these policies have been under attack from two sides. On the one hand, they have been taken as challenges to the fundamental character of liberal law, somehow legitimating collective and coercive challenges to property in some of its vital aspects and undermining the sovereignty of parliaments and the legalism of the judicial process (von Mises, 1949). On the other, they have been seen as betrayals of the political activism and larger social objectives of the labor movement, accepting a conditionally sheltered but dependent position within a social system whose principal direction will be determined by others (Erd, 1977; Klare, 1978, 1982; Rogers, 1984; Tomlins, 1985; Panitch and Swartz, 1985). The former analysis is integral to the general legalistic critique of the welfare state, and I have already given my reasons for putting that aside. The latter presupposes a range of alternatives for labor and a measure of potential labor control over events that do not accord with my reading of the situation (Simitis, 1983; Huxley *et al.*, 1986).

In their political outlines, both lines of attack have changed remarkably little since they were articulated, for example, in

the hearings of the United States Commission on Industrial Relations (1916). The characteristic defenses of the policies might in turn be called pragmatic, in both the banal sense and in the more complex and interesting one. A major new social reality was there to be accommodated. Both policy and law had to be adapted in some suitable way. But the divisions which that commission uncovered within the workings of the pragmatists' major accomplishment of the time, namely Brandeis's "Protocols of Peace" in the New York garment industry, as well as the divisions manifested in the majority and minority reports of the commission, indicate a characteristic cleavage within the legal and constitutional policy of labor. On the one side are some for whom accommodation and adaptation are a matter of social pacification under state regulation. On the other are others for whom they are a matter of institutionalizing nonviolent social conflict and change within structures that limit the role of state regulation (Adams, 1966; United States Commission on Industrial Relations, 1916). This distinction will prove relevant to our assessment of contemporary legal-constitutional designs that model a law competent to give the welfare state its proper constitution upon the collective self-regulation under law achieved in industrial relations.

IV. THE SOCIALIST LABOR LAW PROJECT IN WEIMAR: COLLECTIVE AGREEMENT AND CUMULATIVE SOCIAL CHANGE

Notwithstanding the reductionist theory of law proclaimed by the orthodox socialist doctrine of the Second International (Engels and Kautsky, 1887), there did exist jurists who were attracted to organized social democracy in Germany. Since Lasalle ([1862] 1919), they sought to specify and demystify the dramatic transformations symbolized by the concept of revolution, relating these transformations strategically to the systems of law and political constitution. Such juristic speculation interacted reciprocally both with the practical juristic strategies governing the legislative work of socialist parliamentarians and the legal work of labor organizations to project a conception of legal restructuring that could comprehend the social rights that the socialist-oriented labor movement demanded and the social power the movement deployed without resort to violence or dictatorship (*Die Neue Zeit*, 1890–91).

Curiously, in the light of recent new property discussions, Menger ([1903] 1927), the first important academic jurist in the German-speaking world sympathetic to socialist ideas, proposed

amendments to the draft of the German civil code (Bürgerliches Gesetzbuch [BGB]) that would have extended the protection accorded property to workers' capacity for work (*Arbeitskraft*) so that, for example, an action against "impermissible conduct" could have been initiated when an employer failed to provide adequate safety or required excessive labor. Such adaptation of property concepts had already been commonplace in the English labor movement during the Chartist period (Jones, 1983), and it was repeatedly taken up later elsewhere as well, if only for tactical purposes (Radbruch, 1930).

But the most profound socialist-juristic study of the time to deal with the legal status of property emphasized the stability of the formal legal concept together with the decisive change in its function brought about as economic relationships were increasingly defined by legal institutions such as contract and corporation, technically ancillary to property but effectively superceding it (Renner, [1905] 1949). This decentering of the property concept, together with the emphasis on alternate institutions, including public law institutions, for the legal reconstitution of the employment relationship, bears a certain resemblance to Grosheide's analysis. At the beginning of this century, Renner's conclusion was that the transfer of the primary organizational and regulatory functions to these "complementary" institutions would occur adaptively in the course of social development long before the actual abolition of private property. The formal legal category of property, in his view, cannot be an obstacle in the way of increasing practical acknowledgment of the social character of production. The social functions of property would be socialized first.

