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**Beyond 'Juridification':
Reflections on the Future of the Welfare State and Social
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**by
John Tweedy, B.A. (Hons.)**

**A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of**

Master of Arts

Department of Law

**Carleton University
Ottawa, Ontario
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**Beyond 'Juridification': Reflections on the Future of the Welfare State
and Social Rights
in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
January 4, 1994**

ABSTRACT

This thesis looks to reform the welfare state by pointing towards more emancipatory institutional legal forms and structures of social rights. The starting place for the thesis is Jürgen Habermas's powerful theoretical treatment of the social phenomena of "juridification", an account which links social rights - through his thesis of the "colonization of the lifeworld" - to social processes of alienation, reification, normalization and surveillance. Suggesting that Habermas's treatment offers a fertile starting point for thinking about the future of the welfare state and social rights, this thesis develops a political approach in which social rights are placed at the forefront of efforts to transform society in a more emancipatory direction. Going on to apply the insights of the Habermasian theoretical tradition to social rights, this thesis calls for the establishment of a "relational program" of social rights, identifying two complementary lines of legal strategy to be pursued.

TABLE OF CONTENTS

	Page
Table of Contents	i
INTRODUCTION: The Welfare State and the Politics of Retrenchment	1
CHAPTER ONE: Social Citizenship and the Juridification Critique: Habermas on Social Rights	
I. Citizenship, Social Rights and the Welfare State	9
II. System and Lifeworld	17
III. The Crisis of the Welfare State	23
i) The Colonization Thesis	25
ii) The Politics of the Welfare State	29
IV. The Juridification Critique	34
V. Rethinking Social Citizenship	46
CHAPTER TWO: Social Rights and Habermasian Political Theory	
I. Beyond the Paradox of Social Rights	53
II. Habermas, Political Theory and the Politics of Rights	58
III. Cohen and Arato on Civil Society and Social Rights	71
IV. Discourse Ethics and Rights	80
V. Bartholomew on Social Rights	95
VI. A Habermasian Perspective on Social Rights Reconsidered	104
CHAPTER THREE: Social Rights, Reflexive Law and Constitutional Dialogue	
I. Democratization and Responsiveness: The Politics of Influence	108
II. Sociological Considerations: Reworking the Limits of Law	113
i) Max Weber and the Limits of Law	114
ii) Defining New Limits for Legal Interventionism: Habermas and the Procedural Rationality of Law	119
III. Teubner's Theory of Reflexive Law	124
IV. Reflexive Law and Social Transformation	132
V. A Relational Program of Reflexive Law	138
VI. Constitutional Dialogue and a Relational Program of Social Rights	141
VII. Reflections on a Relational Program of Social Rights	146
CONCLUSION: Further Reflections and Concluding Comments	149
REFERENCES	153

INTRODUCTION

THE WELFARE STATE AND THE POLITICS OF RETRENCHMENT

Sociologists describe the current stage of development of the welfare state as an "era of reformulation"¹, indicating that our present circumstance is one in which we are rethinking both the method of delivery of social services and our underlying commitment to the welfare state itself (Helco 1981:399). In political circles, however, it would seem a more apt description to refer to the present circumstances of the welfare state as an 'era of retrenchment', for in welfare states throughout North America and Europe, "welfare wars" have erupted as governments have targeted welfare programs for 'economization' (Fraser 1989:144). While battles over social spending have been a characteristic feature of the politics of the welfare state since its inception, at no

¹Helco suggests that there have been four periods of the welfare state: 1) the 'experimentation era' that extended from 1870-1920 and was characterized by debates concerning whether and how the government should provide an institutional forum for helping the poor; 2) the 'era of consolidation', which dated from 1930-1950, which witnessed a movement toward a commitment to government intervention in the 'private' sector to manage social problems; 3) the 'expansion era' from 1950-1970 that witnessed the majority of the institutional growth of the welfare state; and 4) the 'reformulation era' which began in 1970 that has demanded rethinking about the welfare state as the Keynesian economic approach has produced new dilemmas (high unemployment and high inflation) (Helco 1981:383-406).

time have these battles been as pressing as the present. Rapidly increasing state debts have brought to the fore questions concerning the financial feasibility of state financed education, health services, day-care, unemployment and other welfare guarantees (O'Connor 1973; Myles 1988). But even more significantly, the debate surrounding the future of the welfare state has highlighted questions concerning the desirability and potentiality of what were once considered by many to be emancipatory social institutions.

In this thesis, I am concerned with the questions which surround the emancipatory potential of social welfare programs, as opposed to the questions which surround their financial feasibility. I start from the perhaps problematic assumption that we can as a society afford the social costs associated with the welfare state, or at least the 'reflexive' model of the welfare state upon which I will focus in the thesis, and leave the political economy questions to the political economists. My purpose is not to answer all the riddles which surround the welfare state, but simply to point to a form of legal organization that would minimize the negative disempowering features currently associated with the provision of welfare services.

A distinctive feature of the growing social debate over the desirability of the welfare state is the ambiguity which has surrounded the political Left's response to the assault

on welfare. The political Right has been unrelenting in its condemnation of the welfare state. Perceiving state welfare as a threat to both economic solvency and political liberty, contemporary neo-conservatives have consistently argued against the desirability of the welfare state while simultaneously engaging in a negative publicity war aimed at those "recipients of government largess", the "freeloaders" and "welfare mothers" who populate society's supposedly lazy and deviant underclass (Nozick 1974; Hayek 1973-79). Arguing that welfare is nothing more than "free money", neo-conservatives have supported increased screening and surveillance of welfare recipients, including such draconian initiatives as "workfare" and the mandatory use of contraceptives (Norplant) by women on welfare, to ensure that only the "worthy" receive state support. As the burden of taxation has impinged more sharply upon widening sectors of the employed population, neo-conservatives have found remarkably receptive audiences for their political claims and powerful negative imagery. Popularly elected neo-conservative governments have dominated the political scene in the U.S., Britain and Canada in the past decade. Although recent electoral changes in the U.S. and Canada offer new hope for change, the social effects of intensified state surveillance and persistent cutbacks in welfare will be felt for some time to come by those least able to mobilize popular political resistance.

Traditionally, progressive (Leftist) political forces have been the main exponents of welfarist policies and the architects of their expansion in the post-War period. And yet, confronted by conservative cutbacks in the raging welfare wars, progressives are putting up anything but a united front. While unanimous in their refusal to accept the neo-conservative line and blame the effectively disenfranchised for the problems of today's society, the Left has been divided in their response to the assault on welfare. Some elements within the political Left have begun to look towards various forms of rearguard action to stop the erosion of welfare. Certainly I would identify the "Social Charter" provisions contained in the defeated Canadian Charlottetown Constitutional Accord as constituting such a rearguard action. For these provisions merely represented an attempt to constitutionally entrench existing social services, as opposed to creating legitimate justiciable social rights that might have value to future attempts to transform society.

Other elements within the political Left approach the welfare state and its programs with more caution, and have implicitly or explicitly declared their inability to support such rearguard actions designed merely to ensure the effective continuation of the welfare state (Fraser 1989; Nedelsky and Scott 1992). Despite a recognition of the clear significance of cutbacks in welfare for the weakest

members of society, these elements believe that a more aggressive strategy designed to transform the manner in which our present social services are delivered is required in addition to defensive efforts like constitutionalization. Their attention is directed towards the statist and paternalistic character of a welfare state that manufactures dependent 'clients' (most frequently female) and subjects them to disempowering processes of surveillance and normalization (Pearce 1978; Foucault 1988; Habermas 1986a). These progressive accounts of the 'freedom denying' tendencies of the welfare state have thus brought about a striking congruity between the political Left and Right. Both sides of the political spectrum have become concerned with how the welfare state functions to inhibit individual autonomy. But it is also certainly this similarity of approaches that raises concerns with these alternative progressive analyses of the welfare state.

In this thesis, I focus on one of the most influential and sophisticated of these recent progressive critiques of the welfare state, that developed by the German critical theorist Jürgen Habermas. The significance of this account, I will suggest, is that it does not propose a simple retreat from the legal interventionism of the welfare state, but offers a more sophisticated approach for exploring possible avenues of legal regulation. While Habermas's account emphasizes the weakness of defensively oriented rearguard

actions designed merely to protect the status quo, he does not believe it desirable nor possible to return to the capitalist market society of a century ago. He explicitly claims to pursue a more radical project which he hopes will allow for the "reflexive continuation" of the welfare state (Habermas 1990a:67). The aspect of this as yet underdeveloped project which I would like to bring to the fore in this thesis is the role and potential future of social rights.

In contemporary social and legal theory, social rights are identified as the normative component of the welfare state project. State recognition of social rights to education, health care, and welfare, among others, have resulted in the creation of government departments, programs, and institutions to deliver the services required by the rights. The current attack on the welfare state is in a very real sense an attack on the normative desirability of these rights. Always seen as conceptually suspect by the political Right (e.g. Cranston 1967), social rights are now being attacked by the political Left. On first glance, it would seem that Habermas is among the harshest of these critics. However, like his social theory as a whole, Habermas's approach to social rights is both deconstructive and reconstructive. In this thesis, I will pursue the reconstructive dimensions of this approach to illustrate how

Habermas leads us towards a reconceptualization of both the institutional legal form and structure of social rights.

This thesis is developed in three chapters, followed by a brief conclusion. Cumulatively, these three chapters are intended to point towards a new institutional form and structure of social rights, a post-social democratic model of social rights so to speak.

The first chapter focuses upon Habermas's "juridification" critique and its implications for social rights. Beginning with a discussion of T.H. Marshall's account of social citizenship, I explore how Habermas's sociology moves us away from a "linear" understanding of the expansion of citizenship rights. His analysis both implicates and, to a certain extent, condemns, social rights for their part in what he identifies as the central predicament of late modern societies, the tendency towards the "colonization" of 'the lifeworld' by 'the system'. The chapter concludes with a brief discussion of some difficulties with this treatment.

The second and third chapters of the thesis focus upon the reconstructive implications of Habermas's theory for social rights. The second chapter seeks to expand upon Habermas's political approach in order to move social rights closer to the heart of a Habermasian inspired transformative project. Two limitations within Habermas's juridification treatment are identified and alternative Habermasian

approaches to these issues are discussed. These discussions, I will suggest, point towards a more aggressive political approach to social rights and the welfare state than Habermas has advanced (and would likely support).

The third chapter of the thesis is intended to complement the theoretical analysis of the second by identifying two complementary legal strategies for reforming the welfare state and social rights. The first legal strategy is to restructure the institutions of the welfare state responsible for the delivery of social services through the use of "reflexive law", a concept that occupies a prominent although ambiguous place in Habermasian theory. The second legal strategy is to pursue the constitutional entrenchment of a specific type of social rights in a form which promotes social and political dialogue. Together, it is hoped that these two strategies will be mutually supportive, and will lead to institutional legal forms that are more emancipatory than those presently associated with social rights.

CHAPTER ONE

SOCIAL CITIZENSHIP AND THE JURIDIFICATION CRITIQUE: HABERMAS ON SOCIAL RIGHTS

I. CITIZENSHIP, SOCIAL RIGHTS AND THE WELFARE STATE

In this first chapter, my primary concern is to examine the extent to which social rights are both implicated and condemned by Habermas's criticism of the welfare state. Does Habermas see a radical future for social rights or does he dismiss them out of hand? We will see that he in fact does neither, and that it is in his recognition of the ambiguous legacy of social rights and the welfare state that his true contributions may be observed.

This chapter is divided into five sections. In this first section, I examine the contributions of the British sociologist T.H. Marshall whose seminal work on citizenship offers the most logical starting place for any discussion of the future of the welfare state and social rights (Section I). The next three sections attempt to reconstruct Habermas's theory on its own terms to illustrate how he links social rights to his account of the "crisis" of the welfare state. In the second section, I introduce his complex theoretical framework of 'lifeworld' and 'system' (Section II), while in the following section I investigate

how he applies this framework to construct an account of the "crisis" of the welfare state (Section III). This is followed by a detailed discussion of Habermas's powerful "juridification" critique (Section IV). The final section of the chapter assumes a more critical posture and is devoted to exploring the implications and limitations of Habermas's treatment of social rights (Section V).

The most logical starting place for any legal discussion of the future of the welfare state and social rights would be examination of the contributions of the British sociologist T.H. Marshall (Marshall 1963). For Marshall's analysis has served to provide one of the most powerful and influential theoretical accounts of the development of the welfare state, and furthermore, has served to demarcate the terms of discourse around rights politics in the late modern period. Writing during the early stages of the reception of the welfare state in Britain, it was Marshall's key suggestion that 'citizenship' could be characterized by its linkage to certain formal legal rights. The evolution and institutionalized expansion of these rights reflected the evolution of society's understanding of the political role of individuals in the community.

According to Marshall, there are three specific sets of institutionalized rights which are capable of being conceptually distinguished from each other. 'Civil rights'

are those rights that have grown out of the liberal tradition and which serve to guarantee individual liberty by limiting the coercive exercise of state political power. Some examples of these rights are freedom of thought, religion, and property. 'Political rights' are those rights which guarantee citizens the formal capacity to participate in the state's exercise of political power. The most common examples here are the right to vote and the right to stand for political office. And last, 'social rights', which Marshall never attempts to tightly conceptualize but defines broadly as encompassing

"the whole range from the rights to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society" (Marshall 1963:74).

Marshall's treatment of the evolutionary development of the institutions of the modern welfare state focuses upon the historical relationship between citizenship and social class. In posing this question, Marshall evokes comparison with Marx's extremely influential critique of "political emancipation" (Marx 1987)². For it was Marx's suggestion that the conceptual separation of each individual into a public and private person (the citizen and the bourgeois)

²For further discussion of Marx's critique of political emancipation, see Chapter 2, Section II.

was a necessary element in the development of capitalist society. The citizen was the recipient of formally equal rights that were rendered ineffective by virtue of the social inequalities that characterized the de-politicized social life of the private person. Thus, Marx regarded modern citizenship as a key component in the continuation of the pattern of class dominance that has characterized human history.

Marshall does not dispute Marx's assessment of the early stages of modern citizenship but exhibits striking continuity with it. Eighteenth century citizenship, understood primarily as entailing formal civil rights, Marshall represents as instrumental in allowing for the entrenchment of the capitalist market. His analysis is couched in evolutionary terms, however. The nineteenth century, he claims, witnessed the expansion of citizenship to include political rights, although the struggle for their universalization lasted well into the twentieth century. In an analysis remarkably similar to the argument articulated by the early Habermas, Marshall suggests that the institutionalization of political rights was soon to lead to the expansion of citizenship to include social rights (Habermas 1989a:222-227). It is his suggestion that the acquisition of social rights was the final element in the evolution of a participatory conception of "social citizenship", with their institutionalization epitomizing

the transformation of the relationship between citizenship and social class. Once supportive of capitalism, citizenship is now at "war" with capitalism. Social citizenship stresses the important relationship between 'having' and 'doing' that was mystified by liberal ideology and bourgeois citizenship. Social citizenship recognizes that in order for a citizen to be a contributing member of the political community, certain guarantees of material standards and social equality are required.

Marshall's analysis represents one of the most optimistic assessments of the growth of the welfare state. However, his analysis has frequently been targeted for criticism. There are three principle objections to Marshall's formulation. First, his analysis has been criticized for its evolutionary character. As Giddens argues, Marshall fails to sufficiently emphasize the struggle which surrounded the acquisition of political, social and labor union rights and the potential which exists for the rolling back of these rights (Giddens 1982:171). This trend towards the rolling back of social rights and social benefits has characterized the politics of the last two decades, and was clearly visible in Thatcher's Britain when Giddens was formulating his objection. I believe this criticism remains principally a political objection (as opposed to a theoretical one), however, although its importance should not be dismissed. Macpherson's treatment

of the expansion of institutional legal rights similarly emphasizes the expansionary logic of rights development (Macpherson 1987:6-11). While it is my position that the legal institutionalization of rights reflected historically specific power relations in society and were not a developmental necessity³, we should equally recognize the historical and current importance of civil and political rights for furthering democratic discourse.

Second, Marshall has been consistently criticized for an overly optimistic representation of the potential of social rights and the welfare state. He has frequently been interpreted as offering the welfare state as the end to class inequality. Marxist and feminist critiques which focus upon the statist and patriarchal development of the welfare state certainly do much to undermine such a claim. However, I consider such a representation to be a misinterpretation of Marshall's thesis. For I believe that it is clear that he does not postulate the disappearance of class inequality with the emergence of the welfare state. Rather, he emphasizes that the welfare state is responsible for imposing "modifications" on class and has witnessed the emergence of new forms of inequality. These new forms of

³As Turner suggests, the development of citizenship is a historically contingent process; its development has "no necessary historical logic or unfolding process" (Turner 1986:64).

inequality would appear to preview both Foucault's and Habermas's concerns with the welfare state (Foucault 1988).

The third criticism which has been directed at Marshall concerns his definition of social rights. Macpherson has tried to add conceptual clarity to Marshall's formulation when he suggests that the difference between civil rights and social rights is that civil rights are claims against the state whereas social rights are claims for benefits to be guaranteed by the state (Macpherson 1985:23). This attempt to capture the difference between civil and social rights based upon the obligation of the state obscures the fact that the state is often required to guarantee certain apparatuses and levels of expertise in its provision of civil rights as well (Waldron 1987). But perhaps a more significant criticism of Marshall is that he fails to distinguish between social rights and social policy programs, but treats them as one and the same (Barbalet 1988:64-65). That is, he makes no attempt to adequately distinguish between social rights themselves and the social policy programs which have implemented the actual methods of delivery. This is a significant point, for, while it is clear that social rights do impose upon the state a duty to free up certain material resources, they do not specify the exact method of delivery⁴. Rather, we should be conscious

⁴For example, a social right to universal health care could be met either by a state run and organized programme (e.g. Canadian medicare system)

that social rights and social policy programs are analytically distinct.

Marshall's analysis, despite its weaknesses, remains one of the most powerful accounts of the development of the welfare state and its potential and limitations. The potential of the welfare state is to be found in its capacity to expand society's political public sphere and increase the potential for public participation. Furthermore, the ever expanding list of rights implied by citizenship emphasizes the potential political resource that rights discourse offers to challenge barriers to popular participation. The limitations of the welfare state are to be found in the new relations of power that have accompanied its development and, as critics suggest, its failure to successfully challenge socially entrenched relations of class, race and gender domination.

The limitations of the welfare state are a primary category of investigation for Habermas and his followers. That Habermas is clearly aware of the contributions of Marshall to conceptualizing citizenship and the welfare state there can be no dispute; he explicitly recognizes Marshall's contributions (Habermas 1992a:9). Yet his focus is upon the new relationships of power which have emerged with the expansion of the welfare state. Far from seeing

or by some form of state and private sector cooperation (e.g. Hilary Clinton's health care package in the U.S.).

the extension of social citizenship as emancipatory, he views the present welfare state as largely disempowering. In the next three sections, I will attempt to flesh out Habermas's position.

II. SYSTEM AND LIFEWORLD

It is widely acknowledged by proponents and critics alike that Habermas's project is one of the broadest and most ambitious endeavors in recent social theory (McCarthy 1978; Bronner 1993). For Habermas has sought to integrate, within a single theoretical framework, the two competing epistemological visions which social theory has constructed since the Enlightenment. He tries to accomplish this by constructing a social theory composed of two 'levels' or 'spheres': one level he terms 'the system', the second level 'the lifeworld'. The methodological monist theories which draw upon empiricism are appropriated by Habermas to offer an account of the institutions and forms of action of 'the system'. The methodological dualist theories of interpretive sociology, in contrast, are drawn upon to provide an account of 'the lifeworld'. The net effect of this integrative effort is a social theory which is capable of incorporating both a state or economic centered approach to social life, and an approach which offers an experiential 'view from below'. This comprehensiveness of scope is perhaps the most impressive feature of his sociology.

Habermas's distinction between the spheres of 'system' and 'lifeworld' is grounded in a reinterpretation of Marx's theory of social labor. In Marx's critical theory, labor was identified as necessary for human reproduction in two senses: labor provided not only the physical conditions necessary for life but it also served as the process by which humans constitute the world in terms of knowledge (Marx 1972b). Labor, or 'instrumental action' as Habermas usually refers to it, is action that is "purposive rational" in that it involves the rational calculation of the means to achieve some end (Weber 1978:I:24). Consequently, instrumental action uses and produces knowledge in the form of empirically verifiable technical rules for the purpose of exercising some form of control over 'reality' (Habermas 1970:91-92).

