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Foundations of societal constitutionalism: principles from the concepts of communicative action and procedural legality*

ABSTRACT

Lon Fuller's principles of 'procedural legality' bring specificity to Habermas' idealized standard of procedural reason, and this brings into view possibilities for broadening the applications of the concept of 'communicative action.' At the same time, Habermas' communication theory provides Fuller's principles with a theoretical grounding against relativism. The interrelationship between the grounding provided by Habermas' idealized procedural standard of reasoned consensus and the much more practicable threshold provided by Fuller's standard of the procedural integrity of law contributes principles to a nonMarxist critical theory called societal constitutionalism.

Ideal types of nonliberal-democracy are noticeably absent from the literature of comparative political sociology. As a result, discussions of the following questions are largely absent from the literature as well: Is it the case that human beings are simply incapable of being genuinely integrated into social and political orders which fail to support rights to private property or other distinctively liberal-democratic practices and institutions?[1] Or can it be that even though this is indeed a possibility in practice, the concepts and typologies currently in use by empirical researchers simply eliminate the possibility from comparative study? Because ideal types of nonliberal democracy remain unavailable, comparative researchers are unable to simply recognize, and then possibly to describe, patterns of social change which are clearly taking place within certain sectors of Third World societies. These same patterns may already be in evidence within selected sectors of Eastern bloc societies. As a result, comparisons drawn today between the actual practices of Western and nonWestern societies are invariably one-sided, and needlessly distorted.

Countless ideal types of 'authoritarianism' may be found in the literature, of course (and generally can be traced to Linz 1964, e.g. McDonough 1981). But these types are defined residually, or by contrast to the very particular institutions and practices of 'liberal-democracies.' In taking a residual approach to authoritarianism (as recently as e.g. Mann 1987), researchers are in effect assuming that contemporary liberal-democratic institutions and practices exhaust actors' possibilities for nonauthoritarian social integration in modern societies as such. When stated this bluntly, however, it is clear that there is no known social or political theory that can ground such a grand assumption. It is simply a prejudice. Despite accumulating evidence and tendencies of social change to the contrary, postwar comparativists continue to share this prejudice as an unquestioned — literally unseen — point of departure of the Cold War era.

A collective prejudice in social research cannot be maintained in the ways that collective prejudices are perpetuated in social life. Rather, a collective prejudice among researchers can usually be traced to an epistemological gap in conceptual frameworks which researchers share despite their different specializations in professional training, and despite their great differences in beliefs and values.

The question of epistemology for the social sciences may be put in the following way: Is it possible for an empirical study to be correct methodologically, and to yet distort social events? Convinced positivists (e.g. Black 1972: 41–56) believe that this cannot be a possibility. But scientific researchers who remain impressed by Whitehead's (1925) fallacy of misplaced concreteness as well as by later rephrasings of the question of epistemology in the philosophy of science (e.g. Popper 1934, and then Kuhn 1962) know that even the most sophisticated methodological practices in the social sciences cannot ensure 'truth.' Sound methodology may veil 'distortion.'

The field of stratification research may be used to illustrate. The methodological sophistication of researchers who used concepts of status attainment was not in question when critics using other conceptual frameworks pointed out that the former researchers' findings distorted 'actual' patterns of stratification in the USA (Knottnerus 1987 for reflections). Critics pointed out that the effects of both structural (e.g. dual labor market) and organizational (e.g. career pattern) factors were missing from the very framework of concepts employed in status attainment research (Baron 1984 for a recent review). Their major criticisms were not methodological, therefore, but epistemological. That is, regardless of any particular researcher's values, training, or research techniques, the concepts of status attainment focused research upon the isolated individual (or family wage-earner) as the core unit of analysis rather than upon either classifications of types of work or upon classifications of organizations as work sites. The resulting 'distortions' cannot be

overcome, therefore, by simply adding more empirical studies within the conceptual framework of status attainment itself.

Comparativists who are critical of mainstream research in political sociology (including at one time the modernization approach, for instance) have failed to similarly point out its epistemological limitations (e.g. Moore 1966, 1979, but also Tilly and Skocpol). Their failure to develop typologies of nonliberal democracy reflects this more basic failure. Put differently, even the most critical comparativists merely react against the particular uses to which particular researchers may put the standard ideal types of liberal democracy and authoritarianism. They fail to expose an epistemological gap within the extant typologies themselves. As a result they share the mainstream's prejudiced assumptions about liberal democracy, regardless of whether they recognize that they are doing so or not.