Renner's ideas were adapted and refined in the German literature of labor law, especially during the first ten years of the Weimar Republic. Sinzheimer, an important labor lawyer who became a Social Democrat in the last years of World War I and served as a leading Social Democratic contributor to the drafting of the Weimar Constitution, developed a functionalist theory of the emerging collective labor law. Ultimately, he projected his law as simultaneously both the model and the dynamic source of a fundamental change in the whole legal system as well as in the effective constitution of social life (Kahn-Freund, [1976] 1981; Kettler, 1984).

According to Sinzheimer ([1927] 1976), the most important complementary institution, capable of absorbing the organizing and directive functions that property had carried out, is the collective agreement between employers and trade unions, an institution that has social reality before it is given legal recogni-

tion and that embodies a dynamism and flexibility that the legal code cannot provide. Working at first only through doctrinal analysis and the promotion of legislation and then later also through his work on the constitution and on the various governmental commissions charged with the design of the new labor law promised in the Weimar Constitution, as well as through his performances as the principal legal adviser to the (Socialist) Free Trade Unions, he sought to secure a form of legalization for the collective agreement that would allow it to retain the openness of a social invention created to meet experienced social need while maintaining its connection to the dynamic and transformative social force that had created it.

For Sinzheimer, the collective agreement is so significant first because it is a spontaneous product of an authentic search for order between collectivities with conflicting interests, a balancing of active social forces and not simply a formal design that must be imposed by the coercive powers of the state apparatus. The order and balance presuppose the continued existence of the two major collective social actors in the employment relationship, but the design is imposed by the newly organized working class. The nature of this imposition, moreover, implies future reorderings, with the initiative remaining with the workers (Kettler, 1984). It is this implication that vitally distinguishes Sinzheimer's mature views from the more static pragmatism with which he was often perforce politically allied and with which his position is accordingly often confused (cf. Korsch, [1922] 1980; Fraenkel, 1973; Kahn-Freund [1976] 1981).

Secondly, to Sinzheimer the collective agreement represents a response to fundamental anomalies in the relationship between the buyers and sellers of work, the relationship that, with Renner and the whole Marxist tradition, he considered decisive for the order of a given society. Its emergence, he thought, signals and speeds the growing social obsolescence of the individual contract of employment, which in fact stands for the actual rightlessness of the worker.

The individual contract of employment is so profoundly misleading in industrial organization, according to Sinzheimer, because it fails to acknowledge the dependency that constrains the worker and the power to which it subjects him. As long as laborers are isolated in mutual competition, as they are when labor is first made free, their total dependency upon employment requires them to accept these legal fictions or to contest them only in unrealistic ways. But when the workers organize for collective action, they achieve some corrections. Some of

the first achievements, Sinzheimer thought, are only indirectly their own. Fear of labor's growing power and a measure of humanitarian concern lead to some legislation that directly or indirectly protects the labor power they must employ, constantly risk, and in time exhaust; and that insures minimally against its loss. In his view, however, the collective agreement that establishes norms for the terms and conditions binding upon an entire sector of economic life is a far more significant and revelatory accomplishment than such welfare regulations and compensations because it periodically gives temporary form to the balance between the power of employers and the organized resistance of workers and because it provides a procedure for lessening the dependency of workers. The effect is to create an expandable measure of power-sharing with regard to controls that had earlier been considered inherent in proprietorship.

After the German Revolution of 1918, Sinzheimer, active in support of the reformist wing of Social Democracy and closely tied to the socialist-oriented Free Trade Unions, elaborated his idea of the limitations that can be exercised by institutions of labor law into a conception of progressive stages that would reenact in the economic sphere what had already taken place in the political sphere (Sinzheimer, 1923). First, corresponding to the collective agreement and the legal arrangements needed to give it full recognition, is what he called the "constitutional order of labor." Here the entrepreneur's power over the labor he hires is limited by certain rights which the workers are assured and by some collective participation with regard to conditions of employment and welfare. Sinzheimer's examples include jointly managed social insurance schemes, the joint working parties set up between the top levels of labor and industry in the last days of the war, and the postwar works councils. Next is to come a "constitutional order of the economy" in which the common interests of all participants in the economy would find ever-clearer expression in institutions forming a common will, as in the postwar comanagement schemes in coal and potash and in the never-implemented constitutional provision for a pyramid of consultative economic councils. This stage would be marked by steadily increasing common control over production. Finally, complete democratization of economic relationships would result, in which the leadership functions required by the rational organization of production would not be connected with property in any way. The abolition of this right by legal enactment, marking the establishment of mature socialism, would then be a solemn ceremonial formality.