Habermas's break with Marx's critical theory stems from his insistence that implicit in the theory of social labor is a conceptual distinction between labor and 'social interaction'. According to Habermas, social interaction or 'communicative action' is logically different than labor. It does not rely on knowledge in the form of technical rules, but rather is "governed by binding consensual norms, which define reciprocal expectations about behavior which must be understood and recognized" for communication to take place (Habermas 1970:92; emphasis in original). Here Habermas is relying upon the phenomenological insight that

communication requires an intersubjective connection between participants, which in turn rests upon the assumption of shared norms to facilitate mutual comprehension (Heritage 1984). It is thus in his formulation of his theory of communicative action that Habermas introduces the foundational role for normativity that characterizes his social theory and which distinguishes him from his contemporary intellectual counterparts, Luhmann and Foucault (Luhmann 1985; Foucault 1980).

In terms of the broader currents of critical theory, the most significant implication of this interpretation of human activity or praxis as a complex constituted of two components, work (instrumental action) and social interaction (communicative action), is that it allows Habermas to clearly move away from Marx's historical materialism and hierarchical model of society as 'base' and 'superstructure'. By maintaining that interaction is not reducible to labor (since they operate upon different logics) Habermas paves the way towards his reconceptualization of society as 'system' and 'lifeworld' in which neither social sphere has conceptual primacy (Habermas 1975).

In the sphere which he refers to as the 'system', Habermas descriptively locates the social structures in which instrumental action predominates. Appropriating the lexicon of systems theory, Habermas locates society's

political and economic subsystems (with their operating 'mediums' of power and money) within the sphere of the system. In linking instrumental action and the system, Habermas follows the earlier critical theory of Horkheimer, Adorno and others by maintaining that the development of capitalism is associated with the generalization of instrumental rationality to even broader areas of social life (Held 1980:251-259). This process Habermas colourfully describes as the "colonization of the lifeworld", a process I will return to discuss in greater detail shortly (Habermas 1987:332-377).

In the second sphere of society, the 'lifeworld', communicative action predominates. For Habermas, communicative action involves reproductive processes of cultural transmission, social integration and socialization. He therefore suggests that there are three structural components to the modern lifeworld capable of being differentiated from one another corresponding to culture, society and personality (Habermas 1987:144). In modern capitalist society, the social institutions which facilitate this cultural-linguistic background are to be found primarily outside of the influence of the state, within what liberal theory descriptively identified as 'civil society'¹.

¹Liberal theory tends to use 'civil society' as an oppositional construct to 'the state'. Including the economic sphere of production (capitalist market), the intimate sphere (individual identity and the patriarchal family) and the public sphere (voluntary associations and

Included among these institutions of the lifeworld are the voluntary associations which comprise society's "public sphere"⁶. Although an association of civil society and lifeworld is indicated by Habermas, he does not offer an intensive exploration of this relationship (see Habermas 1992:452-457). As we shall discuss in the second chapter of the thesis, two of Habermas's 'followers' have taken this step by identifying civil society as the "institutional core" of a modern lifeworld (Cohen and Arato 1992a).

Habermas's distinctions between lifeworld and system and between instrumental and communicative action have significant consequences for our understanding of modern social life. For these distinctions allow him to rework the

other forms of public political life), civil society was represented as a sphere of individual autonomy secured by the state through the coercive power of law and legal rights (Habermas 1989:222). For a more detailed discussion of the liberal understanding of civil society, see Chapter Two, Section II.

'This notion of the 'public sphere' has been the centerpiece of Habermas's theory since his earliest writings, and it remains one of his most enduring contributions. Sociologically, the term 'public sphere' refers to a social realm of communicative interaction between private individuals over matters of public interest. Thus, as he tells us in one of his early works, "a portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body" (Habermas 1974:49). For example, a conversation about the ethics of Woody Allen's relationship with the step-daughter of his partner conducted over beers among friends is a perfect example of the public sphere in action. The existence of a public sphere, Habermas identifies as something distinctly 'modern'; the development of the public sphere coincides with the rise of bourgeois society. For only with bourgeois society was the development of a public sphere possible; the participation of private individuals within the political and social community can only take place with institutional guarantees of freedom of access, assembly and association. In contemporary society, these guarantees are provided by the rule of law and constitutional rights and freedoms.

Weberian thesis of the rationalization of society to effect a decisive break from the pessimism which is at the heart of Weber's treatment of the "iron cage" of modernity (Kronman 1983). It was Weber's thesis that the progressive rationalization of society in the course of modernity meant a paradoxical increase in autonomy and loss of freedom as the instrumentally rational subsystems of state and economy assumed an increasing role in the socialization of individuals (Weber 1946). This fatalistic stance, whereby the heartless and amoral system continues to expand remorselessly to overtake increasing areas of social life, is also at the heart of Luhmann's systems theory, a treatment which is a major influence upon Habermas's formulation of his thesis of the 'colonization of the lifeworld' (Luhmann 1985).

However, Habermas's social theory is easily contrasted with these treatments because he consciously and explicitly seeks to offer us an escape from such a formulation. To do this, he reinterprets the rationalization processes of modernity as taking place at both the systemic level, where instrumental forms of action become increasingly efficient and effective, and at the level of the lifeworld, where communicative structures become increasingly rational as relations of domination are confronted and removed so that communication can rationally arrive at consensus. It is his most general thesis that the advances which have been made

in communicative rationality in the course of modernity offer us a possible salvation from Weber's "iron cage". For these advances offer us the possibility of developing a "post-conventional consciousness"⁷ that is capable not only of asserting itself against systemic pressures but providing the system with a radical directive force. It is in this context that Habermas advances his theory of "discourse ethics" as a deontological proceduralist moral theory capable of rationally resolving practical political questions "in so far as they are of a moral nature" (Habermas 1990b; 1992b:447).

I will discuss Habermas's theory of discourse ethics in greater detail in the next chapter of the paper in connection with Cohen and Arato's contributions to democratic theory. However, for now I wish to focus upon his application of this theoretical framework to offer an account of the "crisis" of the welfare state.

III. THE CRISIS OF THE WELFARE STATE

Since formulating his theory of communicative action, Habermas has represented the welfare state as in "crisis",

⁷Habermas acknowledges that many of our present norms are traditional and derive their legitimacy from irrational sources (e.g. the Bible). With his notion of a post-conventional consciousness, he is pointing beyond our present society towards a social consciousness anchored in norms rationally established through argumentation according to the presuppositions of discourse ethics.

as a potentially doomed project that is in a "desperate race with time" (Habermas 1986a:10)⁶. This account of the crisis of the welfare state has its basis in what he perceives as the apparent contradiction between the goal of welfare state interventionism and the methods which have been selected to achieve this goal. It is his general position that welfare state interventionism, although intended to promote 'social integration', has "pathological consequences" that inhibit socialization (Habermas 1986a:9). Habermas draws these consequences from Marx and Foucault's analyses of modernity;

⁶It should be noted that Habermas's account of the "crisis" of the welfare state is a relatively recent formulation, being advanced only after formulating his theory of communicative action (Habermas 1975). In his earlier social theory in which he focused upon the emergence and transformation of the "public sphere", Habermas advances the welfare state as a sort of 'crossroads' of human development (Habermas 1989:222-235). Concerned with the structural changes which have transformed and ultimately undermined the emancipatory potential of the "bourgeois public sphere" in the course of modernity, it was his thesis in this early material that the welfare state offers two possibilities for future human development. The first possibility involves the continued subversion of the public sphere, and public political life in general, as instrumentally-rational bodies within society further refine their tendency to manufacture and manipulate public opinion through 'public relations' and mass-mediated staged displays. His second possibility is more optimistic; he sees in the welfare state the possibility of establishing a socialist democracy founded on universal constitutional principles which are to serve as the organizing principles for a unified state and society. The key to this utopian transformation of society is the restoration of public political life, which is to be achieved by the democratization of all political inputs into an interventionist state (Cohen and Arato 1992b:130). As we will discuss in the text, with his transition from his early assessment of the welfare state as a 'crossroads of social development' to his current 'crisis of welfare state interventionism', Habermas has shifted his approach to social transformation. In this thesis, I am almost singularly concerned with his second 'strategy' of social transformation, since it is in his theory of communicative action and related treatment of the 'crisis of the welfare state' that he directly raises the questions around the potentiality of social rights that I am investigating.

his category of 'pathological consequences' includes the effects which can be associated with social processes of reification, alienation, surveillance and normalization (Marx 1987; Foucault 1977). For Habermas these social phenomena are indicative of a more fundamental social problem, the devolutionary "colonization of the lifeworld" (Habermas 1987:332-373).

The Colonization Thesis

In one of his earliest formulations of the crisis of the welfare state, Habermas offers an account of the 'colonization of the lifeworld' in very approachable socio-evolutionary terms (1975). Central to this account is a functional interpretation of the relationship between lifeworld and system. For it is one of Habermas's major theoretical premises that modernity has been characterized by the functional differentiation of the two spheres; the competing logics of the rationalization of instrumental and communicative action have been pivotal in the process of differentiation. Refining Parson's functionalist account of society, Habermas employs a distinction between 'social integration' ('integration' and 'pattern maintenance') and 'system integration' ('adaption' and 'goal attainment')⁹

⁹Parson's suggestion was that every society was characterized by mechanisms which performed four social functions, the tasks of adapting society to the conditions of its external and internal environment

(Parsons 1987). The lifeworld performs the function of 'social integration' that is intrinsic to communicative action. The economic and political subsystems assume responsibility for 'system integration' by 'steering' society, through their operating mediums of money and power, around environmental resistances.

According to his analysis in Legitimation Crisis, the present circumstances of the welfare state have their origins in liberal capitalism. Applying a systems theoretic perspective to liberal capitalism, he suggests that in this social stage, the economic subsystem became dominant as it assumed responsibility for system integration; the political subsystem performed the role of setting apart and defending the economic subsystem through the medium of law. Following Marx, Habermas attributes to the ideology of the market a key role in depolitizing economic relations by distorting moral and ethical perceptions of social life. Social integration, which includes the function of legitimation and had been functionally differentiated from the political authorities of traditional societies to be located in the lifeworld, thus finds itself entangled with the system.

It was the assumption of socially integrative tasks by the capitalist market that was a driving force that

(adaption), of keeping society as a whole moving towards some end goal(s) (goal attainment), of creating and maintaining social solidarity (integration) and of maintaining the norms required for the system to continue (pattern maintenance) (Parsons 1987).

propelled society towards the welfare state of late capitalism. For, he suggests, liberal capitalism was characterized by recurring crises, as the unregulated process of economic growth produces "at more or less regular intervals" temporary systemic steering problems, dysfunctions in which the economic subsystem is attempting to overcome temporary problems of adaption or goal attainment (Habermas 1975: 25). Now that society's economic subsystem had assumed socially integrative tasks, these economic crises had direct effect on social integration by repoliticizing the economic system which in turn led to critiques of the ideology of the capitalist market.

Late capitalism, the stage of social development which is characterized by the growth of the welfare state, arises from the attempt to control these economic crises and to prevent system collapse. Society's political subsystem ceases to play merely a negative role of providing an institutional defense of the economy to become directly involved in the pacification of class struggle by controlling aspects of both economic production and distribution. This involves a transfer of some of the functions of system integration to the political subsystem, which in turn requires a further extension of the political administration. However, as the political administration is now directly intervening in the sphere of production to control the dysfunctions of the market, the market is

thereby repoliticized. The capitalist system, no longer finding itself supported by the ideology of the market, thus finds itself facing a legitimation deficit. The political subsystem seeks to offset the missing legitimation by extending rewards conforming to the imperatives of the system, rewards of money and power which support the 'bourgeois ideology of achievement'. Habermas predicts that a legitimation crisis will occur either when the state runs out of the ability to supply such rewards or when expectations arise that cannot be satisfied by them.

The contradictory element in the development of the welfare state, as I mentioned earlier, is to be found in the method of the political subsystem's effort to serve the goal of system integration. In the welfare state's desire to deliver rewards of money and power through bureaucratic and legal measures (to in effect reconcile democracy and capitalism), the 'system' is brought directly into contact with the social structures of the lifeworld, with the disintegration of life relations as the possible consequence. For the instrumental rationality of the political subsystem's administrative operation is capable of migrating into the moral and ethical institutions of the lifeworld thereby affecting its self understanding and diminishing its potential to supply legitimation.

Here Habermas suggests that "technocratic consciousness", the mode of operation of administrative

apparatuses, should itself be understood as an ideology. Unlike the previous ideology of the market in liberal capitalism which operated to conceal and mystify class relations, technocratic consciousness operates to repress ethics as an element of social life; it causes people to lose consciousness of the distinction between work (instrumental action) and interaction (communicative action) and to start thinking of the world as something objectively given (something explicable only with reference to instrumental action). "It is a singular achievement of this ideology to detach society's self-understanding from the frame of reference of communicative action and from the concepts of symbolic interaction and to replace it with a scientific model" (Habermas 1970:113). The end result of welfare state interventionism, then, is the diminishing of the capacity of the lifeworld to supply legitimation since interventionism results in the "objectivization and removal from the lifeworld" of those areas of social life into which the welfare administration intrudes (Habermas 1987:369).

The Politics of the Welfare State

Habermas's colonization thesis often appears to mirror the pessimism and fatalism of Weber's and Luhmann's treatments of modernity. And yet, such a reading is not warranted. For he consistently stresses that the lifeworld does not passively accept invasion, but reacts against

administrative and other forms of systemic manipulation. Here Habermas points to the social movements which have emerged since the 1960's, for he interprets these movements as seeking to contest the excessive state interventionism which has brought about the invasion of the lifeworld. In his treatment, these new social movements are seen as responding to crises caused by the erosion of individual and collective identities associated with the colonization of the lifeworld (Habermas 1986b:365). However, as Swan points out, by this formulation, democratic political action is seen not as an end in itself, but rather as a response to threats to the lifeworld. The significance of this formulation is that democratic politics becomes "reactive" or "defensive", with politics aimed at establishing 'barriers' to ensure the preservation of the lifeworld (Swan 1990:220).

The notion of 'barriers' is at the heart of Habermas's approach to the transformation of the welfare state. His analysis emphasizes that the welfare state lacks the capacity to solve its own problems and that simple reformist approaches will not suffice; mere policy reforms or refinement in the equilibrium point between the expansion of the social welfare and market-based modernization, those approaches most commonly advanced by forces seeking to defend the welfare state, will ultimately fail to offset the legitimation crisis of the welfare state since they fail to

challenge the form and methods of welfare state intervention.

What is required, he tells us, is something more radical and visionary -- a redefinition of the relationship ("shifting of forces") between society's political and economic subsystems and society's autonomous public spheres which are located in the lifeworld, through the erection of a "democratic dam against the colonizing encroachment of system imperatives on areas of the lifeworld" (Habermas 1992b:444). He tells us we must pursue an agenda of "social curbing", which involves the reflexive self limitation of welfare state interventionism in order to protect those

"areas of social life that are functionally dependent on social integration through values, norms, and consensus formation, to preserve them from falling prey to the systematic imperatives of economic and administrative subsystems growing with dynamics of their own" (Habermas 1990c:19; 1987:373).

It is his hope that a consciously self-limiting political subsystem, supplemented by an active and vibrant public sphere, will allow the lifeworld and communicative rationality to flourish. For it is in the lifeworld that society's only remaining hopes for emancipation are to be found. Only the continued rationalization of communicative structures of the lifeworld can facilitate the emergence of a post-conventional consciousness capable not only of resisting, but also directing, systemic pressures. I will

discuss the issue of how the lifeworld might actually influence the system later in the thesis in connection with Cohen and Arato's understanding of the potential of "sensors" (Cohen and Arato 1992a:472).

In approaching Habermas's strategy of social transformation, it is important to avoid attributing to him a neo-conservative political program that calls for the 'rolling back' of the welfare state. For while it is true that he places a heavy burden upon his distinction between lifeworld and system, in effect utilizing this distinction as a standard for judging the authenticity of forms of socialization, it is equally true that he perceives "no recognizable alternative" to the welfare state project (Habermas 1986a:9). Furthermore, he explicitly tells us that for underdeveloped countries (and for developed countries with an underdeveloped welfare system), there is "no plausible reason to diverge from this path of development" (Habermas 1986a:10). The neo-conservative alternative, characterized by a supply-side economic policy and an emphasis upon the restoration of traditional norms (e.g. "family values", God, etc.) must ultimately become even more authoritarian and repressive as this solution will leave legitimation "gaps" as welfare and other institutions which support the bourgeois ideology of achievement are either withdrawn as part of the "rolling back" of the welfare state or are "restructured" in forms conducive to

increased surveillance, normalization and control of beneficiaries. The neo-conservative approach is therefore seen only to further impair the state's ability to function without directly coercive support.

At the same time that we extol the progressive orientation of Habermas's transformative project, we must be aware of the limitations which his dualistic framework imposes upon struggles around democratization. For a particularly significant implication of his theory is that the lifeworld, not the system, should be the principle target of efforts to democratize social life. While, as we have seen, Habermas regards the instrumental rationality of the system as a legitimate threat to the lifeworld, so too does he perceive the communicative rationality of the lifeworld, with its emphasis upon democratic and participatory decision making, as a potential threat to the system. As he suggests in his most recent essay, he now considers the

"state apparatus and economy to be systemically integrated action fields that can no longer be transformed democratically from within, that is, be switched over to a political mode of integration, without damaging their proper systemic logic and therewith their ability to function." (Habermas 1992b:444).

His solution aims at "a new balance" between system and lifeworld, and not necessarily the democratization of the state or work place (Habermas 1992b:444).

IV. THE JURIDIFICATION CRITIQUE

Today, it is widely believed by both those in and out of the legal profession that the law has become a much more active agent in social evolution than in any previous historical period¹⁰. This increasing role for law has resulted from the vast expansion of state responsibility in the post-War period. For the modern welfare state has expanded to take over responsibilities that were previously understood as the proper domain of social institutions within the liberal model of civil society. The state has intruded into what was previously understood as the domain of the family by directly assuming responsibility for education and the provision of family allowances, while at the same time altering traditional family relationships through the enlargement of divorce, the regulation of adoption and new family technologies, and even more directly by the creation of institutions to regulate the quality of family life. Similarly, the modern state has expanded into the realm of the labor market by imposing minimum wage standards and creating such programs as unemployment insurance, worker's compensation packages, and old-age pensions. More direct supervision of the market through

¹⁰An exception to the this view might be Michel Foucault, although this is debatable (Hunt 1992).

monetary policies, statutory controls and other institutions, not to mention increased restrictions upon the use of private property, has also accompanied the development of the welfare state. In short, the modern welfare state today has, through its legal and administrative apparatuses, achieved a previously unprecedented degree of control over social and economic life.

Habermas's assessment of the sociological effects of legal regulation upon today's society has its characterizing formulation in his treatment of the phenomenon of "juridification" (Habermas 1987:356-373). This discussion is offered as an illustration of the tendency of late modern society towards the colonization of the lifeworld; but it also contains a significant and powerful sociology of law. For at the heart of Habermas's juridification thesis is a functional distinction which he draws between 'law as medium' and 'law as institution', a distinction which he relates back to his distinction between system and lifeworld. It is his most general thesis that law is an element of both the system and the lifeworld, and, as he develops in a later formulation, is capable of mediating between the two (Habermas 1988).

In his formulation of law as an element of the system, Habermas suggest that law "takes on the role of a steering medium itself" when it assumes the role of serving "as a

means for organizing media-controlled subsystems" (Habermas 1987:365; emphasis in original). With this thesis, Habermas links himself to the wide body of work which emphasizes the extent to which law becomes "tied up" with society's political and economic sub-systems as it encodes or formalizes the operative mechanisms of these sub-systems. Epitomized in the fields of commercial, business, and administrative law, the 'law as medium' thesis draws attention to the part that law plays in providing a set of formal rules. Law thus contributes to the functioning of the system by both ensuring a coherent regulatory framework allowing for the rational calculation of means and ends, and by directing systemic forces as they inevitably encounter environmental resistances. This thesis of law as medium also has explanatory power with respect to the character of legal development. For the concept of law as medium recognizes the systemic pressures which are exerted upon law which encourage the formalism and self-closure of the legal system that can be observed in internal legal discourse¹¹. Habermas recognizes that from the internal perspective of legal professionals, legal rules are seen as deriving their

¹¹Formulations such as this offer an account of how judges and lawyers talk and argue about social and economic relations; they should not be taken as providing an account of the actual effects of legal rule on these relations. One need only refer to Stewart Macaulay's classic study of 'non-contractual relations' in which legally guaranteed accountability and predictability is assiduously avoided by the entrepreneurs in his study, to be reminded of the need to sustain a distinction between the internal dimension of legal discourse and the social relations to which they refer (Macaulay 1963).

legitimacy from the positivistic application of the formal legal criteria.