By contrast, as soon as empirical research becomes oriented by ideal types or analytical concepts that expose possibilities for actors' genuine social integration within nonliberal-democratic settings, critical researchers can then specify where postwar comparative research suffers from basic distortions. The purpose of this paper is to explore theoretical foundations upon which empirical research may begin to escape the prejudices of postwar comparative political sociology. It explores the theoretical foundations of concepts that are designed to allow researchers to recognize and describe nascent forms of genuine social integration within nonliberal-democratic settings. In particular, it is proposed that the stark polarity between liberal-democracy and authoritarianism be replaced by the more analytical and precise distinction between aspects of social integration and aspects of social control within modern social orders and within modern organizations and institutions (Sciulli, *In Preparation*: chapter 2 elaborates this distinction).

This analytical distinction is intended to allow researchers to specify spheres of social action within, say, either the Eastern bloc or the Third World in which it can be demonstrated that actors are genuinely integrated, even as the larger sociopolitical orders lack liberal-democratic institutions and practices. Of course, the same analytical distinction would also allow researchers to specify spheres of social action within the West in which it can be demonstrated that manipulation and latent coercion are increasing, even as the larger sociopolitical orders continue to maintain liberal-democratic institutions and practices.

I BACKGROUND AND OUTLINE

The analytical distinction between social integration and social control rests in part upon a synthesis of concepts that were developed

independently and at different levels of analysis by Lon Fuller, the Harvard legal theorist, and Jürgen Habermas, the German critical theorist. Fuller and Habermas are the most important postwar representatives of two quite different traditions of theory, respectively, the Common law tradition and the tradition of critical theory (as one significant strand of neoMarxism). The purpose of this paper is to present the rationale for synthesizing their most important theoretical contributions, and for making grand claims regarding the potential contribution that the synthesis — societal constitutionalism — can make to empirical research in comparative political sociology.

In 1964 (the first edition of *The Morality of Law*), Fuller systematically formulated for the first time in the long tradition of Common law theory and practice the most fundamental, general principles underlying the Common law opposition to arbitrary government. With these principles, Fuller specified a threshold of procedures which, he argued, represents the most irreducible basis of law's possible integrity as such (Parsons 1977 demonstrates this methodically against contemporary liberal, Marxian, Weberian and Durkheimian criticisms of law). But Fuller's principles are even more fundamentally important. They specify the most irreducible bases of actors' genuinely shared recognition and understanding of substantive norms of any kind, and not simply of laws in particular. Being procedural, Fuller's threshold standard 'mediates' — that is, it both overarchs and stands between the competing claims of — actors' (and observers') understandings of the meanings (and possible legitimacy) of substantive social duties, or of the aspects of their particular ways of life that they share in common.

By the late 1960s, Habermas' work also took a 'procedural turn.' He developed a communication theory designed to specify whether actors' mutual understandings are 'genuine' or 'manipulated.' Habermas wishes to 'ground' the concept of the 'procedural reason' of actors' mutual understandings in order to replace neoMarxists' more restricted critique of alienation, as well as Weberians' vague concept of substantive rationality. In Habermas' view, a grounded concept of procedural reason offers researchers a 'more comprehensive standard of reason' than the narrow norm of purposive-rational action at the center of all Weberian (as well as a great many neoMarxian) studies of society. In Habermas' view, social enterprises could well improve their efficiency in production and effectiveness in organizing personnel, and yet the larger social orders in which they may be found could become less reasoned.

Habermas' communication theory was not available to Fuller in the mid-1960s, of course. But even today Habermas remains unaware of Fuller's work.[2] This paper demonstrates that each theorist's most important contribution to social theory may be readily synthesized, and without distorting or reifying either theorist's concepts and

distinctions. The resulting synthesis provides one of two theoretical foundations of societal constitutionalism.[3] Rather than elaborating societal constitutionalism directly, however, the purpose of this paper is to discuss the synthesis of concepts on its own terms. By indicating how concepts drawn from Habermas and Fuller 'ground' the analytical distinction between social integration and social control, the merits of societal constitutionalism are exposed at least indirectly.