Sinzheimer thought that this sequence is implicit in the

core institution of the collective agreement under conditions of political democracy and that each successive step, although it may require some legislative action, builds on the social integration and shifts in power achieved at the step preceding. The social provisions of the second part of the Weimar Constitution, themselves the result of compromise (Schmitt, 1928; Nipperdey, 1930), exemplify the principle of collective agreement even while codifying it. Sinzheimer argued that they laid down the framework for social constitution as well as principles to guide judicial doctrine in the direction of the development he projected (cf. Neumann, [1930] 1981). The electoral and parliamentary institutions of political democracy are presupposed at every stage, but Sinzheimer's analysis emphasizes the fundamental transformation in the meaning of the political framework when its social substance and legal instruments are changed by the course of social development (cf. Simitis, 1983).

During the three or four comparatively prosperous years culminating in the Social Democratic electoral victory in Germany in 1928, as the labor movement recovered from its grave setbacks during the period of hyperinflation, it did not appear unreasonable, although certainly controversial, to assert with Renner (1929) that the complex welfare institutions then in the process of being generated by labor were achieving a state of things recognizably on the way toward actualizing economic democracy, and to celebrate a new era of social rights. At least it made good sense for Sinzheimer and his effective younger associates to build this reading of developments into labor's legal theory in the doctrinal contests concerning key outstanding issues in collective labor law. But the jurisprudence of the courts, including the new labor courts after 1927, for which Sinzheimer had fought so hard, indicated that these legal theses were not to prevail (Kahn-Freund, [1932] 1981). The devastating events following the onset of the Great Depression showed that the neocorporatist balance that had been struck was profoundly unstable, dependent as it was on labor's uncertain access to certain parts of the state bureaucracy and on unreliable temporary alliances (Maier, 1975; Preller, 1949; Hartwich, 1967; Kirchheimer, 1964). Even the formal outlines of the design projected by Sinzheimer disappeared with the National Socialists' accession to power. Labor ceased to be an independent force in Germany for more than twenty years, and all of the substantive achievements of labor that were not destroyed were transmuted into privileges at the disposition of the leaders of works communities, that is, they became almost always a matter of patronage by the proprietors. What had been conceived

as the constitutional structure of work and welfare relationships proved to be even more quickly vulnerable to the stress of the Depression and to the hostility of its adversaries than was the political constitution of parliamentary democracy itself.

Sinzheimer (1933) acknowledged that his conception of labor law could not withstand massive unemployment. In the theoretical works he wrote in exile he nevertheless continued to speculate about democratization of economic relationships as the transformative way toward a legal order congruent with the social character of humankind (van Peijpe, 1984). His somewhat younger close collaborators turned more sharply against the legal strategy they had shared with Sinzheimer.

Neumann, for example, concluded in the aftermath of defeat that the labor movement had been credulous about law and the state and that the legal development of the Weimar period had in fact been an aggrandizement of arbitrary power in bureaucracies and courts structurally tied to labor's social antagonists. The legal doctrines associated with labor law (i.e., the shifting from individual persons to institutionalized collective legal personality and the granting of discretion to judges to make decisions in accordance with very imprecise normative principles) he now analyzed as indistinguishable from legal instruments of control generated by a monopoly capitalism no longer served by the standards of legality appropriate to earlier phases. The period of neocorporatism between 1924 and 1928 appeared to him in retrospect as a scene of unequal conflict between interest groups increasingly overshadowed by armed bands, with organized socialist-oriented labor in fact more and more dependent on a less and less legitimate state (Neumann, 1937, 1944, 1980; see also Kahn-Freund, [1979] 1981). Some such assessment, if not always with all the Marxist arguments adduced by Neumann, predominates in the more recent literature on the Weimar labor law experience (Martiny, 1976; Kaiser, 1980, 1981), where the distinctive attempts associated with Sinzheimer are not altogether neglected. Even Ramm (1966), who first renewed interest in these writings, concluded that the practical failure of the conception stemmed in important measure from its inner failings.