As an element of the lifeworld, Habermas suggests that law acts as an institutional expression of the lifeworld's moral and ethical development. His definition of 'legal institution' refers to "legal norms that cannot be sufficiently legitimized through a positivistic reference to procedure", with the consequence that they require "substantive justification, because they belong to the legitimate orders of the lifeworld" (Habermas 1987:365). The examples he gives of law serving as an institution are constitutional law, the principles of criminal procedure and penalty, and moral offenses. Thus, in sharp contrast to Weber's and Luhmann's sociology of law, Habermas insists that law always retains some linkage to the moral structures of society from which it draws legitimation (Weber 1978; Luhmann 1986). Reciprocally, law, by virtue of its coercive capacity, is able to provide the supplementary support for the normative content of the lifeworld that is lacking in purely moral arguments.

I find this account of law to be useful in approaching questions around the potential of a politics of rights in the welfare state. This construction would appear to reconcile the two tendencies of rights that so trouble scholars like Carol Smart. For Smart recognizes that rights have a "consciousness changing potential" in that they

constitute a political language through which interests can be advanced, and that by couching these interests in terms of rights they receive a certain legitimacy (Smart 1989:158). She also recognizes, however, that rights have other dimensions which make claiming rights potentially dangerous. Here she taps into Foucault's concerns with law by mentioning the promotion of possibilities for greater and greater surveillance which can be associated with the pursuit of legal rights (Foucault 1988).

Habermas's representation of 'law as institution' and 'law as medium', interpreted as an analytical formulation of the functional tendencies of law, provides a theoretical framework which is capable of accounting for these two tendencies, something Smart was unable to do¹². The 'law as institution' component of his argument accounts for law's consciousness changing potential by linking legal development to the moral development of the lifeworld. The claim of a legal right to day care, for instance, inspires discourse within the lifeworld to determine the normative validity of this claim. The 'law as medium' component of

¹²I find Smart's approach to be problematic in that she is extremely concerned with the tendency of rights claims to inspire counter claims; she sees these as dangerous to "women's interests". Rather, I believe that this tendency of rights is precisely its value. Here I follow Lefort to argue that rights discourse is inherently expansionary, and therefore, ideally suited for democratic political struggles (Lefort 1986). As I will go on to discuss in a later chapter of this thesis in connection with Cohen and Arato's democratic theory, Habermas's framework would appear compatible with Lefort's interpretation of the democratic potential of rights.

his argument recognizes that legal rights are also part of the system and, that from a systemic point of view, social surveillance can often times be seen to contribute to more efficient and effective system functioning. And yet despite this considerable explanatory power to his sociology of law, Habermas's application of this powerful model in his treatment of juridification contains a number of limitations. Let us explore his treatment further.

In Habermas's treatment, legal development has been characterized by four "waves" or "thrusts" of 'juridification'. Juridification is defined as the quantitative expansion of law to penetrate previously informally regulated social relations; but it is also understood as involving an "increasing density of law" (Habermas 1987:357). Habermas's analysis reflects its subtlety when he is quick to point out that once law has expanded its regulatory focus, an associated complexification of the mechanisms of regulation follows. The first three waves of juridification took place in the seventeenth, eighteenth and nineteenth centuries. These waves of juridification saw the institutionalization of rule by formal rational law, the legal institutionalization of civil rights, and the institutionalization of political rights respectively. These first three waves, Habermas identifies as integral to the social process of functional differentiation. The fourth wave of juridification is

another cup of tea. This most recent wave of juridification, of which social rights are the institutionalized "expression", has not contributed to the functional differentiation of the lifeworld but has had just the opposite effect of inspiring its dedifferentiation.

In his treatment of juridification, Habermas focuses upon what he sees as the limits and constraints imposed upon the lifeworld by the institutionalization of social rights. Significantly, he does not direct such a critical glance at civil and political rights. The wave of juridification which institutionalized political rights he describes as "unambiguously freedom guaranteeing", although he does point out that, from the perspective of the lifeworld, the first two waves might be considered as ambiguous by virtue of their close association with the development of the capitalist market (Habermas 1987:362).

Habermas's account of what he sees as the crisis of legal regulation in late modernity is organized around 'the contradictions of the welfare state' which he represents as the coexistence of 'guarantees of freedom' with 'denials of freedom'. He tells us that "from the start, the ambivalence of guaranteeing freedom and taking it away has attached to the policies of the welfare state" (Habermas 1987:361; emphasis in original). Unlike neo-conservative analyses of the welfare state, Habermas recognizes that the web of welfare norms which function to intervene in civil society

to cushion the effects of production processes based on wage labor have "from the perspective of their beneficiaries as well as from democratic law givers, a freedom-guaranteeing character" (Habermas 1987:361). Welfare norms offer a measure of autonomy to those who would otherwise be at the mercy of what we know to be a heartless and amoral capitalist economic system.

The 'denials of freedom' serve to curtail this freedom guaranteeing character of welfare norms. Originating from the form of welfare state intervention, welfare norms and programs have exacted "a remarkable price in the form of restructuring interventions in the lifeworld" (Habermas 1987:363). His suggestion here is that the interventionist use of law for social policy purposes can only take place through law used as a medium. It is here that his distinction between the functions of law becomes relevant, for, unlike law as an institution which only has a regulative character, law as medium has constitutive dimensions. Here his attention is directed towards the manner in which legal and administrative forms "map" social reality in purposive rational terms and the ideological and symbolic impact this has on shaping social reality. Social welfare law characterizes citizens as atomistic purposive rational actors. He consequently considers the extension of social benefits through the provision of legal entitlements to be responsible for bringing administrative agencies and

systemic rationality into previously communicatively structured areas of social life.

To illustrate the colonizing effects of modern welfare programs, Habermas points to both the deficiencies of the monetary form that he sees as the characteristic output of "the juridification of life-risks" (e.g. social programs to compensate for illness, accident, old age, etc.), and the change in consciousness brought about by the juridification of education. Habermas's concern with the juridification of life-risks has a number of facets. He is concerned with the constitutive power which accompanies the specification of the legal conditions to receive monetary compensation for its individualizing and reifying tendencies. He also expresses dissatisfaction with the depersonalizing bureaucratic implementation of welfare norms and the apparatuses of investigation, surveillance and normalization which public welfare policy has spawned. And lastly, he points to the contradiction of social services set up to lend therapeutic assistance to the client to balance the inadequacy of system conforming compensation when instead of promoting independence and self-reliance, these expert services create further dependency. The net effect of welfare programs is thus both to undermine the self-image of the recipient of welfare benefits and to undermine the features of the lifeworld capable of providing support (e.g.

availability of state pensions reduces preparedness of families to support the aged) (Tweedy and Hunt 1993:16).

Habermas's discussion of education further serves to emphasize the bureaucratization and individualization associated with the fourth wave of juridification. He expresses concern over the manner in which educators and parents meet and engage with each other as rights-holding private interest actors, as opposed to members of society trying to communicatively reach agreement. The instrumental rationality of law as medium, in which social actors become reified, interest oriented, rights bearing individuals, permeates into the lifeworld to affect its self understanding; rights-bearing legal subjects, he tells us, "encounter one another in an objectivizing, success oriented attitude" (Habermas 1987:369). The result is that conflicts over schooling have become strategic contests focused upon 'winning' scarce educational resources as opposed to trying to arrive at consensus over the appropriate norms for education.

Habermas's critique of juridification, as we have seen, serves to emphasize the contradictions of the welfare state, the close proximity of 'guarantees of freedom' and the 'denials of freedom'. His more general treatment of the potential of law in late modernity is not entirely bleak, nor is it explicitly optimistic. He treats law as both an agent of colonization and as a potential line of defense.

For in this treatment of the potential of law in late modernity, Habermas suggests that there exists the possibility for reversing this tendency towards juridification by embracing what is ambiguously represented as a procedural solution. He suggests that legal regulation should be restricted to the institutionalization of an "external constitutional" in such areas of social life as the family or school. Furthermore,

"The place of law as a medium is to be taken by procedures for settling conflicts that are appropriate to the structures of action oriented by mutual understanding - discursive processes of will-formation and consensus-oriented procedures of negotiation and decision-making" (Habermas 1987:371).

His comments in this context are unclear. Is he embracing a politics of informalism, or does he perhaps envision a procedural legal solution? It would seem that he supports the latter option, since he does not call into question the place of law as institution. This interpretation is supported by his more recent treatments of law (Habermas 1988;1989b). However, Habermas has come to recognize that a procedural solution might be more sophisticated than he related in his discussion of juridification. This recognition lies in his retraction of his distinction between law as medium and law as

institution; he has come to realize that the two faces of law cannot be so easily separated (Habermas 1990d:130)¹³.

In the third chapter of this thesis, I will discuss this procedural solution to the problems of legal regulation in greater detail. But for now, I wish to continue to focus upon the implications of Habermas's analysis for the politics of rights, and the politics of social rights in particular.

V. RETHINKING SOCIAL CITIZENSHIP

Habermas's juridification critique serves to emphasize the paradoxical character of social rights in late modernity. In the first instance, social rights are freedom guaranteeing in that they have the capacity to extend the opportunity of participation to those disadvantaged by the socio-economic systems of society; they have the capacity to extend the public sphere. At the same time, social rights

¹³Habermas's formulation of 'law as medium' and 'law as institution' in the Theory of Communicative Action appears to suggest that various laws can empirically be identified as either medium or institution. Recently, Habermas has come to insist, against such a formulation, that all can be problematized from a moral perspective (Habermas 1990d: 130). While some have interpreted this as an abandonment of his law as institution and law as medium position, I believe there is still value in this distinction so long as we remain clear that it only reflects analytical tendencies that are present within all law. Thus a procedural solution to the problems of the welfare state cannot simply be achieved by the elimination of law as medium; we must insist that all law has a medium and an institution component. Habermas's most recent discussion of his procedural law solution would appear to recognize this (Habermas 1988).

serve to take freedom away by contributing to the colonization of the lifeworld. By bringing the lifeworld into contact with the system, social rights tend to discourage the very participatory freedom they seek to generate. This analysis thus raises questions about the desirability of social rights in the late modern period, and more basically, raises questions about Marshall's evolutionary treatment of citizenship. But, does it provide sufficient grounds for abandoning the pursuit of political strategies in which social rights figure as a component of an expansionary vision of citizenship? Should progressive forces continue to press the government for the recognition of, for example, a social right to housing? Or perhaps even more importantly, should we allow neo-conservatives free reign as they seek to dismantle Canada's universal health care system with their effort to impose 'user fees'?

In one of his most recent essays, Habermas discusses the metamorphosis of citizenship in the welfare state (Habermas 1992a). It is an analysis which supports his juridification critique of social rights, and, moreover, reflects the same limitations. Habermas's thesis in this article is that Marshall's treatment of the "linear progress" of citizenship rights fails to deal with increases or losses in autonomy as rights have been institutionalized (Habermas 1992a:10). He recognizes that civil rights ("the negative rights of liberty") and social rights are both

capable of being conferred by a paternalistic authority, and even in countries that have institutionalized all three categories of rights, "these negative and social rights remain ambiguous" (Habermas 1992a:10).

"Liberal rights, which have - viewed historically - crystallized around private ownership, can be grasped from a functionalist viewpoint as the institutionalization of a market-steered economy, whereas, from a normative viewpoint, they guarantee individual freedoms. Social rights signify from a functionalist viewpoint the installation of a welfare state bureaucracy, while from the normative viewpoint, they grant the compensatory claims individuals make to a supposedly just distribution of social wealth" (Habermas 1992a:10; emphasis in original).

Habermas recognizes that both civil and social rights can be considered as the basis for the social independence necessary for the exercise of political rights of participation, but he argues that such a link is contingent; "individual freedom and social security can just as well facilitate a privatist retreat from citizenship and a particular 'clientization' of the citizens role" (Habermas 1992a:11). The more the administration or economy succeed in pushing citizens into the periphery of "organization membership", the less society fits the model of a self-determining community of citizens.

Habermas's analysis begs the question of whether there is a radical future for either social rights or social citizenship, since we now know the wave of juridification

which has accompanied the welfare state to be colonizing. In this context, it is important to emphasize that Habermas has not simply rejected social rights, since he describes his transformative project as seeking "the reflexive continuation of the welfare state" and he remains quite conscious of the colonizing power of the economy. But it is equally clear that, given the distinctly "double edged" character of social rights, a Marshallian inspired progressive political strategy of social rights will not likely be able to transform society in the direction of social justice without first resolving the paradoxical character of social rights, or failing this, identifying those social rights which are the least negative or disempowering. Clearly, by identifying the paradoxical role of social rights in modern welfarism, Habermas has taken a powerful first step in this direction. But can his theoretical framework be used to resolve the paradox of social rights?

In an earlier essay, Alan Hunt and I have reviewed Habermas's juridification critique and sought to raise three difficulties we have with his treatment (Tweedy and Hunt 1993). While we were of the opinion that there is no doubt that Habermas has thrown light on the paradox at the core of modern welfarism, we felt that there were aspects to his formulation that might actually hinder attempts to resolve this paradox in a productive manner. It was our greatest

fear that these limitations within Habermas's analysis might further marginalize social rights within progressive political circles.

First we suggested that Habermas's focus upon the constraining and limiting features of institutionalized social rights requires a similar consideration of the constraining and limiting features of civil and political rights. In this context, his claim that political rights should be understood as "unambiguously freedom guaranteeing" seems particularly problematic, for it would appear to deny the institutionalized reality of these rights (Habermas 1987:362). Most generally, we argued that civil and political rights are more akin to social rights than Habermas lets on. These rights also clearly exhibit negative side effects. For example, while Habermas was content to associate social rights with apparatuses of surveillance and normalization, he fails to consider the surveillance and normalization associated with universal suffrage. The right to vote requires mechanisms of voter registration which in turn are linked to the wider process of gathering knowledge about the population (e.g. census taking, taxation databases, etc.). In short, we argued that there is a complex interpenetration between regulatory knowledge, surveillance and the creation of disciplinary techniques associated with all forms of legal rights. All forms of rights generate the paradox of guarantees of

freedom existing in close proximity to their freedom denying character. The continuing political challenge is to focus on their development in forms which realize their positive and restrict their negative features.

Second, Hunt and I were concerned that Habermas would appear to perceive social rights as the cause of the bureaucratic inflation of the apparatuses of the welfare state, which seems to be a simplification of a more complex relationship. For while it is true that social rights do require some resources and expertise for the delivery of the benefit, it has been the effort to deny benefits which has brought about much of the expansion of screening, investigative and surveillance apparatuses¹⁴. Furthermore, such an approach reflects an insensitivity to the various types of social rights, for it is clear that not all social rights equally imply bureaucratization (Hasenfeld et al 1987; Bartholomew 1993b). Some social programs have very little bureaucracy associated with them, while others involve extensive screening and surveillance. In this area, I believe that it is important to point out that how we conceptualize the social right in question has a significant impact upon the social policy programs created to implement it. As I will discuss in the next chapter, it would appear

¹⁴I believe that the same might also be said of political rights. Using the analysis of suffrage once more, voting similarly requires a monitoring of citizens, with attempts to restrict the vote (e.g. criminal, minor) inspiring further government surveillance.

to be possible to conceptualize social rights in such a way as to minimize the colonizing implications of the programs and institutions that will deliver the services.

The third and final criticism that we made concerned Habermas's fear that rights discourses formalize and reify social relationships, an argument that assumes a form quite similar to the American Critical Legal Studies Movement's "reification critique" of rights (Tushnet 1984; Gabel 1980). Habermas's concerns in this area revolve around what he sees as the instrumental, challenging posture that rights claims induce when used within the sphere of the lifeworld. His concept of the politics of rights thus remains limited to a conceptualization of rights as "trumps", as something one either wins or loses (Dworkin 1986). Hunt and my argument was that it is a more fruitful approach to regard rights as an ongoing and expansionary "language" through which competing claims are articulated and evaluated (Minow 1987:1876). From this perspective, it is precisely the abstract character of rights which makes them useful in this endeavor, for their abstraction facilitates the comparison of competing rights claims (Bartholomew and Hunt 1990:513). As a preview to the concerns of the next chapter, I will only briefly indicate here that this interpretation of rights leads us towards a more ambitious account of the democratic potential of rights discourse in late modernity, an approach which just might be irreconcilably at odds with

the democratic implications of Habermas's dualistic social framework.

Hunt and I sought in our essay to both identify the potential created by Habermas's juridification treatment for the marginalization of social rights and, fearful of this prospect, to introduce the core elements of a case for refusing an approach which abandons either social rights or rights politics based upon an expansionary vision of citizenship. In the remaining two chapters of this thesis, I will focus upon reconstructing social rights so that they might fit more comfortably within a transformative political approach seeking the "reflexive continuation of the welfare state".

CHAPTER TWO

SOCIAL RIGHTS AND HABERMASIAN POLITICAL THEORY

I. BEYOND THE PARADOX OF SOCIAL RIGHTS

In the preceding chapter, we saw that Habermas's juridification thesis implicates social rights in what he identifies as the central paradox of late modern society. The Habermasian paradox, which is linked to the contemporary crisis of the welfare state and more broadly to the widely observed 'post-modernist despair' which permeates current popular culture, is to be observed in terms of patterns of 'social integration'. Social rights are involved in this paradox since, on the one hand, they are seen to promote social integration by offering a measure of autonomy to individuals who would otherwise be at the mercy of a heartless and amoral economic system. These individuals, by virtue of the freedom guaranteeing qualities of social rights, are thus able to partake in the democratic processes of collective will formation through which Habermas believes social integration occurs.

The other edge of the paradox is to be observed in the role of the social rights in the promotion of the "colonization" of the 'lifeworld' by the 'system'. Created and regulated through law in its role as 'steering medium',

administrative apparatuses of the welfare state introduce 'systemic' or 'instrumental' rationality to increasing areas of social life; this process is perceived to have distinctly "pathological" consequences which erode existing social structures which facilitate social integration. Thus, while intended to serve the goal of social integration, social rights can be seen to have the opposite effect. The most significant ramification of this analysis is that social rights are thereby implicated in the distinctly modern phenomenon of the erosion of individual autonomy by the new technologies of power identified by Foucault (Foucault 1977).

If we choose to accept the general thrust of Habermas's analysis, the major question which arises from his treatment is whether the paradox of social rights can be resolved in such a manner as to hold out some optimism in their transformative potential. Can a political strategy in which social rights figure as a substantial component reshape our political structures in the direction of social justice and human emancipation? Here it is my suggestion that Habermas's analysis offers a fertile starting point for reconstructing a political strategy in which social rights figure as a key component in an expansionary view of citizenship. However, while Habermas has made substantial inroads into this area simply by opening up this line of

investigation, he has chosen to proceed no further in his analysis of social rights.

In this chapter and the next, I seek to explore the potential contributions which Habermasian social theory can make to theorizing new possibilities for a progressive politics of social rights which continues to remain grounded in an expansionary view of citizenship. Can Habermasian theory add constructively to Marshall's account of the "linear progress" of citizenship rights? Certainly, Habermas has shown that there are paradoxical dimensions to this progress; the extension of social rights and the welfare state have had significant consequences which have not all been emancipatory. But can this critique be used to inspire a reconstructive project that seeks to rethink the future of social rights and the welfare state with an aim to maximizing the positive dimensions of social rights and minimizing their negative consequences? I believe that it can, but only once the limitations of Habermas's account of social rights are overcome. This is what I will attempt to do in this chapter.

What are these limitations? In the last chapter, I suggested that there were three limitations to Habermas's juridification treatment in so far as this treatment sought to capture the reality of social rights. First, I argued that he improperly sets social rights apart from other forms of rights when he identifies them as paradoxical; all

rights, not just social rights, are characterized by the paradoxical dimensions implicit in their dualistic character of 'steering medium' and 'institution' of the lifeworld. Second, I argued that his account fails to adequately examine the relationship between various types of social rights and juridification, and thus ends up treating all social rights as equally colonizing. And third, I suggested that his account of social rights is encumbered by a political theory in which rights politics is defensive and does not recognize the full democratic potential of rights discourse.