Because Weber's approach to law remains an unquestioned point of departure for many researchers today in comparative political sociology and the sociology of law, Habermas' critique of Weber's concepts of legitimation and legality is reviewed in the first two sections.[4] Habermas effectively undermines comparativists' long-standing assumptions that Weber's distinction between the formal rationality and substantive rationality of law somehow provides a credible alternative to more procedural approaches. Habermas' communication theory and procedural standard of reason are then sketched in Section III as a positive, albeit idealized, response to the limitations he exposes in Weber's approach. In Section V Fuller's notion of 'procedural legality' is presented as another explicitly drawn alternative to Weber's sociology of law, but one which is decidedly practicable even as it remains consistent with Habermas' more idealized communication theory.

A two-part argument in support of the synthesis is offered in conclusion. First, Fuller's principles specify what is in effect an irreducible threshold of procedural restraints on arbitrary power, regardless of whether such power is wielded by governmental agencies or by groups, organizations and movements in society. The threshold specifies whether actors' social integration can be even a possibility in practice, or whether their mere social control accounts for social order. Second, because Fuller's threshold is irreducibly necessary to the very possibility of actors' social integration in practice, actors must honor the integrity of Fuller's procedural restraints whenever they aspire to realize Habermas' loftier ideal of 'communicative action' in practice.

II HABERMAS' CRITIQUE OF WEBER

Weber's definitions of law are well known:

> [L]aw [is an order] externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation. (Weber 1914–20: 34)
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> A 'legal order' shall . . . be said to exist wherever coercive means, of a physical or psychological kind, are available . . . in other words,

> wherever we find a consociation specifically dedicated to the purpose of 'legal coercion'. (Weber 1914–20: 317; also Kronman 1983: 72–95, and Turkel 1980–81: 45–51 on Weber's views of rational law)

In turn, Weber defined the *legitimacy* of domination in terms of the 'probability' that actors' beliefs will be 'appropriate' to each of three ideal types of domination: rational-legal, traditional and charismatic (1914–20: 213). His references to actors' beliefs and attitudes are merely his acknowledgement, however, that any system of domination in time secures actors' acquiescence or support (Habermas 1973a: 95–6).

In Habermas' view (1981a: 265–6), Weber's references to rational-legal domination in particular rest upon reasoning which is circular and spurious. On the one hand, Weber treats domination as rational-legal (a) if enforcement agencies are organized into specialized bureaucracies and (b) if citizens believe subjectively that the agencies' commands are 'right' or lawful. On the other hand, Weber defines law as *any* set of rules which is enforced effectively. As a result, once citizens who are already controlled come in time to believe that given social arrangements are 'rational' (rather than traditional or charismatic), their domination becomes rational-legal. How enforcement agencies otherwise conduct themselves, whether within or outside of their bureaucratic organizations, becomes utterly irrelevant for Weber — with the exception of when their conduct brings citizens to alter their beliefs.

Habermas considers Weber's approach to law and legitimacy to be not merely relativistic but unnecessarily apologetic. Habermas' alternative is to demonstrate that there is indeed a generalizable standard of reasoned social action beyond purposive-rational action, and that it can be used by researchers to determine whether actors' beliefs in the legitimacy of law, or in any other shared social duties for that matter, are themselves 'true' or 'reasoned:'

> In contemporary sociology, the usefulness of the concept of legitimation, which permits a demarcation of types of legitimate authority (in Weber's sense) according to the forms and contents of legitimation, is undisputed. What is controversial is the relation of legitimation to truth. This relation to truth must be presumed to exist if one regards as possible a motivation crisis resulting from a systemic scarcity of the resource of 'meaning.' Non-contingent [or non-relativistic] grounds for a disappearance of legitimacy can, that is, be derived only from an 'independent' [*eigensinnigen*] — that is, truth dependent — evolution of interpretation systems that systematically restricts the adaptive capacity of society. (Habermas 1973a: 97; also 1977b: 205–12)[5]

Unlike other theorists trained in the Marxian and Frankfurt school

traditions, therefore, Habermas does not simply dismiss law as a veil or 'reification' which distorts actors' understandings of the 'real' relations of power in society (e.g. 1963b: 109–20; 1967: 159, 165–7; other exceptions are Franz Neumann and Otto Kirchheimer). Yet, like other theorists trained in these traditions, Habermas too concludes that 'capitalistically modernized' legal institutions lack legitimacy. In his view they contribute to, rather than resist, a general 'legitimation crisis' across the Western liberal-democracies (e.g. 1973a; 1974: 178–205; 1981a: 254–71, 412 n. 49; 1982: 261–3, 281–3; 1984). Habermas' ambivalence toward law stems from his criticisms of Weber for being 'basically a legal positivist' (1981a: 262).