V. FROM INDUSTRIAL JUSTICE TO REFLEXIVE LAW

Some recent German literature in legal theory has cast key institutions of labor law in a role similar to that envisioned by Sinzheimer, as an instance and model of a form of legalization that can provide an alternative to the forms now widely criti-

cized as hyperdeveloped and that can effectively safeguard social rights otherwise at risk (Voigt, 1980, 1983; Teubner, 1982; Ronge, 1980, 1983). Most of these writers have drawn direct inspiration from American rather than German sources. Teubner has been the most innovative among them and, although his most recent formulations depend increasingly on systems analyses, he has paid special attention to the evolutionary design of Selznick (Nonet and Selznick, 1978; cf. Teubner, 1983, 1986). In abandoning the rather shaky reformist Marxist framework that characterized the older German work, Teubner and the others have brought out the more general implications of the legal conception. At the same time, they have run the risk of losing the awareness of power variables that the Social Democratic legacy contains in its imagery of class struggle, however tamed and attenuated. This is not to say that the American progressivist-pragmatic tradition, which provides the background for American expansions upon the model of labor law, does not have its own version of the classical Social Democratic awareness of the interplay between questions of law and might. However, the development of that tradition has tended to obscure this awareness, especially when it has focused on the progressive evolution of collective problem-solving mechanisms rather than on the critique of domination by special interests.

Nonet and Selznick distinguish three evolutionary stages, or ideal-types, but indicate that the evolution in question is intended as a heuristic model rather than as a theory of natural development. The first stage, called "repressive," finds law passively and opportunistically in the service of predominant social and political forces, acting above all as a means of coercion. In the second stage, one of "autonomous" law, the legal system approximates to Max Weber's conception of formally rational law. To establish and preserve institutional integrity, Nonet and Selznick claim, law "insulates itself, narrows its responsibilities, and accepts a blind formalism as the price of integrity" (1978: 76–77). At the third stage, then, to the extent that it can actually be attained, law once again responds to the social environment, as in the first stage, but now it is geared to meet Roscoe Pound's demand that law be responsive to social need. It is much more likely to be engaged in regulation than in adjudication, and it has the cognitive capacity to comprehend social pressure as sources of knowledge while facilitating the achievement of common purposes. Although Nonet and Selznick describe the stages in that evolution in quite general, sometimes hortatory terms, the work clearly rests on Selznick's impres-

sion of the socially constructive administrative programs that he has studied over the years (Selznick, 1949, 1969).

The first dimension in responsive law involves a conception of substantive justice. It is linked theoretically to legal philosophers who place principle above rules in law. Since the philosophical argument itself is slight, however, it seems more firmly grounded in Nonet and Selznick's conviction that the major social programs since the American New Deal have been responsive to real problems and that the practice of an important subset among administrators and judges can be seen as effectively dedicated to "the progressive reduction of arbitrariness in positive law and its administration." In this connection, they expressly challenge the most fundamental categories of formal law. "In the context of responsive law," they write "claims of right are understood as opportunities for uncovering disorder or malfunction, and hence may be valued as administrative resources. But the resolution of controversies cannot remain the paradigmatic concern." This, they assert, "is to demand a system of law that is capable of reaching beyond formal regularity and procedural fairness to substantive justice" (1978: 108). With this, the whole conception becomes very uncertain, or at least dependent on a strong political consensus, and the pragmatist-progressivist provenance of Selznick's ideas becomes evident.

But the striking thing about the conceptions of substantive moral and political knowledge developed in this intellectual tradition is the rich elaboration of its concept of problem-solving intelligence into procedures or methodologies for decision making, which are in turn operationalized in distinctive patterns of organization. For Dewey (1927) this reasoning generates a radical theory of populist democracy; for Lindblom, a "post-ideological" theory of "partisan mutual adjustment" (1965; cf. Kettler, 1967, 1969). As in these cases, Selznick's undertheorized account of methods for adequate social self-management proves to be analytically separable from the philosophical characterization of outcomes as substantively rational.

In his adaptation of Selznick's ideas, Teubner accordingly distinguishes between the notions of a law governed by substantive justice contained in Nonet and Selznick's stage of responsive law and an implicit second dimension, in which the distinctiveness of responsive law derives from its structure and its inner connection with problem-generating and problem-engaging organized social actors. Teubner calls this reflexive law and characterizes it as law that puts in place autonomous and self-legitimating constitutions for diverse domains, each having

its own distinctive principles and appropriate mechanisms, with the overall legal framework providing for mutual respect among the spheres. This law, he maintains, is essentially a law of organization. It is self-limiting because it addresses itself to mechanisms and processes of subsystem conflict resolution rather than imposing solutions. His primary case in point is labor law, understood in a way more directly reminiscent of Selznick's earlier work on industrial justice (1969) than of the Weimar socialist formulations, with their Marxist points of reference.