The aforementioned limitations exhibited by Habermas's treatment of juridification (as applied to social rights) are significant difficulties and are not easily resolved. Fortunately, other Habermasian theorists have recognized these difficulties as well and have sought to resolve them. Consequently, I am in the advantageous position of being able to bring together two separate accounts which seek to resolve the latter two flaws in Habermas's conceptualization; Andrew Arato and Jean Cohen have offered an alternative to Habermas's treatment of the democratic potential of rights in their treatise on civil society, Civil Society and Political Theory (1992a), while Amy Bartholomew has further explored the relationship between rights and forms of juridification in a paper entitled "Social Rights and the Reflexive Continuation of the Welfare

State" (Bartholomew 1993a). I have not chosen to expand any further upon the first of the limitations I listed with respect to Habermas's juridification critique, since I regard the instability of rights as a ubiquitous dilemma of democracy not capable of resolution. All we can do is focus our energy towards seeking the institutionalization of rights in forms which realize their positive and restrict their negative features.

It is my hope in this chapter that, through exploration and critique of the contributions of Cohen and Arato and Bartholomew within the broader traditions of the rights debate, I will be able to expand upon Habermas's position and formulate a theoretical approach which will allow us to identify a model of social rights that should be the most likely candidate for transformative projects aimed at securing "the reflexive continuation of the welfare state." A more concrete discussion of specific legal strategies which should be pursuing in an around social rights is offered in the third chapter.

This chapter is developed in four sections. In the first section, I summarize Habermas's contributions to the politics of (social) rights, this time approaching this subject matter from a slightly different perspective than in the preceding chapter (Section II). While the last chapter attempted to maintain a fairly tight focus upon Habermas's sociological contributions to social rights, the discussion

in this chapter seeks more rigorously to situate his work within the traditions and debates of democratic theory. In the following section, I investigate Cohen and Arato's revision of Habermas's theory which leads to an expanded conception of the space for democratic action (Section III). Next, I discuss the relationship between discourse ethics and rights which underlies Cohen and Arato's work and discuss how this affects their treatment of social rights (Section IV). In the following section, I look at Bartholomew's account of social rights, an approach which places what are identified as "genuine citizenship-based social rights" closer to the center of a Habermasian inspired transformative project (Section V). The final section summarizes the preceding analysis and offers some brief concluding comments on the approach to social rights which I seek to develop (Section VI).

II. HABERMAS, POLITICAL THEORY AND THE POLITICS OF RIGHTS

Democratic theory and discourses of rights have been closely associated since the fusion of liberalism and democracy in theory and practice more than two centuries ago. Grounded in the liberal theoretical tradition, rights discourses have played a central role in the politics of liberal-capitalist societies up to and including the present. Historically, rights have been central in struggles for individual autonomy, as well as efforts to

democratize state and social life. Evidence can be drawn from the trade union struggles of the nineteenth century, the women's suffrage movement of the turn of the century, and more recently, the American civil rights movement of the 1960's, all of which support the centrality of rights discourse to progressive political struggles.

For progressive political forces wishing to transform society, the issue of rights is largely one of commitment. Should the political Left engage with discourses of human and legal rights, or are such efforts self defeating because these rights inherently reflect liberal or bourgeois commitments (e.g. private property)? Moreover, if we do choose to engage with rights discourses, which rights should be supported? These questions are at the heart of socialist¹⁵ and feminist¹⁶ debate and, moreover, are firmly placed at the center of Habermas's socio-political inquiries. Before we look at Habermas's contributions in this area, let me first offer a glimpse of the terrain from which he is speaking.

In the classical liberal theoretical tradition, rights were linked with a political theory of 'civil society'. Secured by personal legal rights, civil society was

¹⁵For recent contributions to the rights debate with a distinctly socialist dimension see Glasbeek and Mandel 1984; Tushnet 1984; Bartholomew and Hunt 1990; Hunt 1990.

¹⁶For recent contributions to the rights debate from a feminist perspective see Minow 1986; Schneider 1986; Smart 1989; Kingdom 1991.

represented as a prepolitical realm of individual autonomy standing in opposition to the regulative and ultimately coercive political state. In today's descriptive social terms, the classical liberal representation of civil society encompasses the economic sphere of production (the capitalist market), the intimate sphere (individual identity and the family) and the public sphere (voluntary associations and other forms of public political life) (Habermas 1989a:222). This distinction between state and civil society is more concretely exhibited in a jurisprudential distinction between the 'public' and 'private' spheres, regulated separately through public and private law respectively. Although there is considerable variation among the classical liberal theorists, the normative justification for a social formation composed of state and civil society is to be found in varying accounts of Natural Law (e.g. Hobbes 1988; Locke 1982, Paine 1945).

These liberal accounts of civil society and the negative rights associated with this construction were revealed to be problematic by the economic centered political theory of Karl Marx. In contrast to liberal analyses of civil society which consistently stressed its anti-authoritarian implications, Marx linked civil society to the capitalist system of class exploitation. Here Marx's analysis must first be contrasted with the classical liberal tradition in that he insisted that civil society is not

prepolitical, but a historically specific phenomena. Like all previous historical epochs, capitalism is characterized by specific relations of production, class divisions and struggles, and corresponding legal-political mechanisms.

According to Marx, the development of modern capitalist society was responsible for the ideological schism of the individual into two components, "a public and a private man [sic]", or, following Hegel, the bourgeois and the citizen (Marx 1987:142). The bourgeois element of individual self Marx identifies with civil society. Protected by the "rights of man [sic]", those rights of the liberal theoretical tradition which are responsible for securing individual autonomy, civil society exists for Marx as a depoliticized realm of economic production and social stratification between the dominant and subordinate classes (the bourgeoisie and the proletariat) (Marx 1987:145). The second element of self constituted by modern social existence, the "public man", is the dimension of the individual understood as a member of a political community. The rights "that are exercised in community with other men [sic]" Marx refers to, appropriately enough, as the "rights of citizen" (Marx 1987:144). Examples of these rights would include such rights as freedom of association and the right to vote.

For Marx, the conceptual separation of each individual into a public and private person limits the potential of

humanity by inhibiting the actualization of 'concrete freedom'¹⁷, or freedom as self-determined self-development (Gould 1978; Gould 1988). Marx denied the universality of the modern minimalist state; he depicted how, through the extension of political citizenship entailing formally equal 'fundamental' legal rights, social and material inequalities were preserved and equally significantly, depoliticized.

"The state does away with difference in birth, class, education and profession in its own manner when it declares birth, class, education and profession to be unpolitical differences, when it summons every member of the people to an equal participation in popular sovereignty without taking the differences into consideration, when it treats all elements of the people's real life from the point of view of the state. Nevertheless that state still allows private property, education and profession to have an effect in their own manner, that is as private property, as education, as profession, and make their particular natures felt. Far from abolishing these factual distinctions, its existence rests on them as presupposition, it only feels itself to be a political state and asserts its universality by opposition to these elements" (Marx 1987:140; emphasis added)

¹⁷At the center of the differences between liberalism and socialism is a disagreement over the definition of freedom. Liberalism understands freedom as a state of being, as a condition of being free from coercion. Marx, in contrast, understood freedom as an action, as the activity of self-realization or self-development. This understanding of freedom requires both liberty (freedom from coercion) and the provision of certain material conditions (Gould 1978:101-121). Berlin has attempted to capture this difference by characterizing the definitions as negative (freedom from) and positive (freedom to) respectively (Berlin 1969).

Thus for Marx, the state expressed the particularities of civil society and its class relations; the fictitious liberal 'minimalist' state was depicted as contributing to the social and economic domination of the bourgeoisie over the proletariat by both directly promoting capitalist interests and by subtly depoliticizing the economic means of reproduction and other potential sources of class conflict. Marx thus criticized the inadequacy of the liberal constitutional state for erecting barriers of rights around civil society and capitalist economic relations, barriers which positively served to emancipate individuals politically from the more openly coercive element of the state but negatively served to inhibit further attempts at human emancipation; "The political community is degraded by the political emancipators to a mere means for the preservation of these so-called rights of man" (Marx 1987:147). The cumulative effect of the bourgeois social and political structure is that "the state can be a free state without man [sic] himself being a free man" (Marx 1987:139). Marx was thus responsible for divorcing civil society from its anti-authoritarian implications emphasized by the liberal tradition and marrying it to social relations of domination and exploitation¹⁰.

¹⁰A number of commentators within the so-called 'civil society movement' seem intent on emphasizing the authoritarian and statist implications of Marx's proposal for the "dedifferentiation of society" (Cohen 1982; Keane 1988). They would appear to stress this dimension of Marxist

Marx's critique of civil society and the "so-called rights of man" has had a significant impact upon the general direction of progressive thought around civil society and the politics of rights (Marx 1987:147). For a major implication of his analysis was to deprive the distinction between state and civil society of its rationality; the state does not represent the universal or general will as advanced by Hegel, but the particulars of capitalist class interest. In more recent years, Western progressive thought has further undermined the rationality of a distinction between state and civil society. The work of Gramsci¹⁹,

thought in order to emphasize the anti-authoritarian and anti-statist dimensions to their own positions, which seek to defend varying versions of civil society. I find this criticism blurs some issues. Marx's commitment to human emancipation makes suspect claims that he was a statist (see especially Marx 1986), and furthermore, his early political theory is understood by many as anarchistic.

¹⁹Gramsci found himself concerned with the strategic potential of civil society. Inspired by the failure of society to 'evolve' beyond capitalism as Marx predicted, Gramsci's political and theoretical insight was to reveal that bourgeois society was a system of both domination and hegemony ("intellectual and moral leadership"), a system of coercion supported by consent (Gramsci 1971:57). The coercive element of bourgeois society Gramsci finds in the political apparatus of the state; the consent element, he identifies in modern legal, social and cultural institutions which support capitalism, institutions which in many cases preceded the assumption of political power by the bourgeoisie. These key symbolic institutions become, in his treatment, pivotal strategic arenas of hegemonic contestation between the dominant and subaltern groups. Gramsci's suggestion is that socialism requires more than just control over the political apparatus for a revolution of the proletariat to be successful; the assumption of the political means of coercion must be supported by hegemonic structures within society. Thus, in as much as these key symbolic institutions can be located within what liberal theory termed civil society, civil society becomes a source of strategic concern in this treatment. However, Gramsci's analysis does not attempt to restore the rationality of a distinction between civil society and state as undermined by Marx, and he has been seen by some as further blurring any distinction between the two (Keane

Foucault²⁰, and even the young Habermas²¹ have further served to problematize the viability of anything more than a descriptive distinction between state and civil society (Gramsci 1971; Foucault 1980; Habermas 1989a).

Similarly, Marx's critique of the 'rights of man' has encouraged progressives to be skeptical of rights discourses on the basis of their self-referencing, atomistic and asocial qualities (e.g. Glasbeek and Mandel 1984). In this

1988). In as much as civil society is understood as reproducing relations of social and economic domination, it is argued, it might be interpreted as an extension of the state itself.

²⁰The work of Michel Foucault further elaborates upon Marx's critique of civil society by turning it away from its economic centered approach to focus upon the emergence of a new and pervasive form of domination. Foucault's central thesis is that a new technology of power was introduced in the seventeenth and eighteenth centuries and perfected in the nineteenth and twentieth. Referring to this technology as 'disciplinary power', he argues that modernity was characterized by the permeation and institutionalization of procedures and apparatuses of surveillance and normalization throughout society (the school, the prison, the army, the clinic, the factory, the convent). The institutionalization of "the gaze", Foucault tells us, serves to immerse "people in a field of total visibility where the opinion, observation, and discourse of others would restrain them from harmful acts" (Foucault 1980:153). Foucault's account once more serves to problematize the rationality of a civil society/ state opposition, while also serving to problematize progressive strategies which identify the state as the instrument to organize the social whole. The emergence of the new disciplinary powers makes discussions of power relations in terms of sovereign and subject or state and society obsolete.

²¹The socio-historical explorations of the young Habermas into the structural transformation of the 'bourgeois public sphere' serves both to undermine the collapse of the Natural Law construction of civil society and to provide a normative argument for the continuation of a realm of individual freedom within society (Habermas 1989a). It is Habermas's thesis that the liberal interpretation of civil society and natural legal rights has been irretrievably undermined by the development of the welfare state, but that the basic rights of this tradition should be maintained and combined with social rights as organizational principles for a constitutional state which organizes all aspects of society.

context, Bowles and Gintis charge Marxist social theory for complicity in a conspiracy "to depict personal rights as the indelible expression of bourgeois individualism" (Bowles and Gintis 1987:152). Bowles and Gintis themselves are representative of a growing position among modern neo or post-Marxists who want to take rights seriously for the significant strategic potential of using rights discourse in counter-hegemonic struggles (Hunt 1990).

Since his earliest political writings, Habermas has been concerned with the transformative potential of a progressive politics of rights (Habermas 1989a). In this context, we must recognize the centrality of rights to progressive struggles over the years, and the diversity of opinion which has surrounded Marx's critique of rights (i.e. did he reject or merely critique rights?)²². Nonetheless, Habermas's early contributions to a political theory of rights have drawn him into direct conflict with Marx's critique of political emancipation (Habermas 1973:109-113).

In two of his earliest works, The Structural Transformation of the Public Sphere (1989a) and "Natural Law and Revolution" (1973), Habermas sought to emphasize the utopian kernel of the institutionalized rights associated with the liberal tradition of constitutional law and human rights. It was his position in this early political theory

²²Recent works in this debate include Lukes 1982; Cornell 198-; Bartholomew 1990.

that these constitutionally recognized "basic rights" inherited from liberalism, rights which Marshall would categorize as civil and political rights, did not exclusively belong to the liberal theoretical tradition but were also key elements of a democratic political theory which had roots in Rousseau, Kant, and Hegel, a tradition of thought not acknowledged by Marx's critique of political emancipation (Habermas 1989a:89-140). From this perspective, these "fundamental rights" were seen to have a more positive role than accredited by Marx's critique of the "rights of man [sic]" (Marx 1987; Habermas 1973). Civil rights were perceived as institutionally securing the space required for critical public discussion in society, the space required for the formation and generation of 'public opinion'.

"Citizens behave as a public body when they confer in an unrestricted fashion - that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions - about matters of general interests" (Habermas 1974:49).

Habermas also defended political rights. These rights, he suggested, should be understood as ensuring that the political administration remains responsive to the opinions generated within the public sphere. They serve as the "organizational principles" for the state itself (Habermas 1989a:83).

Habermas's recognition of the democratic potential of the negative rights of liberalism has been long viewed as one of his more significant achievements. But, in order to get a sense of the transformative potential of a politics of social rights, we must further consider his contributions. For despite his embrace of the democratic potential of civil and political rights, Habermas's early writings on the public sphere remain ambivalent about the potential of a politics of rights to transform the welfare state. Observing the tendency among interest groups and the state itself to manipulate public opinion through public relations and mass mediated public displays, Habermas draws the conclusion that the critical potential of public opinion is being undermined and the public sphere is itself declining in importance (Habermas 1989a:4). Without an active and critical public sphere, he was of the opinion that our existing constitutional freedoms will simply atrophy (Swan 1990:218). The preservation of our constitutional freedoms, and significantly, their further expansion to include social rights, something he explicitly supported at this time, was thereby linked to a broader project to repoliticize public political life (Habermas 1989a:225).

Since formulating his theory of communicative action, Habermas's treatment of human and constitutional rights has become more complex, while his assessment of their future has become less pessimistic. For it is his thesis that law

and rights are central components in society's functional differentiation. Like Weber before him, Habermas regards the establishment in the seventeenth century of a legal system based upon formal rational rules that guarantee the liberty and property of private persons as a necessary condition for the differentiation of civil society from the state. Legal development, in as much as this early form of civil society can be associated with the lifeworld, is thus implicated by Habermas in the functional differentiation of the lifeworld.

Rights are also key agents in the process of functional differentiation. In Habermas's treatment, rights serve, when institutionalized, both to define and to stabilize the boundaries between lifeworld and system. The most basic of these stabilizing rights are the civil and political rights inherited from liberalism. These constitutional rights are understood as functioning primarily to secure the space for democratic participation and political practice. Through their "injunction like" or "trumping" character, legal rights are understood as erecting barriers around the democratic spaces in society in order to prevent their colonization from expanding subsystems of instrumental rationality.

As Swan suggests in his review of Habermas, however, the consequence of such a formulation is to reduce the politics of rights to a mere question of "boundary

maintenance". Rights politics are seen to "contribute little to enlarging the space of democracy or to the development of non-liberal concepts of individual or collective autonomy" (Swan 1990:221). Swan critiques this position, and urges that a more radical interpretation of the politics of rights be pursued, citing as a possible source the contributions of Claude Lefort (Lefort 1986). Significantly, such a conceptual break with Habermas's restrictive interpretation of the politics of rights underlies not only my own treatment of social rights in this paper, but also underlies, to a lesser and greater extent respectively, the two Habermasian approaches to social rights that I will focus upon in the succeeding two sections.

The implications of Habermas's post-communicative action social theory for social rights we have discussed at some length in the preceding chapter of this paper. By his formulation, social rights are to be seen as devolutionary, as inspiring the 'colonization of the lifeworld'. As emphasized by his juridification treatment, social rights are linked to social policy programs - organized and regulated by law in its role as "medium" - which are responsible for the introduction of 'systemic' or 'instrumental' rationality to increasing areas of social life. This process is seen to have "pathological consequences" which are capable of eroding those existing

social structures of the lifeworld that facilitate social integration. Thus, despite his clear and unequivocal support for the constitutionalization of social rights in his early work, his present perspective on the question of constitutionalization remains, at best, unclear. He now regards these rights to be both ambiguous and paradoxical (Habermas 1992a:10).

In the next two sections of this paper, I will explore two alternative Habermasian approaches to social rights which seek to move beyond his treatment. These two approaches are united in their willingness to break with Habermas's treatment of politics as "defensive" and the politics of rights as "boundary maintenance". And yet, while both approaches claim to seek to contribute to the "reflexive continuation of the welfare state", the centrality of social rights to their respective transformative projects is quite different.

III. COHEN AND ARATO ON CIVIL SOCIETY AND SOCIAL RIGHTS

The first of the two Habermasian approaches to social rights that I will look at is developed by Jean Cohen and Andrew Arato in their recently released book Civil Society and Political Theory (1992a). Cohen and Arato's intention in this book is to import Habermas's contributions into democratic theory for the purpose of reconstructing a political theory of 'civil society'. Reconstruction is

deemed necessary, since, they argue, the liberal construction of civil society can no longer be maintained as rational. Typical of Habermasian approaches, they continue to see considerable importance in aspects of the liberal tradition, particularly this tradition's commitment to the rule of law, constitutional rights, political pluralism, and individual autonomy²³.

Cohen and Arato's reconstruction of civil society is theoretically based upon Habermas's sociological distinction between the spheres of system and lifeworld. Their major suggestion is that Habermas's "two step" social theory should be taken as giving rise to a three part model of society consisting of 'state', 'economy' and 'civil society'. State and economy, or society's political and economic subsystems, share the same social function, 'system integration', and thus are functionally distinguished from the lifeworld and its institutional core, 'civil society'. This point is key, for following Habermas's conception of the lifeworld, Cohen and Arato expel the capitalist market from their definition of civil society. This, of course, represents a profound and politically important break with liberal and Marxist constructions of civil society. Also, it is significant to note that Cohen and Arato wish to pay

²³In approaching their contributions, it should be noted that they would likely reject the label of 'socialist'; in this, they distinguish themselves from Habermas.

more attention to the differences between the political and economic subsystems than Habermas. They stress that these subsystems are capable of being distinguished through their different steering mechanisms and forms of institutionalization, and that, in the context of political action, these differences are important. For these differences affect the "meaning" of the interaction between these spheres and the third element of society, a functionally differentiated civil society.

In their effort to reconstruct civil society, Cohen and Arato do not directly correlate lifeworld and civil society. For, they specify the concept of lifeworld is far too broad, including within its bounds both the institutions and traditions of cultural linguistic reproduction of modern societies. Instead, Habermas's definition and development of the lifeworld allows them to "pinpoint" 'civil society' within that social sphere. Civil society, they suggest,

"includes all those institutions and associational reforms that require communicative interaction for their reproduction and that rely primarily on processes of social integration for coordinating action within their boundaries" (Cohen and Arato 1992a:429).

In this context, they identify the public spheres of communication and voluntary associations of the lifeworld as the central institutions of civil society.

