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Endogeneity and Its Discontents: Teubner and Selznick on Legal Pluralism

A Comment on: "The Pluralization of Regulation" by Christine Parker.

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Endogeneity and Its Discontents: Teubner and Selznick on Legal Pluralism

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In *The Pluralization of Regulation*,¹ Christine Parker presents an account of both Philip Selznick's understanding of responsive law and Gunther Teubner's development of reflexive law. She is to be commended for not lumping them together.² Yet, after presenting each theory, she argues in favor of combining them.

Parker is correct that a sensitive analyst can be informed by both theories. More importantly, programs of regulatory reform can benefit by learning from both. Analytic differences do not necessarily make a practical difference, as the pragmatists taught. Yet in describing Selznick and Teubner

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1 Christine Parker, *The Pluralization of Regulation*, 9 THEORETICAL INQUIRIES L. 349 (2008).

2 Cf. Bradley C. Karkkainen, "New Governance" in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004) (criticizing the lumping of different streams of thought with Teubner's in Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004)). Parker's choice to distinguish between Selznick and Teubner is a difficult one, as Teubner posits his theory as a refinement of Selznick's, Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 245 (1983) [hereinafter Teubner, *Substantive and Reflexive Elements*], and claims that all "new governance" or "alternatives to law" should be understood as a reaction to what his theory characterizes as "the structural coupling of law, politics and the regulated areas." Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES 3 (Gunther Teubner ed., 1987) [hereinafter Teubner, *Juridification*].

as potentially complementary, Parker ignores some of the differences in their difference, which I will attempt to explicate.

For Selznick, commitments to both purpose and integrity are necessary to guide responsiveness. Without the institutionalization of these commitments, instead of "controlled adaptation," "drift or opportunism" result.³ For Teubner, as for Luhmann, the normative closure of a self-referential autopoietic system weakens its adaptivity to the environment, allowing for responsiveness.⁴ To supplement Teubner with Selznick requires responding to the collapse of purpose into normativity and integrity into system closure. It requires re-imagining ideals and noticing connections, illuminating taken-for-granted injustices.

For Teubner, at best, we may come to live in "global villages of social autonomous sectors."⁵ The task of law would be shaped by the independence of the nodes of a global "heterarchical, connectionistic, network-type linkage of communications."⁶ For Selznick, at best, we satisfy our needs for solidarity in a community.⁷ Law serves "the human aspiration to sustain coherence and resist fragmentation."⁸ To supplement Selznick with Teubner requires responding to the collapse of global communication into community participation and the choice of organicism over multiplicity. It requires re-imagining ourselves as internationalists and noting the irony of choosing subordination, illuminating the challenges from those outside our community.

In an account of law that is "endogenous," "[e]very practice and every institution is seen as 'in society,' fatefully conditioned by larger contexts of culture and social organization."⁹ Teubner and Selznick differ in their account of law's endogeneity. Teubner's weakness is that he takes too little account of law's endogeneity. Selznick's is that he is trapped by it.

In Teubner's account there are two different ways in which legal pluralism may disintegrate law's normative closure. First, there may be "the adoption

3 PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 336 (1992).

4 Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 146, 149 (1989).

5 Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors in Worlds Society?*, in KARL-HEINZ LADEUR, *PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION* 13 (Gunther Teubner ed., 2004).

6 *Id.* at 6 (quoting Luhmann).

7 SELZNICK, *supra* note 3, at xi.

8 *Id.* at 222.

9 *Id.* at 29.

of an alien code for operations"¹⁰ of the legal system. Second, law may be colonized by incompatible rationalities, each with a claim to universality, each projecting norms.¹¹ Both change law's "evaluation of conflict perspectives."¹²

What Teubner characterizes as threat, Selznick depicts as opportunity. Selznick's analysis of legal pluralism emphasizes that there is "a more or less unified legal order,"¹³ which is capable of incorporating data, models, values, rationalities and energies by "coexistence and interaction" with other "semi-autonomous social fields."¹⁴

What Teubner speaks of as "an alien code," Selznick understands as "shared experience, reflecting shared sentiments, sustained by practical needs."¹⁵ Even if the facts of legal pluralism were understood only as "'data points' from the regulated that give substance to the law's abstract labels,"¹⁶ data may be interpreted more capaciously than merely as "code." Cultures are more than just discourses, and cultural contacts involve more than the exchange of signals. Signs and symbols and myths and scripts are all forms through which purpose is concretized.¹⁷ Teubner, following Luhmann, reduces culture to its evaluative dimension. This results in an overly limited view of the ways in which law may be influenced.¹⁸ Cognition extends beyond the