Selznick had argued, first, that contemporary trends in economic organization themselves already incline toward internal legality, thus institutionalizing a system of rules and reasonableness that is progressively removed from arbitrariness and open to corrective contestation. The social foundations of industrial justice, he maintains, are already present in a tendency toward rules and reasonableness that is inherent in modern organization as it advances beyond the simplicities of bureaucratic hierarchy. Nevertheless, he finds, despite the human relations movement in personnel administration, which he prizes, this system is still too much inclined to instrumentalize participants. Decisively reorienting this incipient rationality in economic organization and giving it a human face, Selznick contends, implies the transformation of the employment relationship.

In a distinction closely analogous to that made by Sinzheimer, Selznick contrasts the prerogative contract, which subordinates the individual employee to the command of the employer, with the collective constitutive contract. The latter, he maintains, is not a contract in the older legal sense at all but rather the establishment of a scheme of internal governance on the basis of negotiations between parties whose interests conflict at least in important part and that are equipped with some autonomous power resources through their organization and capacities for collective action. The collective agreement, then, reorients the organization of economic activity so as to provide autonomy and due process in this domain at least, subject to constraint by regulative principles democratically established by public authority.

The major jurisprudential issue, Selznick finds, concerns the theory of association. He argues above all against attempts to construe corporate organization with the help of the individualist contract theory of common law. He welcomes instead the turn toward a new institutionalism, with status as a source of rights (cf. Simitis, 1957; Kettler, 1984). Within the state's legal

system, the constitutive contracts provide a reference point for comprehensive public policy, so that disputes arising under such contracts that go beyond the internal arbitration system will be resolved by courts taking guidance from relevant statutes and not from the common law of contracts. They provide a framework, moreover, to sustain due process, a framework that can be judicially monitored to assure minimum standards. The presence of lawyers in the negotiations and arbitrations involved in constitutive contracts, Selznick contends, will make available the analytical habits and concepts of the common law. However, the constitutive and political character of the deliberations will prevent the abandonment of substance for form. He finds here a pattern of legalization that, in short, brings the central value of legality—its negation of arbitrariness—into social relationships especially subject to abuses of power, without subjecting them to formalized, largely retrospective, and unreasonably uniform standards or procedures and without adding unmanageably more functions and uncontrollably more power to the central institutions of the state. Selznick thinks that this adaptability and flexibility provide as much assurance of intelligent collective judgment as can be secured.

Selznick does not claim that this complex and contradictory process, as it has been institutionalized in the practice of business organization and labor law, already adds up to industrial justice or to the accomplishment of the principled public purposes often merely enshrined as ineffective ideals in symbolic legislation. But he thinks that it might be legally nudged closer to due process. In a parallel to some of Sinzheimer's larger hopes, Selznick believes that the principle of contestation intrinsic to due process may generate real democratic participation and in time bring the association to polity in Aristotle's sense, as an uncoerced association for the good life. This is the vision, it seems, that captured the imagination of Teubner and other contemporary commentators looking for means of relegalization that are able to move beyond present grave difficulties in the law without abandoning great masses of people to the arbitrary social powers that are in some measure controlled and compensated for by the regulations of the welfare state (cf. Luhmann, 1985).

VI. FUNCTIONALISM AND THE POLITICS OF CONSTITUTION

Whatever the doctrinal merits of Sinzheimer's and Selznick's analyses of the collective labor law (cf., e.g., Kaskel, 1922,