In terms of the political dynamic of their theory, Cohen and Arato embrace Habermas's theses of 'systemic' and 'social rationalization', as well as his general anxiety concerning the 'colonization of the lifeworld'. They consistently exhibit a sensitivity to the colonizing encroachments of the instrumentally organized and systemically integrated action fields represented by the capitalist market and the political administration, while also recognizing that the modernization of the lifeworld implies both a rationalization of the cultural-linguistic substratum of the lifeworld and "a differentiation, on the sociological level, of the structural and institutional components of the lifeworld and their resulting internal rationalization" (Cohen and Arato 1992a:434).

As a most general position, they exhibit coherence with the aims of Habermas's project of "social curbing", including his goal of pursuing the 'reflexive continuation of the welfare state'. But there is a second dimension to Cohen and Arato's project which distinguishes their position from his. They explicitly claim to seek the institutionalization and democratization of politically oriented public spheres within the state and economy (Cohen and Arato 1992a:468-491). Significantly, Cohen and Arato raise the alternative of "reflexive law" as one possible means through which such public spheres might be institutionalized. This subject of "reflexive" law and its

possible relationship to social rights will be explored more closely in the third chapter of the thesis.

Cohen and Arato are quick to recognize limits in their call for the democratization of the state and economy. Once more following rather closely Habermas's contributions, they suggest that democratization can proceed more easily within civil society than the subsystems of instrumental action, for democratization is understood to be more harmonious with the proper functioning of the lifeworld. However, while Habermas suggested that democratization is a potential threat to systemic integration, Cohen and Arato want to more closely explore this source of potential tension. Here, they make the logical first step of arguing that it does not necessarily follow that democratization compromises systemic rationality; democratization is not per se incompatible with efficient functioning (Cohen and Arato 1992a:416).

A more sophisticated response to the question of democratizing the state and economy is soon provided through their appropriation of Habermas's notion of "sensors" (Cohen and Arato 1992a:480). For Habermas's social theory provides for the existence of clusters of instrumental and communicative action within the lifeworld and system respectively; the spheres are only predominantly integrated by one form of action. Most generally, it is through these "sensors" that the lifeworld and the system are capable of exerting pressure upon one another. According to Cohen and

Arato, a major political task of restructuring the welfare state should be to identify the clusters of communicative action within the political subsystem and pursue its rationalization with corollary democratization, to develop and institutionalize politically-oriented public spheres within this instrumentally integrated subsystem (Cohen and Arato 1992a:480). In this way, they suggest, it should be possible to introduce reflexive public spaces into state institutions without jeopardizing efficient systemic steering.

Despite their broadening of the scope of political action, Cohen and Arato fail to make the step to embrace a more democratic interpretation of the potential of a politics of rights. In Habermas's treatment, rights were seen to secure the public spaces in society required for 'collective will formation'. For Cohen and Arato, rights serve as the foundation of a politics of influence originating in civil society and aimed at the state. Here, Cohen and Arato embrace Lefort's insight that rights discourse is inherently expansionary (i.e. rights generate rights) and argue that such discourses are contributory to the development of a post-conventional consciousness within the lifeworld (Lefort 1986). Originating from the assertions and claims of individuals and groups in civil society, rights are perceived as created through social struggle, their institutionalization empowering those who

claimed them while simultaneously imposing limits on the political and economic subsystems. In this way, the effect of asserting rights is one of stabilization through "the strengthening of barriers defending the lifeworld" (Cohen and Arato 1992a:478).

In a recent critique, Swan has suggested that Cohen and Arato's effort to proceed beyond Habermas's "defensive" political theory is only a partial advance (Swan 1993). While Swan supports Cohen and Arato in their attempt to bring a more "offensive" component into Habermasian theory (i.e. the introduction of politically oriented public spheres within the state and economy) he sees specific problems with their treatment of the politics of rights. For following Habermas, they tend to accept the idea that the influence of a politics of rights should be confined to civil society. That is, while they recognize the centrality of rights politics to struggles to democratize the social institutions within civil society, they do not feel that a rights politics emanating from civil society should be directed at the state or economy. Rights are once more viewed as stabilizing the boundaries between system and lifeworld. Swan descriptively summarizes their progress over Habermas's position as merely moving from a conception of the politics of rights as "boundary maintenance" to one of "border skirmishes" (Swan 1993:6).

Implicit in Swan's critique of Cohen and Arato is an interpretation of the politics of rights in which rights discourses are capable of being employed not simply to stabilize boundaries but as an "oppositional discourse" to challenge ('destabilize') existing boundaries. Using the example of environmental rights, he emphasizes the potential of rights discourse to create spaces for reflexive popular participation within the political and economic subsystems themselves.

"The assertion of such rights demonstrates the potential for the expansion of rights to encompass and contest not just relations in civil society but also those within the subsystem of political administration and within the realm of expertise in the economy" (Swan 1993:14)

In suggesting that rights have the potential to open up democratic spaces within the instrumentally integrated system, Swan is self-consciously challenging a substantial implication of Habermas's dualistic social theory. Rather than seeing this as a movement away from the dualistic framework, I prefer to regard Swan's contributions as furthering Cohen and Arato's initiative by indicating the centrality of rights struggles directed at the system to opening up 'sensors' through which the lifeworld can continue to exert its influence. For, as Swan's examples would suggest, rights struggles designed to ensure popular participation in the establishment of definitions around environmental issues (which are as much normative as

empirical) seem to me certainly within the legitimate scope of influence of the lifeworld.

The question which I have kept to one side to this point concerns Cohen and Arato's treatment of the potential of social rights. Their basic sociological assessment of the role of social rights in late modernity exhibits continuity with Habermas's treatment. They recognize that "certain features of the welfare state fragment collectivities, destroy horizontal solidarities, isolate and render private individuals dependent on state apparatuses" (Cohen and Arato 1992a:24). At the same time, they defend certain programs (social security, health insurance, job training programs for the unemployed, unemployment insurance, family supports such as day care or parental leave) for creating autonomy and not dependency. Whether or not various programs create dependency, they treat as merely an "empirical question". They believe that the key theoretical question is whether or not social services are symbolically constituted as welfare for "failures" or as social supports for all members of the community (Cohen and Arato 1992a:612).

While it is clear that the symbolic constitution of welfare programs is a key political issue that should not be dismissed by progressives (see e.g. Fraser 1989), Cohen and Arato offer us little or no guidance for resolving the paradox of social rights exposed by Habermas's

juridification treatment. By refusing to engage in any detail with the "empirical question" of which programs are most directly colonizing, their analysis fails to proceed beyond Habermas's comments towards theorizing a potential future for social rights.

Although I find their analysis of social rights to be limited, there is potential value in the tentative linkage which Cohen and Arato indicate between social rights - through their associated administrative apparatuses - and the use of reflexive law in an effort to open up sensors through which the lifeworld can exert influence on the system. This link and its potential are never adequately developed or explored by Cohen and Arato. The tentative advances which they make in this area are offset, however, by their problematic appropriation of discourse ethics as a political theory of "basic rights". For a substantial implication of this treatment is that social rights should be understood as something akin to 'second class' rights. Let us now explore this treatment.

IV. DISCOURSE ETHICS AND RIGHTS

The theoretical linkage between rights and democracy which is at the center of Cohen and Arato's reconstruction of civil society has its basis in Habermas's theory of "discourse ethics" (Habermas 1990b). For Cohen and Arato chose to ground their political theory in an interpretation

of discourse ethics as a "theory of democratic legitimacy and basic rights" (Cohen and Arato 1992a:345). Since I have chosen to postpone a fuller discussion of Habermas's contributions in this area in the first chapter, I will now introduce this component of his project.

Habermas's discourse ethics arise largely from the need to provide a philosophical basis for grounding some norms as valid. For a major contribution of post-modernist theory has been to rob normative claims of their justifications of validity. Rather than accepting the relativistic or potentially nihilistic consequences of such a position, Habermas has, in conjunction with the German philosopher Karl Otto-Apel, proposed a deontological proceduralist moral theory which would allow norms to be treated as valid, a moral theory which commentators consistently locate in the Kantian intellectual tradition (Tuori 1989:127; McCarthy 1978:325).

Habermas bases his moral theory upon what he refers to as "universal pragmatics", the experimentally derived implicit rational presuppositions of human cognition, speech and action. Here it is his suggestion that every speech act makes three claims to validity - to truth, correctness and truthfulness. As recent sociological experimentation has suggested, in order for intersubjective understanding to exist in communication, these norms must be presumed to be shared (Heritage 1984). When norms of communication are

conspicuously violated, discursive demands for justification ensue; once more this has been well established by experimentation. From these insights, Habermas posits that it is possible, through discourse, to rationally establish some norms as valid, although this validity is fallible and always subject to revision in subsequent discourse. Discourses which seek to test the validity of claims to truth, Habermas refers to as 'theoretical discourses'; discourses which test the validity of claims to the correctness of normative statements are resolved in 'practical discourses'.

Having identified discourse as a possible means for establishing norms as valid, Habermas has elaborated upon the conditions which must be met for the outcomes of these discourses to be considered rational. Here, he suggests that norms must meet the rigorous requirements of the principle of "discourse ethics". He sets out this principle as follows.

"[O]nly those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical ethics"²⁴ (Habermas 1990b:66; emphasis in original).

²⁴Note: Habermas's reference to a 'practical ethics' is important because he insists that actual discourse take place in order to rationally determine the validity of norms (Walker 1992).

Habermas goes on to suggest that there are two major components to discourse ethics: the ideal speech situation (ISS) and the principle of universalization (U).

The ideal speech situation is formulated as an 'ideal type' construction in which power relations both internal and external to discourse are excluded so that democratic discussion might generate consensus solely by the force of the superior argument. Only discussion which is free from all constraints of domination, whether their source be conscious strategic behavior or communication barriers secured in ideology and neurosis, could claim to be rationally motivated. More generally, however, the ISS describes a set of rules and relations among participants that would have to pertain if such an agreement were to be reached. Benhabib has suggested that there are four conditions for the ideal speech situation, two of which refer to speech acts and two of which refer to existing action contexts.

"The four conditions of the ideal speech situation are: first, each participant must have an equal chance to initiate and to continue communication; second, each must have an equal chance to make assertions, recommendations, and explanations, and to challenge justifications. Together we can call these the 'symmetry condition'. Third, all must have equal chances as actors to express their wishes, feelings and intentions; and fourth, the speakers must act as if in contexts of action there is an equal distribution of chances 'to order and resist orders, to promise and refuse, to be accountable for one's conduct and to demand

accountability from others.' Let me call the latter two the 'reciprocity condition'." (Benhabib 1986:285; emphasis in original).

Ideally, meeting the conditions of symmetry and reciprocity will ensure an unconstrained dialogue which is free from relations of power.

The second criterion implied by discourse ethics is the principle of universalization. This principle requires that

"All affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone's interests (and these consequences are preferred to those known alternative possibilities for regulation)." (Habermas 1990b:65)²⁵

The principle of universalization is about testing norms. Only those norms tested with a view to their foreseeable consequences and side effects and capable of being agreed upon by each and everyone should be treated as valid. Unforeseen consequences or side-effects ensuing from the acceptance of a norm are understood as demanding the establishment, through the same procedure, of alternative norms. Clearly this requirement of consensus again

²⁵Note: Cohen and Arato argue that Habermas's formulation of the principle of universalization should give way to the idea of "collective identity". They suggest that there are authoritarian implications to Habermas's original formulation. By making this replacement, Cohen and Arato suggest, collective identity can serve to mediate between interests and the "metaprinciples" of discourse ethics. The result, they claim, is a non-authoritarian formulation better able to deal with the impossibility of obtaining an actual consensus in practical discourse and more attuned to issues of social solidarity (Cohen and Arato 1992a:360-374).

emphasizes the basic utopian orientation of his formulation, for it is clear that such a consensus is rarely, if ever, achieved.

An underlying problem with Habermas's discourse ethics is that the domain of application is unclear. Unquestionably, discourse ethics is advanced as a moral theory, as a deontological proceduralist theory through which it is possible to justify norms without specifying the content of the norms themselves. Through complexification, Habermas extends the domain of application of discourse ethics to socio-political relations: discourse ethics is to be used to resolve practical political questions "in so far as they are of a moral nature" (Habermas 1992b:447). In this context, discourse ethics is to be understood as a proceduralist political theory of democratic legitimacy and (ideal) model of organization for institutions of a "deliberative democracy"²⁶. Furthermore, in its capacity as a theory of justice capable of mediating between system and

²⁶Joshua Cohen has outlined the characteristics and principles of what he describes as a theory of "deliberative democracy", a term Habermas has employed upon occasion (Habermas 1992:446). This notion of deliberative democracy, Cohen suggests, is

"rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public agreement and reasoning among equal citizens. Citizens in such an order share a commitment to the resolution of problems of collective choice through basic reasoning, and regard their institutions as legitimate in so far as they establish the framework for free public discussion" (Cohen 1989:21).

lifeworld, discourse ethics is understood as being able to supply legitimation for a political system based upon the rule of law and constitutional legal rights (Habermas 1988;1989b).

In their appropriation of Habermas's discourse ethics, Cohen and Arato have chosen to follow Heller and confine the proper domain of discourse ethics to socio-political relations, as opposed to moral relations. As Heller has argued, discourse ethics serves well as a "procedure through which, socio-political, but not moral, norms may be tested and legitimized under conditions of symmetric reciprocity" (Heller 1985:6). Cohen and Arato support this position when they argue that, through its inherent presuppositions, discourse ethics protects the moral and political pluralism of the participants in a practical ethics. In short, its potential application to moral relations would compromise its value as a political ethic (Cohen and Arato 1992a:347-360).

As a political ethic of democratic legitimacy, discourse ethics implies more generally that "we should only be subject to those social and political norms of which we are the authors" (Heller 1985:9). Deductively, included among those norms subject to discourse ethics would be our human and legal rights. Consequently, Cohen and Arato identify discourse ethics as constituting a procedure for justifying the validity of legal rights. But they also

choose to go beyond this step to suggest that rights are to be understood as presuppositions of discourse ethics, and that the metanorms of discourse ethics are understood as implying certain basic rights.

Habermas's own comments upon the potential relationship between discourse ethics and rights are not systematic (Bartholomew 1992). For instance, in his major formation of discourse ethics, he tells us that in the ISS no speaker "may be prevented, by internal or external coercion, from exercising his [sic] rights" (Habermas 1990b:89). He goes on to elaborate that he was referring to rights to "universal access and equal participation" in discourse, and that these rights should "be enjoyed equally by all, that is without the possibility of repression, be it ever so subtle or covert" (Habermas 1990b:89). It seems apparent in this instance that he is referring to moral rights, as opposed to legal or constitutional rights. And yet, in a later article, he tells us that popular sovereignty and human rights are to be understood as the demand to legally institutionalize rational communication (discourse ethics) (Habermas 1989b). Here he distinguishes between two sets of fundamental rights inherited from the liberal tradition, the rights of "communication" and "negative civil rights". The first set of rights "go towards constituting the practices of bargaining and rational discourse" (Habermas 1989b:153).

The second set, by contrast, promote the self-limitation of practices of rational discourse.

In their treatise on civil society, Cohen and Arato seek to clarify the relationship which Habermas indicates between discourse ethics and these two sets of rights. They suggest that there are three possible ways of conceptualizing a relationship between fundamental rights and discourse ethics: (1) fundamental universal rights could be presupposed by discourse ethics; (2) fundamental rights could be the content of rational consensus; or (3) fundamental rights could be implied by the metaprinciples of discourse ethics. How they develop these relationships has powerful implications for a progressive politics of social rights.

The first relationship -- rights as implied by discourse ethics -- suggests that certain fundamental rights can be linked to the metaconditions of discourse. Discourse ethics presuppose individuals whose autonomy is guaranteed. Following Habermas, they suggest that the negative civil rights inherited from liberalism ("negative liberties" and "personality rights") are capable of securing this autonomy. It is of particular concern how autonomy is defined. Recognizing that the principle of autonomy is a "substantive moral principle", Cohen and Arato advance two interpretations of autonomy (Cohen and Arato 1992a:397).

The first interpretation is derived from universal pragmatics and implies only

"the ability to take on dialogue roles, to engage reciprocally in ideal role taking, to achieve reflexivity vis-a-vis these roles, and to articulate one's own needs, interests and values in order to determine their universalizability and arrive at a common agreement on general norms" (Cohen and Arato 1992a:398).

But this interpretation of autonomy falls short for Cohen and Arato. They argue that this first interpretation of autonomy also implies a conception of the individual who is to participate in a discourse that is parasitic upon a more complex "dualistic" understanding of autonomy. The two key elements of this broader interpretation are "self determination and individual choice", and "the ability to construct, revise and pursue one's own life plan" (Cohen and Arato 1992a:398). I will discuss the implications of this construction momentarily.

The second relationship identifies fundamental rights as the result of rational consensus. The product of democratic discussion, these fundamental rights do not stand as external limits to democratic discussion, nor are they constitutive of discourse itself. The examples they give of these rights are property rights and social rights. The inclusion of social rights in this category, of course, omits them from the other two categories.

The third relationship between fundamental rights and discourse ethics "can be read off directly from the principles of symmetric reciprocity underlying the idea of discourse ethics itself" (Cohen and Arato 1992a:400). These are the fundamental rights which Habermas terms "communication rights" that serve to institutionalize the public spaces within society in which democratic legitimacy is generated. Communication rights are understood as mediating between rights as limitations upon the outcome of rational consensus and rights which are the content of rational consensus. Since these rights are constitutive of discourse itself, Cohen and Arato suggest that these rights can be conceived of as "antecedent to and inviolable by any democratic consensus" (Cohen and Arato 1992a:400). Examples they give of these rights are speech, assembly, association, expression, and citizenship rights²⁷.

In this treatment, Cohen and Arato seem to fall into the same trap as Habermas in that they fail to clarify the transition from a discourse of moral rights to a discourse of legal rights. Tentatively, I suggest the reason for this is probably to be found in the evolutionary dimensions which are implicit in Habermas's theory of communicative action. Law, as an agent of the lifeworld, is under pressure from

²⁷Including citizenship rights within this category while including social rights within the second would appear to indicate that Cohen and Arato want to, contra Marshall, separate social rights from the question of citizenship.

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the lifeworld to conform to patterns of communicative rational discussion. But, interpreting the relationship between moral and legal rights in this way contains a tendency exhibited by both Habermas and Cohen and Arato to disregard the institutionalized reality of legal rights. Discussions of how basic rights and distributive principles are best justified tend to de-emphasize the constitutive and limiting features of legal rights (Bartholomew 1992).

Cohen and Arato's treatment of the relationship between fundamental rights and discourse ethics would appear to have considerable significance for the political and legal evaluation of rights claims. While they claim that all rights require discursive justification to be treated as valid and thus legitimately serve as constitutional rights, communication rights and negative civil rights can invoke the metanorms of discourse ethics in arguments for justification. Rights which fall into their second category (contents of rational consensus) also require discursive justification but they cannot rely upon the commitments of discourse ethics for their justification but require justification from other arguments.

Unfortunately, Cohen and Arato go beyond merely drawing this distinction. In a manner reminiscent of the liberal tradition's discourse of human rights, they would appear to attribute to communication rights and negative civil

liberties a status as "basic rights", or "rules of the game". They suggest that

"the two sets of rights most fundamental to the institutional existence of a fully developed civil society are those that secure the integrity, autonomy and personality of the person and those having to do with communication" (Cohen and Arato 1992a:403).

And later,

"The model of rights we require would put the rights of communication (the public sphere) and the rights of the intimate (the 'private') sphere into the center of the catalogue of constitutional freedoms. These would have priority over all political, economic, and social rights" (Cohen and Arato 1992a:455)

Thus, while Cohen and Arato might not oppose the constitutionalization of social rights, they would, in any event, argue that civil (except property) and political rights should have priority over them.

It is my position that this privileging of civil and political rights over social rights is neither a requirement of discourse ethics nor a desirable implication of this theory. Rather, it is the result of an unreflective and potentially authoritarian moment within their formulation. This charge of authoritarianism has often been repeated in connection with Habermas's discourse ethics. As a general position, I will agree with this charge in so far as it indicates that any procedural theory must presuppose some

substantive commitments. However, I also agree with Benhabib that the real question which surrounds this procedural theory is not whether such substantive positions exist, but rather

"whether we can conceive of ethical discourse in such a radically reflexive fashion that even the presuppositions of discourse can themselves be challenged, called into question, and debated" (Benhabib 1992:46).

Cohen and Arato's construction seems to carelessly flirt with the fine line between an authoritarian formulation of basic rights and such a reflexive theory of legal rights.