10 GUNTHER TEUBNER ET AL., *LAW AS AN AUTOPOIETIC SYSTEM* 104 (1993).

11 Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, in *LAW, SOCIETY AND ECONOMY* 155 (Richard Rawlings ed., 1991). "[L]egal pluralism . . . refers to a plurality of incompatible rationalities, all with a claim to universality within a modern legal system. Different social particularistic rationalities have formed bridgeheads within the law from which they operate in the designing of mutually incompatible legal concepts, to represent alternative doctrinal arguments and methods, and to project norms which contradict each other." *Id.* at 157. The two forms of disintegration are related, as law seeks to incorporate other rationalities to prevent the introduction of alien code "disintegrating . . . normativity into social or political particularity." Teubner, *Juridification*, *supra* note 2, at 26-27.

12 Niklas Luhmann, *Closure and Openness: On Reality in the World of Law*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 335, 347 (Gunther Teubner ed., 1988).

13 SELZNICK, *supra* note 3, at 469.

14 *Id.*

15 *Id.*

16 Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 505 (1997).

17 Gertrude Jaeger & Philip Selznick, *A Normative Theory of Culture*, 29 AM. SOC. REV. 658 (1964).

18 *Cf.* Paul DiMaggio & Walter Powell, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 16 (Paul DiMaggio & Walter Powell eds., 1991) (criticizing Parson's account of culture).

evaluation of multiple translations ("hermeneutic differences"¹⁹). As Selznick emphasizes, we respond to the "non-rational," which is to be distinguished from the "irrational."²⁰ For Selznick, understanding experience, not simply choice, is necessary for elaborating purpose.

For Teubner, its normative closure is what gives stability to law.²¹ Law has such remarkable stability that although Teubner is sensitive to multiple cultures and discourses, he can still write about a "British legal culture" or a "German legal culture."²² Law stands apart, even if it is "sandwiched" between the "autonomous logic" of the state and the regulated.²³ Structural coupling presents a problem of coordination ("damage limitation"²⁴). The goal is "the stable persistence of the difference."²⁵ In their couplings, discourses encounter each other exogenously.

For Selznick, law is generated by institutions, both "legal" and "non-legal," which are better understood as "governed by multiple rationalities and negotiated authority" and being a "loose coupling and even organized anarchy," than as a "unified system of coordination."²⁶ This understanding of law as endogenous with that which it seeks to regulate expands law's purposes. For example, economic organizations are not understood as confronting law exogenously and through structural coupling re-inscribing the law in terms of economic efficiency. Rather, law endogenously "permeates the most fundamental morals and meanings of organizational life: Law constructs and legitimates organizational forms, inspires and shapes organizational norms

19 Gunther Teubner, *In the Blind Spot: The Hybridization of Contracting*, 8 THEORETICAL INQUIRIES L. 51, 55 (2007).

20 Philip Selznick, *Institutionalism 'Old' and 'New,'* 41 ADMIN. SCI. Q. 270, 275 (1996). Stinchcombe compares "the old institutionalism in which people built and ran institutions, and the new Durkheimian institutionalism in which collective representations operate on their own." Arthur L. Stinchcombe, *On the Virtues of the Old Institutionalism*, 23 ANN. REV. SOC. 1, 2 (1997). Selznick would claim that he too is heir to Durkheim.

21 For an account of the mechanisms of stability, see Gunther Teubner, *Alienating Justice: On the Surplus Value of the Twelfth Camel*, in CONSEQUENCES OF LEGAL AUTOPOIESIS (David Nelken & Jirí Pribán eds., 2001).

22 Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 20 (1998).

23 Teubner, *Juridification*, *supra* note 2, at 25.

24 Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L. L. 999, 1045 (2004).