III HABERMAS' CRITIQUE OF LEGAL POSITIVISM

Habermas (1981a: 258–9) finds that Weber's notion of rational-legal legitimation reflects his 'one-sided' treatment of the process of rationalization generally, since Weber reduces rational law to the following three characteristics. The first is 'positivity,' whereby social life is regulated by a sovereign law-making body which employs 'juridical means of organizing' enforcement rather than resorting to coercion more directly. The second is 'legalism', whereby actors are treated not as moral agents but rather as self-interested possessors and consumers, or as strategic calculators. The third is 'formality,' whereby entire domains of social life (that is, the marketplace) are defined as neutral arenas within which self-interested actors may compete with each other using strictly strategic calculations. In Habermas' view these three characteristics may well represent the core of 'bourgeois private law' (also Macpherson 1962). But they do not exhaust the possible components of reasoned law as such.

Given these narrow views of law, when Weber otherwise deals with actors' subjective attitudes toward law his only additional references are, in Habermas' words, to 'procedures through which it [law] comes to pass.' Habermas (1981a: 255–8) ridicules these references to procedures because what Weber has in mind are mere symbols of, or instructions regarding, effectiveness in enforcement.[6] The procedures are not intended to inform citizens at all regarding what the laws prohibit or facilitate, or even regarding what the specialized enforcers are doing. Quite to the contrary, the procedures are simply cues which enforcers exchange among themselves within and across their bureaucratic agencies of enforcement. They contribute only to maintaining consistency and camaraderie among the enforcers themselves, and in this way they contribute to improving their effectiveness in social control.

This is precisely why Weber uses *Autorität* when referring to the relationship of camaraderie between a chief and his staff, for instance,

and why he then uses *Herrschaft* when referring to the command relationship between the staff of enforcers and the general population:

> [A] system of domination may — *as often occurs in practice* — be so completely protected, on the one hand by the obvious community of interests between the chief and his administrative staff (bodyguards, Pr[a]etorians, 'red' or 'white' guards) as opposed to the subjects, on the other hand by the helplessness of the latter, that it can afford to drop even the pretense of a claim to legitimacy. But even then the mode of legitimation of the relation between chief and his staff may vary widely according to the type of basis [*Autoritäts-grundlage*] of the relation of the authority between them, and, as will be shown, this variation is highly significant for the structure of domination [*Struktur der Herrschaft*]. (1914–20: 214, my emphasis)

Weber treats the *rationalization* of law, then, in terms of only two factors: (a) the professionalization of legal officials (from prophets, to honoratoriores, to secular power-holders, to professionals educated in the positive laws), and (b) the bureaucratization of the officials' agencies of enforcement.

Habermas notes that legal positivists (from Hans Kelsen to Niklas Luhmann) remain consistent with Weber when they belittle the importance of legal procedures by referring to them as a mere 'secondary traditionalism.' Legal procedures, they argue, habituate a malleable citizenry into their unfounded, strictly subjective beliefs that enforcers could justify their actions (1981a: 255–6, 266, 269–70; also 1963b: 113–14; 1973a: 36–7). This belief is unfounded because, in the view of legal positivists, there are no generalizable standards of reason upon which authorities anywhere could justify their actions in the face of sustained questioning by citizens. This is why Weber's rational-legal type of domination, to recall, rests upon the inter-relationship between effective social control by specialized enforcers and the controlled subjects' acceptance of their own social control. Weber's ideal type of rational-legal domination rests upon whether enforcement specialists reduce, or better still, utterly eliminate, citizens' questioning. When they succeed, citizens' beliefs that laws are right cannot be exposed as unfounded (1973a: 111–17).