The major problem with Cohen and Arato's treatment is that they fail to qualify why social rights are placed in the second category -- rights as the content of rational consensus. It would appear to me that social rights might equally be considered as falling into either or both of the other categories. First, while I certainly agree with Cohen and Arato that the ideal discourse situation presupposes (category one) autonomous individuals and collectivities, the manner in which they unreflectively import a liberal construction of negative freedom is arbitrary and deserves to be challenged. Cohen and Arato are explicitly aware that they are linking discourse ethics to "the core principle of liberty or inviolate personality underlying the liberal idea of basic rights" (Cohen and Arato 1992a:398). This understanding of "negative liberty or the free self-

development of unique, inviolate personalities" emphasizes the importance of autonomy in the narrow sense of protecting the capacity of free choice from external coercion (Cohen and Arato 1992a:398). But there are other accounts which emphasize the need to include social rights in any attempt to conceptualize individual autonomy (e.g. Gould 1988:204-205). Even Habermas recognizes that "it is true that both individual freedom and social security can be considered as the legal basis for the social independence necessary for an effective exercise of political rights" (Habermas 1992a:10; emphasis added).

Second, Cohen and Arato also fail to justify their exclusion of social rights from the third category -- rights implied by discourse ethics. These rights secure the conditions of symmetric reciprocity required by discourse ethics, and seek the elimination of repression "be it ever so subtle or covert" (Habermas 1990b:86). Why social rights, which are intended to mitigate the more repressive dimensions ensuing from social inequalities, are not seen as contributing to the elimination of repression is unclear to me.

Cohen and Arato's treatment of social rights, as we have seen, epitomizes the tendency towards their marginalization that Alan Hunt and I feared would be spawned by Habermas's treatment. Their sociological treatment offers little progress beyond Habermas's formulation of

social rights as paradoxical, and their political theory identifies social rights as 'second-class' rights subordinate to "communication rights" and "rights which secure the integrity, autonomy and personality of the person".

V. BARTHOLOMEW ON SOCIAL RIGHTS

An alternative Habermasian approach to social rights has been offered by Amy Bartholomew in her recent article "Social Rights and the Reflexive Continuation of the Welfare State" (Bartholomew 1993a)²⁸. Bartholomew starts from a general agreement with Habermas's assessment of the ambiguous and paradoxical role of welfare state programs, but tries to push beyond his treatment of social rights by advancing a "two pronged" strategy towards incorporating social rights into transformative projects aimed at securing the reflexive continuation of the welfare state. Here I must make clear at the outset that Bartholomew's transformative project is closer to Cohen and Arato's than Habermas's because she too stresses the need to pursue the democratization of administrative apparatuses of the welfare state. Additionally, I believe that it is important to point out that implicit in Bartholomew's analysis is an

²⁸A more condensed version of this manuscript has recently been published as "Democratic Citizenship, Social Rights and the Reflexive Continuation' of the Welfare State" in 2 (1993) 42 Studies in Political Economy 141-156.

interpretation of the potential of a politics of rights more in keeping with Swan's position (and Hunt's and mine) than either Cohen and Arato's or Habermas's (Swan 1993).

Bartholomew's proposal for rethinking the future of social rights and the welfare state is two pronged. The first prong of this strategy is to propose a tighter conceptualization of what a social rights actually is. In this respect, she recognizes the deficiency of Marshall's definition of social rights; she argues that he "provides no stable or adequate definition of what attributes a social right might have and does not consider the ways in which social policies and social rights may differ from civil and political rights" (Bartholomew 1993a:7). Here she stresses the need to adequately distinguish between 'genuine citizenship-based social rights' and 'welfare rights'. How she goes about doing so I will discuss shortly.

The second prong of Bartholomew's strategy to incorporating social rights into a "reflexive" welfare state is to make social rights "dialogical". In this context, Bartholomew seeks to elaborate upon Marshall's vision of citizenship to stress the need for citizenship to be "internally participatory" as well as "externally participatory" (Bartholomew 1993a:33). As conceptualized by Marshall, social rights provide citizens with power resources thereby facilitating their participation within the community; but there is no consideration of the

importance of establishing a "participatory core" to social rights themselves. The forging of a closer link between social rights and "reflexive" democratic participation within the institutions of the welfare state constitutes the second step of her solution.

This commitment to internal participation serves to link Bartholomew's work more clearly back to Cohen and Arato's argument concerning the need to institutionalize politically oriented public spheres within the administrative apparatuses of the welfare state. Like Cohen and Arato, Bartholomew links her project to the pursuit of a "reflexive law strategy", although she exhibits some trepidation about this (Bartholomew 1993a:33). Because an evaluation of the emancipatory potential of social institutions created and regulated by reflexive law is forthcoming in the next chapter, I will leave this line of discussion here in order to return to the principle component of Bartholomew's essay, her elaboration of a theoretical model of social rights more compatible with the reflexive continuation of the welfare state.

For Bartholomew, a key part of theorizing a future for social rights in a "reflexive" welfare state is to distinguish between different forms of rights associated with the current welfare state. She believes, just as I do, that we must very well engage with the "empirical question" that Cohen and Arato avoided concerning the relationship

between social rights and specific forms of juridification. For, even from the most abstract perspective, it is clear that not all social programs of the welfare state are identical; some programs are contributory (e.g. pensions) while others are financed through taxation (e.g. education); some programs are means-tested (access restricted to people in restricted categories) (e.g. food stamps in the U.S.) while others are universal (e.g. medical care in Canada); and some programs (as presently constituted) have significant social stigma attached to them (e.g. welfare) while others have very little (e.g. soldier disability pensions). In short, there is a plurality of organizational and institutional forms associated with the social rights of the welfare state, all of which serve to influence the exact dimensions of citizen encounters with bureaucratic welfare agencies (Hasenfeld et al 1987:387-415)²⁹.

²⁹Hasenfeld et al offer a typology of bureaucratic encounters in the welfare state which distinguishes four types of bureaucratic encounters: the 'customer' relationship in which applicants have considerable freedom of choice while the welfare bureaucracy has a high degree of discretion about whom to accept (e.g. private medical insurance); the 'consumer' relationship in which the citizen has considerable freedom of choice while the welfare bureaucracy cannot control the input of customers (e.g. hospitals, education); the 'inmate' relationship in which the citizen has little freedom of choice and the welfare bureaucracy has little choice over eligibility (e.g. food stamps); and finally, the client relationship in which the citizen has little freedom of choice while the welfare bureaucracy has significant discretion in determining who qualifies for their services (e.g. welfare) (Hasenfeld et al 1987:420). These four types of bureaucratic encounters are understood as offering an insight into power-dependency relations among citizens and the welfare bureaucracy; the greater power advantage held by the welfare state bureaucracy, the greater the potential threat to social rights themselves.

In order to formulate a distinction between 'social rights' and 'welfare rights', Bartholomew reduces the level of theoretical abstraction associated with the Habermasian tradition and investigate the contributions of the feminist "dual-track" theories of the welfare state (Fraser 1989; Gordon 1990). As Bartholomew goes on to develop, the most basic suggestion of this literature is that men and women have been incorporated into the welfare state quite differently. The so-called "masculine track" of the welfare state is composed of programs like unemployment insurance, soldiers pensions, and social security in which citizens pay into these programs. Seen as primarily the preserve of men, these programs are rights oriented and lack a social stigma. Rather, recipients of benefits are seen as having prepaid or contributed into the programs in some manner, either through their market labor, service for their country, or in some other capacity. While implemented by bureaucratic means, these programs require minimal effort on the part of the beneficiary to collect benefits, with a minimum of surveillance, control and normalization. If we were to rely upon Hasenfeld's typology, we are speaking here primarily of bureaucratic encounters of the 'consumer' and 'customer' type (Hasenfeld 1987:420).

The "feminine track" of the welfare state, in contrast, is composed of programs like A.F.D.C., food stamps, etc. These beneficiaries are constituted not as deserving

recipients but as dependent clients of the welfare state. Financed by taxation, recipients of benefits are socially stigmatized as lazy or deviant, as society's "freeloaders" since they are not viewed as having contributed in any way to the benefits they are receiving. Furthermore, as these programs are means tested, they are conditional upon the 'client' or 'inmate' falling into some predetermined category. Since the general objective of these programs of the feminine track is to 'rehabilitate' the 'socially challenged' recipient of benefits, these programs tend to generate continuing practices of client surveillance and normalization.

After having introduced the contributions of feminist dual track theory, Bartholomew reintegrates these comments within Habermas's theoretical framework. Here she suggests that it is apparent given Habermas's comments in his juridification critique, that one track, the masculine, is clearly superior to the second. These programs, she suggests, would "be less likely to undermine self-image, self-help, solidarity and the communicative resolution of problems", the issues at the heart of Habermas's juridification critique (Bartholomew 1993a:23). Bartholomew does not allow her analysis to rest here, however. She takes this analysis and uses it as the basis for distinguishing between 'welfare rights' and 'social rights'. Most generally, welfare rights are those rights associated

with the means tested welfare programs of the feminine track, while social rights refer to those programs associated with the male track of welfare state citizenship. Bartholomew's argument in this respect is quite elaborate. As she goes on to develop, the primary difference between the two types of rights revolves around the conditionality of their entitlement. Welfare rights are conditional by nature, being means-tested; genuine social rights, in contrast, lack this conditionality of service delivery; social rights are understood to be universalistic. In this context, Bartholomew makes the claim that it is the conditionality of welfare rights which are responsible for much of the juridifying character of welfare.

Significantly, Bartholomew refrains from what would be a problematic identification of social rights as non-colonizing. Rather, employing a further distinction between insurance or contribution based social rights (e.g. pensions, U.I.C.) and citizenship-based social rights (e.g. universal health care, universal day care, abortion on demand), she claims that it is these latter which "are the least inherently bureaucratic and the least colonizing" of the presently institutionalized rights associated with the welfare state (Bartholomew 1993a:29). For with these genuine citizenship based social rights, need is determined by the citizen and not the bureaucracy, with a universalistic provision of services (as opposed to the

extension of monetary benefits as with the insurance or contribution based social rights). Moreover, Bartholomew throws her support behind service based as opposed to monetary based social rights; service based social rights, she suggests (e.g. day care, health care), would be less likely to promote the development of a consumerist mentality within the lifeworld. It is these social rights, Bartholomew claims, that are the best candidates for a Habermasian inspired approach to transforming the welfare state.

I find myself in agreement with this effort to point out that all welfare state programs are not the same, and moreover, provide some theoretical grounds upon which to proceed. Some programs are clearly more colonizing than others. I do not think I take Bartholomew out of turn when I suggest that we should not interpret her as only defending those programs currently constituted as social rights, but rather that welfare programs should be rethought in such a manner as to reflect citizenship-based, universalistic, service-oriented constructions. For example, a guaranteed right to subsistence could be implemented by semi-autonomous food banks available to all without question, as opposed to the current alternative of welfare cheques and food stamps.

One example which bears some discussion in this context and is currently in fashion in political circles today is the option of a right to a guaranteed annual minimum wage.

This right is perhaps problematic to mention in this instance since it is not service based but monetarily based; clearly, this right can therefore be linked to a consumerist mentality that is more in keeping with the political Right than socialist transformative politics. But at the same time, a right to a guaranteed annual income could be implemented with little appreciable surveillance or normalization. Rebates could be extended on the basis of the annual income tax summary which we already submit to the government. In the context of Habermasian politics, which refrains from challenging the logic of the free market of exchange (although it might be supportive of using the political system to curb capitalist exploitation), this solution would appear to be a fairly efficient and desirable alternative to many of the welfare state programs currently in place.

This example of a right to a guaranteed annual income also stresses the second dimension to Bartholomew's two pronged solution to identifying a role for social rights in Habermasian politics. In order for a universal social right to a guaranteed annual income to have any hope of actually being an emancipatory step forward, civil society must have some way to impact upon the administrative agencies which implement and define the level of entitlement of this right. Decision making within these agencies must be made open to some form of reflexive social input so that the most

invasive and colonizing strategies for delivery of this minimum wage might be avoided.

If I might summarize my discussion in this section, I find that Bartholomew's two pronged approach to social rights does much to reconcile the paradox exposed by Habermas's juridification treatment. She has provided an account by which we can identify which rights are the most colonizing, and which are minimally colonizing. In doing so, she has maintained the important distinction between social rights and social policy that was missed by Marshall and again by Habermas. Her position recognizes that even the most desirable form of right, the genuine citizenship based social right, can be implemented in a paternalistic manner. In this context, Bartholomew has pointed to concrete policy directions which should be pursued for institutionalizing a "participatory core" within the programs which deliver social rights so that the lifeworld might exert influence upon these bodies.

V. A HABERMASIAN PERSPECTIVE ON SOCIAL RIGHTS RECONSIDERED

In this chapter, I have worked within the theoretical tradition of Habermas's critical theory in order to probe those key areas of Habermas's analysis which lead him towards a marginalization of social rights in his transformative project. In the course of this analysis, I have made a number of suggestions which I consider essential

for reintegrating social rights within this tradition of thought. Let us now attempt to bring these together to form the groundwork for some sort of consistent theoretical approach to social rights.

The theoretical approach which I seek to develop begins with a more expansive interpretation of the scope for political action than articulated by Habermas. Following the contributions of Cohen and Arato, we need to recognize the importance of identifying and democratizing spaces ("sensors") within the state and economy through which the lifeworld can influence the system. This democratizing process needs to be self-reflexive upon the systemic requirements, functioning and performance of these subsystems.

To complement this increased scope of political action, we need to simultaneously increase the range of application for a progressive politics of rights. We need to cease to think of rights only as "trumps", and should regard rights, as I suggested in the concluding comments of the preceding chapter, as a "language" through which political claims are advanced and debated (Bowles and Gintis 1987; Minow 1987). The metaphor of rights as "trumps" underlies both Habermas's and Cohen and Arato's treatment of the politics of rights and ends up leading them to restrict the politics of rights to struggles for democratization within civil society. Swan has pointed beyond this treatment by suggesting that the

politics of rights could be an important component of efforts to create and democratize "sensors" within the state and economy. Rights have the capacity not only to stabilize institutional social arrangements, but also to destabilize them. This destabilization could similarly be emancipatory, being an example of how rights discourse can stimulate a political consciousness in civil society capable of resisting systemic pressures of self-closure and self-referentiality.

The final dimension to this approach is a recognition that all social rights do not equally imply bureaucratization and monetarization. That is, I believe that it is possible to identify a type of social right (universalistic, service-oriented, internally participatory) that would appear most compatible with the kind of social transformation which the Habermasian tradition claims to be seeking. As Bartholomew has argued, these rights would appear to be the least colonizing and monetarizing form of welfare state entitlement.

Does this approach developed above push too far and compromise the internal consistency of a Habermasian framework? It would appear likely that Habermas and even Cohen and Arato would feel that this approach threatens to go too far towards a reformist social democratic perspective. Perhaps I am guilty of this. Nonetheless, the approach which I have sought to develop on the basis of

previous contributions does lead to new possibilities for social rights and the welfare state, possibilities which I will seek to flesh out in the next chapter of this thesis.

CHAPTER THREE

SOCIAL RIGHTS, REFLEXIVE LAW, AND CONSTITUTIONAL DIALOGUE

I. DEMOCRATIZATION AND RESPONSIVENESS: THE POLITICS OF INFLUENCE

Habermas's "juridification critique" problematizes social rights by connecting them to social practices of alienation, reification, surveillance, and normalization. Legally institutionalized social rights are seen to promote the alienation of individuals from the community by specifically constituting them in legal and bureaucratic forms as atomistic individuals. The violent abstraction of legal and bureaucratic forms is furthermore seen to reify the current late capitalist social order by promoting an artificial "social and psychological distance" between "clients" and the welfare state, further disempowering the already disempowered in society. Apparatuses of surveillance and normalization are also closely associated with social rights, since the institutions which deliver such rights frequently screen "clients" and are often linked to "social services" set up to lend "expert" therapeutic assistance to help "reform" those receiving welfare benefits; such programs only further serve to undermine the independence and self-reliance of the citizen which they claim to seek to restore. For Habermas these "pathological"

practices of the welfare state are indicative of a more fundamental social problem, the "colonization" of the lifeworld by the system (Habermas 1987:361-364).

In the first chapter of this thesis, we explored Habermas's "colonization" thesis and discussed the transformative implications of his social theory. Most generally, Habermas believes that for society to progress in a more emancipatory direction, "barriers" must be established between 'the system' and 'the lifeworld' for the purpose of preserving the internal logics and functional integrity of the two action fields. This distinction between logics is rooted in his distinctive theory of communicative action (Habermas 1984, 1987). In terms of broad political policy, he advocates a policy of "social curbing"; the political subsystem must learn to limit itself and exercise self-restraint in its regulation of areas of social life within the lifeworld (Habermas 1990c:18). He claims to seek the "reflexive continuation of the welfare state", a project which he implicitly suggests demands a new legal jurisprudence, one which is more directly informed by the social sciences (Habermas 1990a:67). It is this new jurisprudence which will be my focus in this chapter.

Before I begin exploring the new direction of legal theory and practice associated with this Habermasian notion of "the reflexive continuation of the welfare state", let us first summarize the implications of the preceding chapter.

For in that chapter, I sought to overcome two theoretical limitations exhibited by his juridification treatment: a conception of rights politics as boundary maintenance and a failure to distinguish between forms of social rights.

The most concrete implications coming out of this chapter is that it is possible to indicate a type of social right that would appear to be the most likely candidate for the reflexive continuation of the welfare state. These social rights, as identified by Bartholomew, are characterized both by a universalistic construction and a service based (as opposed to monetary) orientation, and by an "internally participatory" character. This internally participatory character is intended to make those social institutions responsible for the delivery of social rights more responsive to the demands of the lifeworld. Such social rights, it is argued, are inherently the least colonizing form of welfare state provision. (Bartholomew 1993a)

This issue of responsiveness raised by Bartholomew's commitment to "internally participatory" social rights would appear to be the central dilemma for Habermasian political theory as a whole. Perhaps overly concerned with the need to preserve the lifeworld, Habermas largely ignores this question. He seems most interested with the erection of his "democratic dam" between system and lifeworld, with insufficient attention paid to identifying or defining

interaction at the boundaries between system and lifeworld (Habermas 1992b:444).

Cohen and Arato take these issues more seriously. They make the important suggestion that a Habermasian inspired transformative approach should also seek to institutionalize politically oriented "public spheres" within the state and economy so that civil society might be better equipped with the means to influence the system. Here they are quick to recognize limits. The democratization of the state and economy must be pursued with a conceptual eye towards the performance and functioning of these subsystems (Cohen and Arato 1992a:436-491). It is this latter approach which I certainly regard as the more attractive of the two.

How is it possible to democratize the institutions of the welfare state responsible for the implementation of social rights? In both Cohen and Arato's work on civil society and Bartholomew's discussion of the "second prong" of her two part strategy for retheorizing social rights (i.e. making social rights "internally participatory" as well as "externally participatory") the authors have tentatively linked themselves to the pursuit of a "reflexive law strategy" (Cohen and Arato 1992a:480-487; Bartholomew 1993a:33). What does such a strategy look like? Conceptually developed by the German legal theorist Gunther Teubner, "reflexive law" is advanced as a procedure-oriented participatory alternative to the current legal bureaucratic

regime. Most generally, this approach suggests that law and procedure should be used to structure, rather than decide, issues within those areas of society which are subject to legal regulation.

The conceptual relationship between reflexive law and critical theory is somewhat complex. While Habermas's critical theory is a major inspiration for Teubner's theoretical formulation of a reflexive law regime, there nonetheless exists a certain tension between reflexive law and Habermasian transformative approaches. Moreover, there would appear to be some potentially significant difficulties in using reflexive law in the context of welfare state administration. In this chapter, I propose to explore these tensions as I focus upon the broader question of how to change the form of delivery of welfare services to make these institutions more compatible with the aims implicit in Habermas's slogan of the "reflexive continuation of the welfare state".

This chapter is developed in six sections. The first section explores Habermas's contributions to the sociology of law by way of contrast with Max Weber's contributions to our understanding of the "limits" of legal interventionism (Section II). In the next section, I introduce and explore Teubner's strategy of reflexive law (Section III). This is followed by a brief discussion of some of the tensions of this approach with a Habermasian project of social

transformation (Section IV). Next, I discuss Willke's strategic approach to establishing a "relational program" (Section V). In the following section, I go on to make a case for a relational program of social rights by attaching the pursuit of a reflexive law strategy with a macro-level constitutional dialogue (Section VI). The final section offers a summary of the legal approach developed in the preceding pages and mentions some of the limitations of this strategy (Section VII).