25 Teubner, *supra* note 19, at 62.

26 Selznick, *supra* note 20, at 275.

and ideals, and even helps to constitute the identities and capacities of organizational 'actors.'²⁷

Dispensing with structural coupling, endogeneity also explains how the economy can reshape legal rationality. Teubner understands "norms of employee protection" as the use of "law as a means of control to constitutionalize the economy."²⁸ Employee protection disputes, however, also have "infused legal norms with managerial values, such as the importance of smooth relations, the therapeutic underpinnings of most disputes, and the importance of building relationships and preserving community."²⁹ This describes neither the introduction of a new code nor the collision of discourses and rationalities. Almost unnoticed, legal rationality gives greater prominence to negotiation, mediation and arbitration. Efficiency enters not as an alien, but as a legal value, such as in the right to a speedy trial.³⁰ Mimetic processes require neither surrender nor conscious adoption.

Seeing agonistic, exogenous battles — the collision of discourses — Teubner may ignore changes that don't appear to threaten normative closure, but which sap integrity.³¹ Reflexive law is an account of normativity. But, consider in light of the endogeneity discussed above that "insofar as law is informal, flexible, negotiated and reflexive law, it will tend to cast itself as a constitutive discourse and practice within society rather than in instrumental terms."³² Normativity, as both legality and rationality,³³ is continually under construction in "interlinked contemporaneous discourses"³⁴ of both legal actors and those in the regulated field.

Selznick as a complement to Teubner, as Parker recognizes, directs us to keep our attention focused on legal ideals. For Teubner, though, focusing on legal ideals means focusing on normativity, and this may be shaped to permit or perpetuate injustice. Selznick's understanding of the complexity of experience means that evaluations and deliberations are but a part of

27 Edelman & Suchman, *supra* note 16, at 493. Edelman and Suchman contrast the endogenous and autopoietic approaches in *id.* at 502 n.21.

28 Teubner, *Juridification*, *supra* note 2, at 11-12.

29 Edelman & Suchman, *supra* note 16, at 495.

30 WOLF HEYDEBRAND & CAROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* (1990).

31 Selznick might characterize normative closure as generating "ideological thinking," which "does not struggle" against its abstractions. SELZNICK, *supra* note 3, at 411.

32 Wolf Heydebrand, *Process Rationality as Legal Governance: A Comparative Perspective*, 18 INT'L SOC. 325, 338 (2003).

33 Lauren B. Edelman, *The Centrality of the Economy to Law and Society Scholarship*, 38 LAW & SOC'Y REV. 181, 191 (2004).

34 Edelman & Suchman, *supra* note 16, at 502.

our experiments in elaborating purpose. Selznick's understanding of the mutually constitutive nature of law and organizations means that integrity is always at risk and attention must be paid to "the fate of ideals in the course of social practice."³⁵ The endogeneity of law and society not only supplements any account of structural coupling, but even questions it.

Selznick provides an account of "the integration of law and society."³⁶ He develops understandings of "the enmeshed, embedded, implicated self,"³⁷ the "enveloping world,"³⁸ and the "authority of the situation."³⁹ He rejects "unsituated rationalism" and "untempered claims to institutional autonomy."⁴⁰ Context, connection and relation are his themes.⁴¹ Endogeneity is presumed.

For Selznick, what tests actions is the realization of values, not legitimacy.⁴² Legitimacy has a limited meaning to Selznick. It refers to the linkage of "authority and consent."⁴³ Consistent with Teubner, Selznick finds that "[a]rtificial reason is . . . the language of legal legitimacy."⁴⁴ But for Selznick such legitimacy is a minimal requirement. At stake for him is "the capacity of law to deliver justice [and other values]."⁴⁵

For Teubner, legal pluralism brings the "alien" [code] into law. For Selznick, legal pluralism has "normative import"; "Law is more just when it

35 SELZNICK, *supra* note 3, at x.

36 *Id.* at 463.

37 *Id.* at 69.

38 *Id.* at 388.

39 *Id.* at 287.

40 *Id.* at 14. For further criticism of abstraction, see *id.* at 21, 50, 69, 103, 105, 197. For further criticisms of autonomy *simpliciter*, see *id.* at 183, 191, 197, 204, 336.

41 On context, see *id.* at 11, 26, 474 ("Blurred boundaries and overlapping functions are natural (if troublesome) offspring of moral decision."); *id.* at 436 ("the continuities of institutional and moral life").