Habermas thereby reveals the most damaging criticism of Weber's circular reasoning: rational-legal domination is not a distinct type of legitimation at all (also Parsons, e.g. 1958: 197–221; 1969: 498–9). It is, rather, 'merely an indication of [some other] underlying legitimacy' (1981a: 266, 438 n. 34). It is an indication either of traditional legitimacy, or, even more simply, of actors' unfounded, habitual deference to rulers. For Weber as for legal positivists ever since,

rational-legal domination at its foundations is as unreasoned as traditional domination. The increasing numbers of legal experts and the increasing formalities and complexities of their procedures merely 'lengthen the path to [the citizenry ever questioning] legitimation' (1981a: 269; 1982: 314–5). They do not render law any more reasoned.

IV HABERMAS' ALTERNATIVE: COMMUNICATIVE ACTION OR PROCEDURAL REASON

1. Substantive rationality v. procedural reason In order for any standard of reason to be generalizable in the contemporary world, and to thereby genuinely provide a standard of reason rather than a spurious rationale for relativistic prejudices, it must invariably be procedural in Habermas' view. It cannot possibly be directly substantive. It cannot specify that a particular way of life, in its totality, is reasoned. Rather, if there are indeed procedural requirements of reason in social action that are irreducible, then those particular substantive actions taken by any group, organization or sector of society which violate the integrity of these procedures cannot possibly be reasoned. This is the single most important thesis of Habermas' social theory. It also happens to be the thesis which Lon Fuller defended independently against the relativism and cynicism of legal positivists in the 1950s and 1960s.

Possible manifestations of reason in social life cannot possibly be recognized in common by actors or observers outside of the procedural mediation of reason. What is a substantive standard of water pollution, for instance, that is 'reasoned' (e.g. Hawkins 1984)? What is a substantive rate of inflation or a substantive percentage of unemployment that is 'reasoned'? What is a 'reasoned' relationship in substance between concerns about maintaining, say, neighborhood, community or regional integrity and concerns about erecting unnecessary obstacles to interstate (and international) commerce? What is a 'reasoned' relationship in substance between demands for greater egalitarianism and the power and authority that either state agencies or private (or public) corporations seemingly need to remain effective or efficient? These questions may be multiplied endlessly. They all revolve around the same fundamental problem: what in substance is *the* public interest? What is a substantively rational public policy?

With his procedural turn, Habermas faces this problem directly, and yet in an ironic way. He turns away from the substantive issues involved and instead concentrates upon specifying the qualities of the procedural mediation within and through which reasoned substantive actions can possibly be recognized by actors (or observers) in common. All other neoMarxists steadfastly refuse to do this. They

continue to hold out the promise of specifying more directly what is reasoned in substance in social life, and of then extending substantive reason in practice against the blockages posed by actors' alienation, reification, fetishism and 'false consciousness' (1981a: chapter 4 for Habermas' critique of his teachers). But if the procedural integrity of reason is indeed generalizable — and this has yet to be explored in this paper — then it is simply not possible to demonstrate the reason of particular social practices any more immediately or more directly (that is, in substance) without an infinite regress resulting (1981a: 171–2, 267–70, 218–20). After all, how do actors or observers, or for that matter a vanguard of activists or theoreticians, recognize which social actions are reasoned in substance without referring at some point to why their very descriptions and evaluations of the actions are themselves reasoned rather than the product of prejudice or distortion?

2. A consensus theory of truth Habermas' strategy of specifying the qualities of the procedural integrity of reason stems from his conviction that neoMarxism, as a tradition of discourse, suffers from serious limitations both in theory and in practice. His strategy stems also from his rejection of all substantive standards of reason in the 'bourgeois' social sciences, including those found in the philosophy of science and in particular in Neopositivists' copy theories of truth (e.g. Habermas 1968a, 1973b: 1–68, 1981a: 107–19; 1982: 274–8; Apel 1972, 1980; Alexander 1982 on presuppositions). Reviews of the details of Habermas' criticisms of neoMarxism and Neopositivism are both unnecessary to, and well beyond the scope of, the argument of this paper. His conclusions in each instance, regardless, are that 'truth' is not an 'objective' event revealed to individual scientists or actors in isolation, and that reason in social action is not an immediate 'substantive' result revealed to individual observers or actors in isolation. Rather, any individual's recognition of truth or reason is always mediated by the communities of communication within which such findings are directly or indirectly formulated and presented.