II. SOCIOLOGICAL CONSIDERATIONS: REWORKING THE LIMITS OF LAW

At its broadest level, Habermas's sociology attempts to rework Weber's account of modernity in more optimistic directions. Nowhere is this more clear than in his reworking of Weber's sociology of law. For in this context, Habermas seeks to go beyond Weber's account of the limits of the transformative potential of law. In this section of the chapter, I propose to examine how Habermas's sociology of law identifies a new jurisprudential approach to questions of law in the welfare state. More specific to my concerns, it is Habermas's redefinition of the "crisis" of law in the welfare state which makes possible a continued commitment to social rights, and perhaps equally significantly, identifies a line of inquiry to pursue to restructure the institutions of the welfare state responsible for the delivery of the services guaranteed by social rights.

Max Weber and the Limits of Law

Weber's sociology is best known for its pessimistic representation of the progressive rationalization of modern society. By this account, social development is paradoxical. The rationalization of society is seen to have generated greater opportunities for the pursuit of individual freedom by making available more efficient and effective means for controlling our natural and social environment. And yet at the same time, rationalization has entailed a loss of individual freedom as the bureaucracy and other social institutions (e.g. the media, labor unions, political parties) have assumed an increasing role in the socialization of individuals. Very much at the center of this account of social life, descriptively referred to as Weber's "iron cage", is his treatment of law in modern society, including his account of the limits of law's transformative potential (Mitzman 1970).

Writing at the turn of the twentieth century, Weber characterized our Western legal systems as "formal rational". In this context, he suggested that there are three defining characteristics to a formal rational legal regime: 1) law assumes the form of abstract and general rules, rules which are produced internally by the legal system and not derived from "external" sources; 2) the legal corpus is systematized so that there are no 'gaps' - all

events are capable of being explained in terms of the law; and 3) strict procedures are set in place which limit the discretion of judges and administrators who oversee and implement the law in the most efficient and effective manner possible (Weber 1978:II:658).

For Weber, these three distinctive properties of formal law were responsible for its centrality in modern social life - the rule of law itself is rooted in these properties, he argued. This thesis, conventionally referred to as his thesis of "legal domination", grounded the legitimation of the legal exercise of political authority in the rational properties intrinsic to the form of formal law (Cotterrell 1983). Such a formal legal system, he suggested, would be rational in terms of its scientific rationality of elaboration, its predictable linking of action and consequences, and its securing of a sphere of private autonomy for individual purposive rational calculation (Kronman 1983).

Conceptually, this thesis of legal domination was central to Weber's sociological project, for through it, he connects legal development with the growth of the capitalist market. The calculability and predictability implicit in a formal rational legal system are considered prerequisites for an efficient capitalist economic system (Hunt 1978). Moreover, law was clearly linked by Weber to the growth of the bureaucracy. The law created and regulated political

authority (including the bureaucracy), and the bureaucracy in turn rationally implemented the law, driven by its own imperatives to do so as efficiently (minimum cost, labor and resources) and effectively as possible.

While there is considerable importance to the descriptive dimensions of Weber's sociology of law, his legal theory is generally cited today for its predictive dimensions. Writing during the latter stages of what Helco refers to as the 'experimentation era' of the welfare state³⁰, Weber witnessed the historical clash between socialist and trade union forces against the prevailing liberal hegemony over the potential of using law in an interventionist manner i.e. as a means through which to implement social planning policies designed to minimize the social inequalities created by the blind working of market forces (Helco 1981). Weber's response to this question is best known for its sophistication, and by the tragic choice which it poses. For he identifies this clash as an "inevitable conflict between an abstract formalism of legal certainty and the desire to realize substantive goals", a conflict which ultimately divided and continues to divide those who hold political power from those who do not (Weber 1978:II:811).

³⁰According to Helco, the experimentation era of the welfare state extended from 1870-1920 and was characterized by debates concerning whether and how the government should assume an interventionist role (Helco 1981). For further discussion, see Footnote 1.

According to Weber, interventionist legal regulation by the state could not draw its legitimacy from the formal rational characteristics of law, but would have to draw its legitimacy from a source external to the legal system i.e. some normative or ethical postulate (e.g. distributive justice). The problem is that the introduction of such "substantive rational law" into the legal corpus would work to undermine the formal dimensions to the legal system, and hence potentially place the rule of law itself at risk. For such substantive law, Weber suggested, is designed to achieve specific goals in concrete situations and consequently would be more particularistic, yet at the same time, more general and open-ended than formal law. The "materialization" of law, the re-introduction¹¹ of substantive goal-oriented principles into the legal corpus, is consequently perceived as inspiring law's politicization and, just as significantly, its deformatization. Weber recognized the tragedy of this situation, because a formal rational legal regime, conceived of in terms of due process and formal equality, would be unable to transcend the

¹¹In Weber's sociology, the development of modernity was associated with the rise of formal legal rationality and the decline of the extra-legal modes of justification which characterize substantive rationality. His developmental treatment of law thus comes perilously close to a simple sequential model in which formal rational law replaces substantive law, although, it must be stressed, he does not complete this step. For this reason, some commentators prefer the more precise term "re-materialization of law" to the more conventional "materialization" of law (e.g. Teubner 1988).

structural inequalities generated by capitalist social relations (Weber 1978:II:812-813). Weber left the question of future legal development as a choice, to support formal law or to support substantive law. His own fear of the potentially authoritarian character of substantive legal rationality ultimately led him to support the former³².

Weber's fearful portrayal of the "materialization" of law indicates definitive limits to the capacity of law to transform society. At some point in time, excessive legal interventionism will undermine the legitimacy of the rule of law. Presently, this issue of the limits of law is at the core of the debates surrounding the future of social rights and the welfare state. For as Weber predicted, law has become increasingly politicized in the welfare state, and the legal form has been altered. The new regulatory law designed to implement the social policy programs of the welfare state is characterized by both its specificity and generality - its range of application is specific to the securing of the legislative goal, but the regulations themselves are so general that significant flexibility is given to the bureaucratic institutions which have been created to implement social policy. Conceptually, this

³²Weber pointed out that substantive law was frequently at odds with individual liberty; "Formal law is thus repugnant to all authoritarian powers ... because it diminishes the dependency of the individual upon the grace and power of the authorities" (Weber 1978:II:812). His warning comments in this regard have tended to be treated lightly by a number of contemporary socialist and feminist legal theorists.

regulatory law can be (although I will argue does not have to be) linked to social rights since social rights bring the law into these areas of social life. I will return to discuss the strategic implications of Weber's analysis shortly. For now, let us concern ourselves with how Habermas reconceptualizes what Weber has identified as the limits of law.

Defining New Limits for Legal Interventionism: Habermas and the Procedural Rationality of Law

Weber's sociology serves as the major theoretical contrast for Habermas's own efforts in this area. The differences between the two arise from Habermas's dualistic social theory; Weber does not make a distinction between 'instrumental' and 'communicative action', and consequently, has no concept of the 'lifeworld'. In the first chapter of the thesis, we discussed how Habermas connects law and legal development to the lifeworld through his thesis of "law as an institution". This thesis relates legal development to moral developments in society by suggesting that law institutionalizes normative postulates of the lifeworld. This thesis is in turn supplemented by his second "law as a medium" thesis which emphasizes the systemic dimensions of law and legal development; law is seen to serve as a means for controlling media-controlled subsystems (Habermas 1987:365-366).

In his relatively recent article "Law and Morality" (1988), Habermas considers the implications of his dualistic representation of law for Weber's thesis of legal domination and, more obliquely, for Weber's attempt to conceptualize the limits of legal interventionism. Perhaps Habermas's most famous article on law, this essay explicitly seeks to reconceptualize the rule of law. The argument made in this article is that Weber's analysis makes two problematic assumptions which lead him astray. First, Weber tries to ground the legitimation of formal law in its instrumentally rational properties - its rule governedness, its creation of space for purposive rational action, and its scientifically constructed method. Second, Weber equates the "materialization" of law with its "moralization".

As might be anticipated, given his belief that the source of legitimation in society comes from the lifeworld and not the system, Habermas argues that the legitimation associated with formal law is supplied by the communicative character of law's procedural rationality. Here he suggests that the legal system's rigid internal proceduralism structures legal discourse, both within the legislature during the drafting stage and within the judiciary during the interpretive stage, so that that discourse approaches the rationality of procedure implied by his theory of discourse ethics (Habermas 1990c). The internal discourse of the legal system, in turn, is characterized by the fact

that it remains permeable to demands articulated in both the lifeworld and the system. Habermas thus reaffirms his stance that law stands between system and lifeworld when he claims "law stands between politics and morality" (Habermas 1988:246). Since law and legal development cannot be completely separated from morality, he goes on to argue, the legitimacy associated with the rule of law can be traced back to the moral and ethical structures of society. In the eighteenth century, the moral defense of the rule of law was to be found in social contract theories. Such theories are no longer defensible in a pluralistic late modern society. In contemporary society, he argues, a procedural theory of justice like discourse ethics is required to justify the rule of law.

What is the significance of this analysis? It is apparent that Habermas is trying to look beyond the limits of legal interventionism identified by Weber. The materialization of law does not mean its moralization, since even formal law in Weber's sense of the term is to be related to the moral fabric of society outside of the legal system. Relatedly, Habermas claims that Weber's fears concerning the deformalization of law, and his fears concerning its politicization, seem inappropriate. First, formal and informal law are just different variants of the positive law. And second, law always has a political dimension. For Habermas, social development depends -- in

the last analysis -- "on the political struggles at the frontier between system and lifeworld" (Habermas 1988:248). Law, by virtue of its position between system and lifeworld, is one of the key sites of struggle between the two social spheres. The conflict that Weber identified, then, the conflict between systemic certainty and moral and ethical conceptions of justice, exists not as a paradox but as both a prerequisite and impetus for legal autonomy and the rule of law, and more broadly for a democratic society: "There can be no autonomous law without the realization of democracy" (Habermas 1988:279)

Habermas's sociology of law allows him to go beyond Weber and support the development of the welfare state with the deformed variations of law which have arisen with it. But, as we have discussed, Habermas does not fully support the welfare state, nor does he support unrestricted legal interventionism. He sees the welfare state and the social rights which are its "expression" to be ambiguous. As we have discussed previously in connection with his juridification critique, Habermas has strong suspicions of the specific methods of legal interventionism within those areas of social life integrated by communicative action. For he believes that legal regulation can lead to the colonization of the lifeworld, although it is clear that this does not necessarily have to occur. The problem, he

argues, is the extensive component of law as medium associated with welfare state regulation.

Here we return to the discussion left unfinished earlier in the paper regarding Habermas's under-developed prescription for law. For he claims that legal regulation, to avoid colonizing the lifeworld, should assume the form of an "external constitution". Rather than outright rejecting legal regulation of areas of social life within the lifeworld as neo-liberals might, he wishes to eliminate (or more realistically, minimize) the constitutive "law as medium" component to legal regulation by replacing it with

"procedures appropriate for settling conflicts that are appropriate to the structures of action oriented by mutual understanding - discursive processes of will-formation and consensus-oriented procedures of negotiation and decision making" (Habermas 1987:371).

Habermas's comments on "law as an external constitution" have informed Gunther Teubner's recent work on "reflexive law", although he works from the perspective of systems theory as opposed to critical theory. Habermas's recent work on the procedural rationality of law, in turn, clears the way for him to embrace something like reflexive law and even goes so far as to make specific reference to this legal form (Habermas 1988:231). And yet, there is some tension between reflexive law and a Habermasian transformative approach. This tension, I will go on to suggest shortly, makes linking this legal strategy to social

rights potentially problematic. This will be my focus of the next two sections of the thesis.

III. TEUBNER'S THEORY OF REFLEXIVE LAW

Gunther Teubner's theory of reflexive law is predicated upon the belief that the two dominant contemporary strategic approaches to legal reform will ultimately be unsuccessful. These two approaches are, first, the strategy of improved effectiveness in legal regulation advocated by members of the legal profession and second, the "reformatization" of law advocated by Weberian influenced social theorists and political neo-liberals. The first approach to legal reform expresses concern with what is seen as a growing inefficiency of state regulation. The difficult task of extending the law's regulatory focus to encompass new areas of social life is seen to have created new technical problems for law, problems which can be related as both cause and effect to the overburdening of the legal system. For example, law is now being asked to directly intervene in such politically sensitive social relations as the family, although, as feminist legal theorists point out, law has always played an important role in this area. Since much of the new legal regulation is seen to be so politically sensitive, laws are frequently drafted by legislators reflecting differing ideologies and concerns, with the consequence being occasional overlap and contradiction. In

addition, the rapid technological change which has characterized our society of the post-War period has exposed the inadequacy of the response time of the legal system to these changes, and moreover, has demanded an increased expertise on the part of legal professionals to cope with this technology (e.g. the legal regulation of reproductive technology). In order to maximize the efficiency of legal regulation and the legal system itself, measures such as technical improvements in the drafting of legislation, the simplification and elimination of redundancies in existing regulation, and the unburdening of the legal system with the provision of suitable financial resources, are advocated.

The second approach to reforming law in the welfare state has its major inspiration in Weber's sociology and is based upon the notion that the "materialization" of law has precipitated a "crisis" in legal regulation. The only way to halt the politicization and delegalization of law resulting from its materialization, it is argued, is to "relegalize" the legal corpus; law must again become formally rational. The implications of this solution, however, is a reactionary program of "delegalization". In order to relegalize the law, substantial areas of welfare state regulation would have to be peeled back and replaced, if at all, with informal (non-legal) alternatives. Given the potentially regressive political implications of such a program of de-legalization, for non-legal alternatives would

be even more unlikely to balance social inequalities, progressive theorists have generally regarded this solution with some suspicion.

For Teubner, neither of these approaches to legal reform will likely resolve the problem of welfare state regulation. His interpretation of the 'real' problem of law in the welfare state is drawn principally from Luhmann's systems theory (Luhmann 1985; 1988). By this account, the current "crisis of the welfare state" is to be directly associated with the failure of the legal system to adjust to the complexities of what Luhmann refers to as a "functionally differentiated society". Such a society is characterized by the development of highly specialized social subsystems, each of which has achieved functional autonomy and each of which is driven by the need to maximize its own internal (instrumental) rationality. It is important to note here that systems theory does not make use of a concept of the lifeworld; those functions associated with this social sphere are performed by additional social subsystems.

Following Luhmann, Teubner indicates that the legal system should be understood, like the rest of society's functionally differentiated subsystems, as an "autopoietic" system (Teubner 1988b). Such an autopoietic system both produces and reproduces its own elements, thereby achieving "system closure". Yet at the same time, an autopoietic

system remains capable of adapting to environmental demands (external subsystems and the natural environment) by filtering environmental imperatives through its own internal mechanisms. This filtering process is referred to as system "reflexion".

From the perspective of systems theory, the current "crisis" of legal regulation is seen as the consequence of the current "substantive" legal regime imposing itself too rigidly upon other functionally differentiated subsystems. This has the effect of confusing and stifling the regulated subsystem's - and the legal system's own - internal development. Encumbered by a rigidity of form, interventionist legal regulation, it is argued can only lead to a potentially regressive dedifferentiation of society. "Reflexive law" is advanced by Teubner as an alternative legal approach capable of resolving this crisis of law in the welfare state, without the politically regressive tendencies of the pursuit of strategies of informalism. It is a strategy based on changing the form of legal regulation.

So, what does such a reflexive law strategy look like? According to Teubner, "reflexive law" is an emerging legal form characterized by "legal self-restraint". Instead of regulating to achieve specific ends, legislators restrict themselves to using law for "the installation, correction and redefinition of democratic self-regulatory mechanisms"

(Teubner 1983:239). Conceptually, he suggests that a "reflexive" legal regime shares with Weber's "substantive" legal regime the belief that focused legal intervention in social processes is within the proper domain of law, although reflexive law itself is to be distinguished from substantive law on the basis that this type of law "retreats from taking full responsibility for substantive outcomes" (Teubner 1983:254)³³. Here it is his characterizing suggestion that reflexive law seeks to affect the "quality" of legal outcomes, without specifying the outcomes itself. Quality of outcomes is to be affected through the rational structuring of procedures of decision-making.

³³In order to illustrate the distinctiveness of the emerging form of reflexive legal rationality, Teubner attempts to sketch out the characteristic dimensions of this emerging form of legal rationality using Weber's concepts of formal rational and substantive rational law as his contrast. He employs three criteria in this effort: the source of justification of law (its 'norm rationality'), the external social functions which law serves (its 'system rationality'), and laws internal structure (its 'internal rationality'). Under these criteria, a formal rational legal regime finds its justification in its contributions to individualism and autonomy; externally, it functions as the structural presupposition of a market based economic system, and, through its rational properties, formal law functions to secure the legitimation of the political system; its internal structure, in turn, is characterized by its abstract, deductive, rule-orientation. Substantive law, in contrast, finds its justification in the "collective regulation" of economic and social activity which is necessary to compensate for social and market inequalities; its external function is to instrumentally modify market based social relations, and its internal structure is characterized by its purposive orientation, its open-endedness, and its particularity of application. A reflexive legal regime finds its justification in the need to control processes of self-regulation; its external function is to structure and restructure subsystems for internal discourse and external coordination; and its internal structure is procedure oriented.

How will this approach help to resolve the "crisis" of law in the welfare state? Teubner's suggestion here is that reflexive law will work within the complex environment of a functionally differentiated society to promote "reflexion" within the subsystems it regulates. Assuming a Habermasian stance, he argues that reflexivity within subsystems is only possible through the creation of "discursive space". Within this "discursive space", policy is capable of being formed which reflects both upon the performance and functional requirements of the regulated subsystems, and upon the "outside effects of their attempts to maximize internal rationality" (Teubner 1983:278). In order that decision making within this discursive space itself be rational, law is to be used to organize the institutional structure so that the forum created will be neutral to all parties. Thus unlike legal formalism, a reflexive legal regime does not take prior distributions as given, but searches for what he refers to as "regulated autonomy". I interpret Teubner's comments in this area as once more reflecting Habermasian ties; it would appear that he holds out something like the procedural conditions of discourse ethics as the regulatory ideal of reflexive law. Despite the centrality of participation to this project, however, Teubner is explicit that individual participation in decision making and power equalization are only aspects of a legal strategy whose main goal is "to substitute for outside interventionist control

an effective internal control structure"; they are not the goals of reflexive law in themselves (Teubner 1983:278).

Since Teubner claims to be identifying an emerging legal structure, he is able to offer some illustrations of forms of reflexivity currently in existence. Here he points to two examples in recent German labor and consumer law. In labor law, he points to the legal regulation of collective bargaining. In this area, legal regulation "operates principally by shaping the organization of collective bargaining, defining procedural norms, and limiting or expanding the competencies of the collective actors. Law attempts to balance bargaining power, but this only indirectly controls specific results." (Teubner 1983:276)

His second illustration, he suggests, is a "shaky example" of reflexive law at work. Within the field of consumer law, law has been employed to organize and procedurally structure autonomous semi-public institutions responsible for providing consumer information and political-legal representation for unorganized social interests. While clearly an attempt to establish reflexivity, Teubner considers this example problematic because it (as yet) fails to account for social asymmetries of power and information. How collective bargaining differs and is freed from these asymmetries of power, Teubner chooses not to clarify, although this seems to me to be potentially dangerous assumption.

It is clear that a reflexive law strategy transforms the terms of discourse around legal regulation. In particular, two issues are identified as key sites of future struggle by this approach. First, there is the power issue we have just mentioned. The challenge for reflexive law is to procedurally structure discursive space so that the "regulated autonomy" of participants is actually realized, and no parties are favoured in the give and take of discourse. Clearly, how this is to be achieved will vary between institutional forums; some forums will require more procedural structuring than others to offset differences in power. If we follow Bartholomew's suggestion and connect social rights to the pursuit of a reflexive law strategy, then the importance of these future battles over legal procedure is firmly placed at the forefront of efforts to reform the welfare state. These battles are extremely important, for as Hasenfeld et al suggest in their reflections on "bureaucratic encounters", substantial asymmetries of power are typical of relations between agents of the welfare state and citizens seeking services (Hasenfeld et al 1987).

The second battlefield created by the pursuit of a reflexive law strategy involves the issue of participation. At some point in time, all discourses must be closed, both in terms of agenda and in terms of those participating in the discussion (Bronner 1992:38). Drawing this line becomes

a contentious issue. For example, if reflexive law was to be used in the field of education to create a procedurally structured discursive forum, who would be entitled to participate: educators, students, parents, special interest groups, tax-payers? Critically, I think that it is important to point out that since the purpose of reflexive law is not participation, but reflexion, it would seem that these lines might be drawn more restrictively than many of us would like. These concerns with the potential partiality of the discursive forums created by reflexive law lead us towards another consideration, the compatibility of reflexive law with a Habermasian transformative approach.