42 Throughout his academic career Selznick has been consistent in seeking social knowledge that elaborates our understanding of values and how to realize them. The last chapter of his first book, *TVA and the Grass Roots*, carries the title "The Voluntary Association and the *End Point* of Administration" (emphasis added). PHILIP SELZNICK, *TVA AND THE GRASS ROOTS* (1949). In the last sentence of his most recent book, *The Communitarian Persuasion*, he seeks to educate us about "who we are and what we live by." PHILIP SELZNICK, *THE COMMUNITARIAN PERSUASION* 160 (2002) [hereinafter SELZNICK, *THE COMMUNITARIAN PERSUASION*].

43 SELZNICK, *supra* note 3, at 268.

44 *Id.* at 451.

45 *Id.* at 468. For Selznick, concerns with legitimacy may interfere with justice: "The virtues of clarity, certainty, and institutional autonomy are contingent, not absolute. They do not always serve justice; indeed, they often get in its way." *Id.* at 437.

springs from . . . local or particularistic . . . institutions."⁴⁶ To protect values, "government must be seen as derivative and instrumental — as the agent of community, not its creator."⁴⁷ Consequently, in the name of value legal pluralism asks how groups, institutions and governments should interact.

Teubner has already criticized Selznick for not responding to "the crises of rationality, legitimacy, and motivation."⁴⁸ A more focused critique might be to draw on Teubner's role as an international lawyer and ask more about the standpoint that Selznick has adopted. *The Moral Commonwealth*, like Selznick's other writings, is particularly American, not only in focusing on U.S. law, but in ignoring the possibility of an internationalist perspective.⁴⁹ Once government is derivative of community, why don't communities have claims on other nations' governments? What legal orders emerge or should emerge from transnational (or diasporic) communities? An endogenous perspective on global phenomena, Teubner might point out, readily supports imperialist projects. Selznick might be asked to detail how impositions of law do not become the responsive solutions to conflicts of laws? As conflicting values emerge from different communities, what are legal practitioners to do?⁵⁰

Teubner also can criticize Selznick based on the facts of social exogeneity. Selznick compares social systems with ecosystems and sees their analysis as based on similar principles.⁵¹ The bounded nature of the system and its interdependence allows for "agreement on foundational ideas."⁵² As problems and interactions are global, Selznick's method derives warranted solutions

⁴⁶ *Id.* at 469.

⁴⁷ *Id.* at 505.

⁴⁸ Teubner, *Substantive and Reflexive Elements*, *supra* note 2, at 270.

⁴⁹ Almost the only non-anthropological references in *The Moral Commonwealth* to outside the U.S. are to Eichmann, SELZNICK, *supra* note 3, at 175, Nuremberg, *id.* at 262, and the kibbutz, *id.* at 316.

⁵⁰ Regarding the practice of law, Teubner and Selznick, in fact, end up in the same place. Teubner says that "the argumentative practice of law decides about collisions of discursive logics by leveling out their fundamental differences [T]he trivialization of different logics enables them to treat incommensurable things alike and balance — *horribile dictu* — principles, values, and interests against each other. Pears and apples! Justitia is blind!" Gunther Teubner, *De Collisione Discursuum: Communicative Rationalities in Law, Morality and Politics*, 17 CARDOZO L. REV. 901, 915 (1996). Selznick says that the task "is bound to give lawyering a shaky reputation, because we are always looking for acceptable tradeoffs and workable compromises." Philip Selznick, *American Society and the Rule of Law*, 33 SYRACUSE J. INT'L L. & COMM. 29, 39 (2005).

⁵¹ SELZNICK, *THE COMMUNITARIAN PERSUASION*, *supra* note 43, at 66-67.

⁵² *Id.* at 126 (discussing the U.S. Constitution).

addressed to non-existent world federalist or strong transnational regimes. Selznick would properly charge us with continuing to seek knowledge on values relating to justice and right conduct. But, in the meantime, Teubner can ask about solutions to conflicts where nations, peoples, groups or parties refuse to confront each other except as an other.

Selznick presents an account of values that could be called "organic."⁵³ He continually refers to "coherence"⁵⁴ or "wholeness."⁵⁵ That which does not yield to coherence, "degrades."⁵⁶ Individual persons need to be understood as "organic unities."⁵⁷ Communities need to be understood as a "unity of unities."⁵⁸

This account of value results in a communitarian ethic in which "[p]ersonal well-being requires . . . loyalty, trust, and other group-centered virtues."⁵⁹ This results in his acknowledging that "[p]eople gain a great deal from many kinds of subordination and deference."⁶⁰ People find their actions bound by community. Participatory democracy, for example, demands "loyalty and commitment. It is a way of saying. 'We belong; we want to build, *not destroy*.'"⁶¹ Only seeing endogeneity, Selznick doesn't acknowledge the irony of demanding subordination as a condition of participation. In the name of difference, Teubner can challenge Selznick's organic valuing of system integration needs, such as national security interests.