1932; Cox, 1963; Simitis, 1983), it is by no means clear, first, that the model can be applied to different issue domains and second, that the experience can be abstracted from the historical and political contexts to which it belongs. Both questions come back to the forms, purposes, and powers of the labor movement. Comparative historical study seems to suggest that the effectiveness of the autonomous labor organizations depends heavily on their success in gaining the support of political authorities. Sinzheimer concluded in 1929, for example, that the Weimar system of compulsory arbitration at the discretion of the Minister of Labor was essential to the regime of collective agreements, even though it made the social actors more dependent on the state than his initial theory of the collective agreement would have allowed (Sinzheimer, 1929; Hartwich, 1967). Neumann was not alone in his conviction that such dependency, either in the Weimar period or in more recent history, disables the labor movement from pursuing precisely the lines of development that Sinzheimer projects (cf. Erd, 1977). Similar arguments have been made with regard to constraints imposed on the American labor movement in return for the support it receives from the National Labor Relations Board (Klare, 1982). The question, however, is not only whether such linkage between movement and state represents a threat to the integrity of the movement but also what happens when the state's agencies break the link or turn against the regime to which the movement has been central. Then the prospects for the evolution that Selznick projects appear dim indeed.

In his recent elaborations of the argument on behalf of reflexive law, Teubner (1984b, 1986; Teubner and Willke, 1984) has conceded the limited applicability of the collective labor law example and has subsumed this case under a much wider class of procedural or constitutive legislation designed to steer the "self-steering" mechanisms of social subsystems by legitimating and reforming their internal organizations. One of his major interests, in fact, has been the restructuring of organizations so as to revise their internal logics (the norms, priorities, and cognitive methods according to which they act). Most recently, he has addressed himself to the reform of corporate law so as to bring about internal weighing of considerations relating to social interests not ordinarily comprehended within corporate rationality (Teubner, 1984a), a legally sanctioned institutionalization of corporate social responsibility. Without presuming to dismiss the interesting analyses that Teubner presents and develops in his recent work, it is nevertheless fair to note that this direction removes him further from an under-

standing of the political dimension in constitution and reconstitution.

Teubner's subsystems now have reproductive mechanisms that hardly accord with the realities of powers and resistances that empirical research uncovers, and they possess rationalities that leave little room for intrasystemic ideological divisions (cf. Jörges, 1983; Münch, 1985; Kettler, 1986). In his earliest formulations, Sinzheimer too was fascinated by theories of organization and function that promised to supersede political conflict. However, it was precisely his recognition of the power dimension in the ordering of social relations that marked his turn to the Social Democratic movement and his commitment to increase the power of labor organizations. This, however, is not to be confused with a reductionist treatment of law as simply equivalent to power in other modes. The distinctive achievement of social democratic legal thought from Renner through Sinzheimer, Fraenkel, and Neumann was precisely their work on a political-social theory of the legalistic mode and its development in a state thought to be inclining toward social democracy.

Teubner counts on the power of the political system to provide the sanctions required for use of reflexive law to reconstitute autonomous, self-regulating social subsystems in the public interest. But this reliance begs too many questions about the structural determinants of state action. American labor policy has allowed the constituted collective labor regime to be marginalized (Huxley *et al.*, 1986). Similarly, recent British legislation in the field of collective labor law might be thought to exemplify perfectly Teubner's conception of reflexive law since it concerns itself exclusively with procedural requirements for organization and collective action. Yet the design and effect have been to lessen subsystem autonomy drastically and to introduce massive, punitive, and largely arbitrary judicial regulation where nonstate interaction processes had prevailed (Wedderburn *et al.*, 1983; Davies *et al.*, 1983). Some might argue that the new logic is more in the public interest than the old, but the argument would be a political one, subject to political rejoinder (Simitis, 1983). In the meantime, there are signs that this legal remedy seriously threatens primary social actors in the older constitutional design.

A counterexample does not refute a complex argument, but it may call attention to a vital missing dimension. Teubner's theory cannot be satisfactorily developed within the unpolitical framework of abstract functionalist theory; it requires the context of an adequate political theory of constitution. Social dem-

ocratic political thought can hardly claim that distinction, but it is at least open to the central issues. That is why the recollection of its dual legacy is offered as a constructive contribution to the contemporary debate.

But the study has barely begun. The major purpose of this introduction to the inquiry has been to indicate the inner connections between past achievements in the reconstitution of labor relations and the conception of an evolutionary alternative to delegalization schemes for the welfare state. The second point was to identify the difficulties raised for this alternative approach by the historical record of political preconditions for the effectiveness of the new labor law. There are excellent reasons for wanting to pursue the ways of relegalization derived from Sinzheimer and Selznick, but appearances are powerfully against them. Such a recognition has classically been the starting point for careful reconsideration of the facts.

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