Thus, Habermas, proposes a 'consensus theory' of truth in science and of reason in social action. Put differently, he emphasizes the importance of the mediation of 'discourse' provided by communities of communication. Truth and reason are first and foremost manifestations of the quality of actors' and observers' communications, and only then are they reflections of the qualities of the events or actions being described and communicated. After all, actors and researchers alike invariably receive and assess what are always only partial (and too often contradictory or conflicting) descriptions and evaluations of the 'same' events and actions in the world. Habermas' 'procedural turn' is his specification of the procedural qualities of the communities of discourse within which actors and researchers eventually operate

whenever they become most rigorous — or least 'distorted' — in recognizing, understanding, describing and evaluating events and actions in common.

At their most basic level, Habermas refers to these qualities as 'universal pragmatics.' Just as universal syntactics (as presented by Noam Chomsky) proposes a grammatical code within which reasoned sentences can possibly be constructed in any written language, Habermas sees universal pragmatics providing a similar code for speech. Only within this code may speakers of any ordinary language (actors or researchers) arrive at a genuinely mutual understanding. Speakers' mutual understanding, in turn, is for Habermas the irreducible basis upon which scientific 'truth' as well as 'communicative' or reasoned social action invariably rests within any group or any society.

3. The ideal speech situation Rather than exploring the details of universal pragmatics here, it is sufficient for the purposes of this paper to address what Habermas calls the 'ideal speech situation.'[7] Only within this situation, he argues, is speakers' genuine 'discourse' or genuine mutual understanding fully realized. Within the ideal speech situation,

> participants do not exchange information [about states of affairs in the world], do not direct or carry out actions [in the world], do not have or communicate [particular] experiences. [I]nstead [they] . . . search for arguments or offer justifications

for their descriptions and evaluations of the events in social life that are of interest to them (1971: 18–19).

A speech situation is ideal, however, only when it takes place under three conditions. Habermas himself acknowledges that these conditions are not really practicable but rather are, in his own words, 'counterfactual' and 'unreal.' First, participants within the speech situation 'suspend' all presuppositions regarding which 'objective' factors may constrain their social actions and social change. Each participant temporarily treats any and all proposals for social actions as potentially practicable. This community thought experiment permits participants to 'neutralize' their personal 'motives' as well as their ties to institutional affiliations and material interests outside of the ideal speech situation. They can thereby develop a shared 'cooperative readiness to arrive at an undestanding' about each proposal strictly on its merits as an argument. As a result, and second, the validity of any participant's statements within the speech situation is determined exclusively on its merits as an argument. Its validity is determined independently of any considerations of a participant's social standing outside of the speech situation. Third, participants 'suspend' all of their earlier 'assumptions' regarding which sorts of

statements may be valid (also 1973c: 255–261; 1981a: 17–19, 22–42; 1982: 241).

Habermas insists that these three conditions ensure that all participants within the ideal speech situation may 'validate' statements or influence actors' mutual understandings of statements by the quality of their arguments. This is his 'universalization thesis' or thesis of absolute democratization. Actors' unrestrained access to, as well as subsequent democratic participation within, genuine discourse is what Habermas means by the ideal speech situation. He also refers to this as the 'symmetry-requirement' of 'discourse' (1973c: 255–61, 1981a: 17–19, 22–6; 1982: 235–6, 241, 255–8, 262–3; for Fuller's ideal of reciprocity, 1969: 23–6).

The particular effects of communicative action in substance can be expected to vary from group to group and from society to society. Yet, Habermas insists that all organizations and institutions within all liberal-democracies (as well as all social movements too, other than the exception Habermas draws specifically for the Anabaptists!) are without exception too far removed from meeting the procedural standards of communicative action for their actions to be legitimated as reasoned. As a result, Habermas' examples of communicative action are drawn exclusively from actors' interpersonal relationships. In particular, he uses psychoanalytical sessions as an exemplar of how speech may evolve into communicative action: an analyst uses 'depth hermeneutics' to remove an analysand's phobias or deepseated 'distortions' in understanding the social world, and thereby establishes the preconditions upon which the analysand's reasoned discourse and reasoned action become a possibility (1968a: chapters 10–12; 1971: 28–32, 37–40; 1981a: 20–1, 41–2).