IV. REFLEXIVE LAW AND SOCIAL TRANSFORMATION

As a result of Teubner's contributions, there would now appear to be three strategic models for approaching the reform of law in the welfare state: increased effectiveness, de-legalization, and the legal regulation of self regulation. Teubner has formulated this third approach in an effort to resolve the "crisis of the welfare state" resulting from law's failure to keep up with the requirements of a "functionally differentiated society". I will now repeat myself when I stress that this is not the same crisis of the welfare state identified by Habermas. While Teubner's theses that media-controlled subsystems can suffer from over-regulation and that over-regulation can

adversely affect law's role of steering medium are important concerns from a Habermasian perspective, they are not the cause of the "crisis" of the welfare state. The cause of this crisis is to be found in the colonization of the lifeworld by the system. This raises a significant question, a question which troubles both Bartholomew and Cohen and Arato: should the pursuit of a reflexive law strategy be an element of a political project designed at seeking the reflexive continuation of the welfare state? In other words, does Teubner's reflexive law solution lead to the sort of social transformation that Habermasians seek?

Let me begin this discussion by returning to Habermas's contribution on this subject. It must be noted from the start that there is some similarity of perspectives between Habermas and Teubner. Habermas would appear to share Teubner's belief that the two dominant current approaches to legal reform - improving the effectiveness of legal regulation and "delegalization" - are not desirable strategies to pursue. Approaches which emphasize an increased effectiveness in legal regulation ignore law's "colonizing" tendencies and are thus unable to contribute to the resolution of the broader social problem, the "invasion" of the lifeworld by the system which has precipitated the Habermasian crisis of the welfare state. Similarly, a Weberian inspired approach of de-legalization would be problematic because it strives for a society that cannot be

retrieved; in Habermas's sociology, the evolution of the welfare state was a product of systemic necessity resulting from the incapacity of the free market to secure its own legitimation.

Most generally, Habermas's sociological contributions have expressed two different attitudes towards law. His juridification treatment in the Theory of Communicative Action (1987) pessimistically focused upon law's role in the colonization of the lifeworld, while in "Law and Morality" (1988), he focuses upon different concerns, the legitimation of law, and in the process, offers a more positive assessment of the possibilities of law in the late modern period. Habermas would appear to take the position in this latter article that some form of "procedural law" is capable of both curbing the colonization of the lifeworld and contributing to the rule of law. It is this similarity of turns here that really directs our attention towards Teubner's theory of reflexive law, and more specifically to the concerns of this project, to the possibility of linking social rights to the pursuit of a reflexive law strategy.

Cohen and Arato have focused upon the question of the compatibility of reflexive law with their transformative approach. While warm to the general of idea of reflexive law, they also express some tentativeness about its theoretical consistency and transformative potential. A warning should clearly be issued at this point, because, as

I discussed in the introduction to the chapter, Cohen and Arato's project might be seen to be more ambitious than Habermas's, in that in addition to seeking the erection of "barriers" between system and lifeworld, they also seek to identify and democratize "sensors" within the economy and political administration through which the lifeworld can influence the system. This more aggressive transformative approach is something which I have consistently supported in this paper; without the identification and establishment of sensors, there would appear to be no way for the lifeworld to influence the system.

Cohen and Arato's make two major suggestions in their discussion of reflexive law. First, they suggest the overall coherence of Teubner's reflexive law strategy with the project of democratization which they are pursuing. Reflexive law could possibly create partial discursive spaces through which the lifeworld could exert influence without interfering with proper systemic functioning. Indeed, if Teubner is correct, reflexive law should encourage more efficient subsystem functioning.

But, and this is their second point, they have some serious reservations about the implications of the partiality of the discursive space created within the regulated subsystems. Like Reich, they suggest that there are simply no guarantees that various subsystems would actually be sensitive to external environmental concerns

relayed through these discursive spaces; input from the lifeworld might be treated by subsystems as mere noise (Reich 1988:8; Cohen and Arato 1992:484). Furthermore, the actual contributions of reflexive law to the formation of a post-conventional consciousness within the lifeworld would likely be very minor. The requirement of reconciling subsystem function, performance and external side-effects under which reflexive law is placed would not likely lead to organizational procedures designed to foster the establishment of universal norms.

Despite these concerns, Cohen and Arato make the argument that a reflexive law strategy would likely work better within their political theory than it does on its own terms. Here they point to what can only be considered as the methodological weaknesses of Teubner's theory of reflexive law¹⁴. It is their suggestion that Teubner's treatment is characterized by its own internal paradox.

¹⁴Blankenburg, for one, has critiqued Teubner's theory of reflexive law for its methodological weakness (Blankenburg 1984). As Blankenburg points out, Teubner's theory of reflexive law draws from bits and pieces of three different accounts of law in the welfare state: Luhmann's system's theory (1985), Habermas's critical theory (1987), and Monet and Selznick's internal legal account of the development of "responsive law" (1978). While recognizing that these approaches are all substantially different, Teubner claims points of commonality and from there seeks to build his theory of reflexive law by borrowing bits and pieces from each (Teubner 1983). The problem with such an approach, Blankenburg claims, is that at no time does Teubner explore the fit or lack of fit between the three theories from which he draws; his "approach is not to integrate these theories at their core but instead to select elements of each, guided by a sometimes distorted view of where they might fit together" (Blankenburg 1984:274).

They point to two incongruities in his position. First "Teubner seems to indicate that self-regulation takes the form of decentralized moral self-control", and second, he argues that "reflexivity in subsystems is possible only through the establishment of discursive structures" (Cohen and Arato 1992a:484). These elements of Teubner's project are drawn from Habermas's critical theory, and do not have a place within systems theory. Without a concept like the lifeworld, they argue, "there is no consistent view of the source of relevant morality or the universal potential of any of the partial discourses that establish reflexivity" (Cohen and Arato 1992a:484).

If I might summarize the analysis so far, I have sought to demonstrate on the conceptual level some of the concerns which underlie Bartholomew's tentativeness to link social rights with reflexive law. If we went ahead with this proposal, the institutions responsible for the delivery of social rights could be made more internally participatory than they currently are. Reflexive law could be employed to procedurally structure "discursive space" in such areas as health care, education, or day care. However, and this is the point I have sought to underline, this discursive space, even if successful in achieving the regulated autonomy which it seeks, would only produce partial discourses. This solution would not reciprocally contribute to the moral development of the lifeworld, and it should be made clear,

it was not Teubner's intention to do so. If we are intent upon using law to encourage community and social solidarity, something which I believe to be at the heart of Habermas's approach to law, it seems to me that this legal strategy is more limited than we might wish.

V. A RELATIONAL PROGRAM OF REFLEXIVE LAW

A potentially more attractive approach to a reflexive law strategy is to be found in Helmut Willke's "relational program" (Willke 1988). For Willke's approach moves away from the autopoietic social theory from which Teubner developed this concept towards a dualistic conception of society, and in so doing, addresses some of the more significant deficiencies of Teubner's approach.

Willke's concerns with Teubner's approach once more arise from what is seen as internal inconsistency in his theory. Teubner, as we have seen, makes a case for the legal regulation of self regulation. Discussion within legally created and structured discursive space is hoped to lead to internal reflexion by the regulated subsystem and external co-ordination. However, this approach raises the issue of the overall co-ordination of legal regulation. Conceptually, Teubner is forced to one of two positions: he can assume either a miraculous coordination of regulated self-regulation, or require that one subsystem retain a central vantage point (i.e. the state would have to co-

ordinate the self-regulation of other subsystems). Willke would appear to regard the first position as overly optimistic, and the second position as problematic. It is his claim that within the complex environment of functionally differentiated subsystems, the state is no longer capable of supplying the legislative goals needed to achieve this co-ordination. His "relational program" is designed to correct this problem.

What does this relational program look like? Like Teubner, Willke claims that legal regulation should be restricted to the stimulation of subsystem self-regulation through the establishment of procedures facilitating reflexive self-limitation; this element of his project remains consistent with Teubner. However, he is specific that this is only one of two objectives of a relational program. The second objective is to provide for the formulation of "legislative goals" reflecting "overall social needs and requirements" (Willke 1988:290). Such needs, Willke claims, are unable to be set by the state. They might, however, be formulated within "discourse systems" in which "representatives of centrally affected interests are procedurally guided towards finding their common cause, their 'common sense', their 'generalizable interests'" (Willke 1988:290). For example, within the economic subsystem, a procedurally regulated discursive

forum could be created in which industry, state, and labor meet to explore various policy alternatives.

The overall point of the relational program, Willke argues, "is to enable self regulation of the parts, but at the same time to concert and guide these processes of self-regulation by agreed upon and self-imposed common goals" (Willke 1988:291). While Teubner's approach attempts to form partial discursive spaces within subsystems, Willke seeks the additional dimension of establishing a metasystemic discursive program outside of all regulated subsystems.

The value of such an approach becomes clear when approached from the perspective of the lifeworld (Cohen and Arato 1992a:485). Willke's relational program uses law both to facilitate the emergence of a post-conventional consciousness within the lifeworld by attempting to institutionalize discourse ethics in metasystemic forums where practical discourse takes place for the purpose of goal setting, while simultaneously equipping the lifeworld with sensors of influence to impact upon the system in a manner which would not excessively compromise (and possibly facilitate) system functioning.

How does this discussion relate to social rights? I believe that Willke's identification of the need for overlapping levels of dialogue is crucial for institutionalizing social rights in more emancipatory forms.

While I consider a reflexive law strategy directed at creating discursive spaces within the very institutions which deliver social rights to be an important component of making social rights more emancipatory as Bartholomew suggests, I believe it to be insufficient. Following Willke, it is my position that such a reflexive law strategy needs to be supplemented by the creation of a metasystemic forum in which broader policy around social rights can be discussed and debated. In making this suggestion, I am starting from the premise that social rights, and rights generally, are capable of making a significant contribution to the development of community and social solidarity within the lifeworld. In terms of specific policy proposals for creating such a metasystemic forum, my thoughts in this area have been shaped by Nedelsky and Scott's recent contribution to the politics of rights in Canada. Let us now look to Nedelsky and Scott's contributions.

VI. CONSTITUTIONAL DIALOGUE AND A RELATIONAL PROGRAM OF SOCIAL RIGHTS

In their recent essay, Jennifer Nedelsky and Craig Scott consider the transformative potential of constitutionalizing social rights (Nedelsky and Scott 1992). Confronted by the political reality of government proposals to introduce a "Social Covenant" into the Canadian constitution as a supplement to this document's "Charter of Rights and Freedoms" (a document which is comprised entirely

of the civil and political rights of legal liberalism), Nedelsky and Scott's comments are directed at what they see as the possibilities implicit in an "Alternative Social Charter" (ASC) drafted by members of the Canadian political Left as a more desirable alternative to the government sponsored initiative. In one of their few comments on the official government proposal, Nedelsky and Scott suggest that it was nothing more than a simple defensive action designed to protect the existing "social services" model of social rights. For this reason, they regarded the proposal as "probably worse than nothing" (Nedelsky and Scott 1992:60). Their position on this issue is very much in keeping with the aims and beliefs of the Habermasian tradition, although Nedelsky and Scott make no explicit effort to associate themselves with this literature.

Nedelsky and Scott's major suggestion in their essay is that the ASC provides an example of how a constitutional rights strategy might be pursued and contains a "model" enforcement mechanism that they believe should be a part of any social charter introduced into the Constitution. In building their argument, Nedelsky and Scott seek to develop two metaphors for rights which they claim underlie the ASC: the metaphor of "rights as sites of dialogue" and the metaphor of "rights as relations".

The first metaphor, 'rights as sites of dialogue', is meant to indicate that, following the contributions of Minow

and Bowles and Gintis, they consider rights to be a political "language" through which members in society rationally converse about different claims regarding basic values and relationships (Minow 1987; Bowles and Gintis 1987). In this sense, they seek to distance themselves from the more conventional jurisprudential treatment of rights as "trumps" with its institutional corollary that rights claims are either won or lost (Dworkin 1986). To reintegrate these comments with my discussion of the preceding chapter, it is just this difference which ultimately separates the perspectives of Habermas and Cohen and Arato on social rights from either Bartholomew or the position taken by Hunt and me.

Nedelsky and Scott's major contribution in developing this metaphor of 'rights as sites of dialogue' is to suggest that it too has an institutional corollary. Since rights are to be the metaphorical site of ideological struggle, it follows, they argue, that the institutions associated with these rights self-consciously foster actual dialogical processes; "if rights are sites of dialogue, then so too are rights-interpreting institutions" (Nedelsky and Scott 1992:64). Here it is their claim that the interpretive enforcement institutions proposed by the ASC (Social Rights Council and Social Rights Tribunal) are designed to foster such an ongoing dialogue between civil society and the

welfare state. This dialogical element of their project is what I consider to be so significant.

Nedelsky and Scott's second metaphor, "rights as relations", is meant to illustrate "what the substance of rights dialogue is and should be about" (Nedelsky and Scott 1992:69). Their major argument is that the reality of rights as relationships should become the focus of the concept itself; the social relationships of power, responsibility, trust and obligation which have previously dwelt in the background of rights politics should become the legitimate focus of rights politics. Their hope in this context is that debate can be engendered concerning which patterns of relationships are better than others, and what sort of rights will foster them. It is perhaps significant to note that Nedelsky and Scott specifically mention that among these relations which should be brought to the fore are the relations implied by the present welfare rights of the welfare state. Here they recognize that in addition to socially stigmatizing the recipients of benefits, these rights programs tend to construct the recipient as passive recipients of goods and subject them to continuous practices of surveillance.

I consider Nedelsky and Scott's contributions, and in particular, their commitment to dialogism, to be extremely important. However, there are some points of difference between the approach which I am advocating and their

position. First, just as Bartholomew was guilty of slighting the metasystemic level of dialogue as she focused on dialogue within institutions of social policy delivery, Nedelsky and Scott are guilty of slighting the social policy/ decentralized site of dialogue as they focus on dialogue at the metasystemic level. Following Willke, I want to argue for the necessity of both of these levels of dialogue. Second, Nedelsky and Scott are quite explicit in their support for the resistance of the drafters of the ASC to drafting social rights in universalistic terms. Following Bartholomew, I believe that the conditionality of social rights is directly linked to their colonizing tendencies, and consequently take issue with them on this point (Bartholomew 1993a).

Despite my difference with Nedelsky and Scott over the type of social rights itemized in the ASC, I do agree with their general position that this document might have potentially transformative implications by institutionalizing an ongoing macro-level dialogue between the state and civil society over the meaning of social rights. Such a strategy, coupled with the pursuit of a reflexive law strategy aimed at creating spaces for dialogue at more local levels, I believe to be mutually supportive and complementary.

VII. REFLECTIONS ON A RELATIONAL PROGRAM OF SOCIAL RIGHTS

In this chapter, I have sought to make the case for establishing a relational program of social rights. This strategy has two dimensions. The first dimension is to pursue the constitutional entrenchment of "genuine social rights" in something like the Alternative Social Charter proposed by the Canadian Left. This action is explicitly intended to be more than just a defensive action designed to protect existing services. Rather, this action is intended to generate an ongoing macro-level dialogue between the welfare state and the actors in civil society claiming social rights. The second dimension of this strategy is to restructure the administrative institutions of the welfare state responsible for the delivery of social services using reflexive law. The purpose of this is to create discursive space through which actors in civil society can influence the functioning subsystem by making it aware of the external consequences of its pursuit of internal rationality.

The question which remains is whether this strategy will lead to a more emancipatory welfare state. I began this chapter by discussing how Habermas's juridification treatment connects social rights to social practices of reification, alienation, surveillance and normalization. The theoretical model of social rights which I have sought

to develop is intended, as much as possible, to address these problems.

First, universalistic service-based social rights should lead to institutional structures which involve less surveillance and normalization than those presently associated with welfare rights and the welfare state, although it must be conceded that some surveillance will be inevitable. Furthermore, universalistic social rights should reduce the normalization associated with welfare services; if everyone is entitled to the services, then hopefully there will be a reduction of social resentment aimed at welfare service beneficiaries. And lastly, the service basis of such social rights should avoid the creation of consumerist mentality which presently surrounds many citizenship issues.

Second, the dialogical dimensions to this proposal to create a 'relational program' of social rights should help work against the alienation and reification currently associated with social rights and the welfare state. By promoting and institutionalizing social rights in forms which support an interpretation of rights as dialogue with relational consequences in terms of social structure, social rights might actually help promote community and social solidarity by providing terms and forums of rational political debate. Practical discourse around the meaning of social rights could help stimulate the emergence of the

emancipatory post-conventional consciousness which Habermas holds out as society's only remaining hope.

The strategy I have developed in this chapter is tentative, and there are many questions yet to be asked. Perhaps this legal strategy is, in the final analysis, overly optimistic. Nonetheless, I do believe that this strategy would appear to be a good place to begin these debates around the future of the welfare state and social rights.

CONCLUSION

FURTHER REFLECTIONS AND CONCLUDING COMMENTS

In the Introduction to this thesis, I set out as my goal to point towards an institutional legal form and structure of social rights that would hopefully lead to a more emancipatory welfare state. My starting point for this endeavor was Jürgen Habermas's influential "juridification" critique of social rights, one of the broadest and most theoretically complex of the recent progressive critiques of social rights, social citizenship, and the welfare state. Despite a general agreement with Habermas's assessment of the welfare state in late modernity, it was my suggestion that he has likely been too hard on social rights. This in turn led to further suggestions on my part. First, that Habermas's treatment offers a fertile starting point for reconstructing social rights. Second, that Habermasian theory must expand its treatment of the scope for political action and its treatment of the politics of rights in order to make this reconstruction possible. And third, that the reconstruction of social rights is dependent upon the acceptance and adoption of a more radical approach to legal regulation.

In the preceding chapters, each of these suggestions has been developed. Have I achieved my goal? This thesis has urged the simultaneous pursuit of two legal strategies as part of a project aimed at transforming the welfare state. First, we should pursue the constitutional entrenchment of something like the Alternative Social Charter (ASC) recently advanced by members of the Canadian Left. This action is expressly intended to serve as more than just a defensive action to protect the erosion of existing social rights from neo-conservative efforts to "roll back" the welfare state. Rather, such a constitutional document could be used to reshape the welfare state by only itemizing universalistic social rights, which should impact upon the way in which social services are delivered. Effective universalistic social rights could eliminate the need for much of the surveillance currently associated with the welfare state. Additionally, if we remain true to the intentions of the ASC, then we should be looking to connect these social rights to interpretive institutional forms designed to promote an ongoing macro-level dialogue between the welfare state and the actors in civil society invoking these rights. It is my hope that this ongoing dialogue, in which rights become the site of contestation over meanings and ideologies as well as the relationships they imply, could possibly help stimulate the emergence of a post-conventional consciousness in the

lifeworld. Thus instead of contributing to social processes of alienation and reification, social rights might actually contribute to formation of community and social solidarity.

Second, social rights should be linked to the pursuit of a "reflexive law" strategy. Law should be used to create and structure "discursive spaces" within those institutions of the welfare state responsible for the delivery of services. These legally created and structured discursive spaces would create more local and partial dialogue than the macro-level dialogue discussed above, and consequently, would not likely contribute as fully to the rational development of the lifeworld. They do provide an entry point by which the lifeworld can influence the system, however. The overlapping of the two levels of dialogue, dialogue at the level of interpretation and at the level of implementation of social rights, it is hoped, would not only foster an active and participatory civil society (in Cohen and Arato's sense of the term), but also provide it with a mechanism to influence the system.

Will this strategy achieve its goals? To this question, I can give no honest answer. First, the faith I have placed in Habermas's assessment of the power of communicative forces may just be unjustified; the lifeworld may not be able to prevent the expansion of the system as it seeks to occupy increasing areas of social life, although I hope this is not the case. Second, this project remains to

a great extent incomplete. Battles are going to have to be fought at local levels to design discursive forums in which symmetry and reciprocity in discourse are actually established. These issues are primarily administrative however, and invite further contribution from those better acquainted with this field than I. And third, there is the political economy question which I put to the side as I sought to develop this approach: Can we as a society really afford the costs associated with the welfare state? These considerations have significant bearing on whether the proposed legal strategies for reconstructing social rights and the welfare state will achieve their emancipatory potential.

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