Selznick understands multiculturalism as a "quest for recognition" that is "in part a quest for inclusion" and therefore "is by no means opposed to integration and assimilation."⁶² There is no place in his theory for "a pluralism detached from any basic commitment to the larger unity it seeks

53 In deference to Selznick's fight against Stalinists, I will not call it "organicist."

54 See, e.g., SELZNICK, *supra* note 3, at 22, 76, 477 ("moral integration"); see also SELZNICK, THE COMMUNITARIAN PERSUASION, *supra* note 39, at 125 ("The communitarian alternative has a surer grasp on the realities of coherence and the need for consensus.")

55 See, e.g., SELZNICK, *supra* note 3, at 63, 34 ("integrated moral self"); *id.* at 192 (against "segmented self"); *id.* at 358 ("comprehensiveness"); *id.* at 474 ("whole persons or for the comprehensive well-being of a group").

56 *Id.* at 258.

57 *Id.* at 519.

58 *Id.* at 369.

59 *Id.* at 536.

60 SELZNICK, THE COMMUNITARIAN PERSUASION, *supra* note 43, at 93.

61 SELZNICK, *supra* note 3, at 317 (emphasis added).

62 SELZNICK, THE COMMUNITARIAN PERSUASION, *supra* note 43, at 47, 49.

to shape and perfect."⁶³ He doesn't comprehend a pluralism that rejects an overriding commitment to a larger unity.⁶⁴

Teubner warns against "the romantic desire to reconcile the divisions in society."⁶⁵ Law's goals are limited and its contribution is not "to reconstitute the lost unity of society but to designate borders of plural identities, protect them against domination by other discourses and limit damage from the fallout of discourse collisions."⁶⁶ Teubner writes for "a tortious society," where "powerful and uncontrollable internal dynamics" produce accidental and painful contacts.⁶⁷ Exogenous respect for others' integrity and identity is problematic, as social practices create "self-concepts and reflexive theories . . . [that] are bold enough not to respect their own boundaries."⁶⁸ Instead of a duty to build a larger unity, Teubner derives for us a limited duty, a "duty of loyalty to the network."⁶⁹

Teubner as a complement to Selznick, as Parker recognizes, directs our attention to autonomous capacities for self-regulation. For Selznick, though, self-regulatory bodies exist "for the achievement of public purposes."⁷⁰ Teubner's understanding of the exogenous position means that he can give an account that is internationalist without being transnationalist. Teubner's recognition of exogenous conflict allows him to recognize the challenge from those who wish to remain outside our community.

⁶³ *Id.*

⁶⁴ Affirmative action and other policies for inclusion are part of the communitarian platform. *See, e.g., id.* at 115-16. "Within broad limits minorities should be able to pursue their interests and affirm their identities." *Id.* at 93.

⁶⁵ Teubner, *supra* note 11, at 159-60.

⁶⁶ *Id.* at 175.

⁶⁷ *Id.* at 156.

⁶⁸ *Id.* at 157.

⁶⁹ Gunther Teubner, *Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organization* (2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=876939. His unpacking of this duty in terms of "trust, reliance, confidence, and of course, good faith" suggests that he may have more substantive notions in mind. Gunther Teubner, *Hybrid Laws: Constitutionalizing Private Governance Networks*, in *LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGAL OF PHILIP SELZNICK* 319 (Robert A. Kagan, Martin Krygier & Kenneth Winston eds., 2002). In the same article, he suggests that for public-private networks "a network constitution is required that would indeed transfer principles of institutional autonomy, constitutional rights, due process, rule of law, public accountability to these mixed private-public configurations." *Id.* at 329. But, as Parker suggests, these substantive elements are not well situated in his theory.

⁷⁰ SELZNICK, *supra* note 3, at 471.

In *The Pluralization of Regulation*, Christine Parker effortlessly glides between the exogenous and the endogenous, showing us that she has mastered the paradox of "being in but not of."