If Habermas' idealized standard of procedural reason is to possibly inform empirical research in comparative political sociology, it must be explicitly interrelated with Fuller's procedural standard of law. Put simply, Fuller's approach to law is more concrete and practicable than Habermas' ideal of speech, and yet Fuller's procedural threshold is consistent in every respect with Habermas' grander procedural ideal. Habermas' critique of Weber's views of rational law cannot be applied to Fuller's legal theory. Conversely, Fuller's approach to law exposes a major gap in Habermas' own theorizing: certain extant organizations and institutions within certain modern societies are indeed legitimate in a sense that Habermas must acknowledge is reasoned even though they certainly fail to realize the more rigorous procedural standard of ideal speech.

V. LON FULLER AND PROCEDURAL LEGALITY

Like Weber and Habermas, Fuller accepts that all institutions within

modern societies adapt in one way or another to pressures of rationalization, and that these pressures are systemic, inexorable and immutable. He accepts also that actors experience these pressures as the increasing fragmentation of their once shared substantive interests, normative beliefs, and understandings of their own social lives. As bureaucratic agencies maintain social control despite this fragmentation, Fuller accepts too that these agencies are just as capable of enforcing arbitrary decrees as legitimate laws, and that actors (and observers) may simply believe in time that well-enforced decrees are actually legitimate. But unlike Weber and Habermas, Fuller presents a procedural threshold which allows researchers (as well as actors) to specify when even well-enforced and subjectively accepted decrees are none the less 'lawless,' or are mere cues of unreasoned social control.

1. Fuller's procedural threshold Fuller points out that once the membership of any community extends beyond the simplest interpersonal relationships, actors' 'natural identity of interests' (John Locke's phrase) or casual normative consensus is no longer a likely basis of their social bonding or social order. Rather, law comes into play. With law, both actors' mere social control through the effective enforcement of decrees as well as actors' possible genuine social integration through their mutual recognition and understanding of shared social duties become possibilities.

> One can imagine a small group — transplanted, say, to some tropical island — living successfully together with only the guidance of certain shared standards of conduct, these standards having been shaped in various indirect and informal ways by experience and education. What may be called the legal experience might first come to such a society when it selected a committee to draw up an authoritative statement of the accepted standards of conduct. (Fuller 1969: 130; also 205–6)
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> Though it can be said that law and [substantive] morality share certain concerns — for example, that rules should be clear — it is as these concerns become increasingly the objects of an explicit responsibility that a legal system is created. (Fuller 1969: 131)

In this way Fuller concedes that Weber was correct, but only in part: in the modern age, actors (or observers) can only recognize, describe and evaluate whether rules are being *successfully enforced* in terms of whether instances of disobedient behaviour (or deviance) increase or decrease over time. And, at least in principle, this can be calculated purposive-rationally by outside observers.

But Fuller raises a point that moves beyond this tautology and beyond the standard of purposive-rational action: whether rules are *successfully understood* by actors in common, or whether actors actually

understand what their shared social duties are, cannot be recognized, described and evaluated by referring simply to whether disobedient behavior increases or decreases. Actors may purposefully disobey rules that are clearly understandable (e.g. civil disobedience in Great Britain and the USA). They may also disobey rules inadvertently — or, for that matter, authorities may enforce obedience unevenly — when rules are not understandable (e.g. 'laws' prohibiting 'threats to the State').

Whether actors and authorities understand what their shared social duties are, therefore, can only be recognized, described and evaluated by observers (or actors), in Fuller's view, if the duties remain consistent with the procedural qualities of interpretability which distinguish law proper from mere decrees that may be well-enforced. Specifying these qualities has long been the preeminent concern of the Common law tradition of Anglo-American countries. Because of this, the Common law tradition, unlike the Civil law tradition of the Continent (Merryman 1969), rests upon an implicit but none the less generalizable standard of reason in social action. Fuller was the first legal theorist in a very long line of Common law jurists and theorists to explicitly formulate and discuss this standard of the qualities of law's interpretability.

A sharp distinction must be drawn, for instance, between the legitimacy of a leader's claim to hold an office (due, e.g. to an electoral result) and the legitimacy of the leader's subsequent actions once in office. The former may rest upon majority opinion or popular acceptance. But the latter, Fuller points out, can be determined quite independently of popular acceptance, and unambiguously. Fuller's thesis (1969: 46–84) is that shared social duties of any kind, within any sphere of modern life, can only be recognized and understood in common by heterogenous actors (and observers) when rule-making conforms to each of eight procedural qualities:

1. Generality. In order to be lawful, a system of rules must be applicable in principle to all citizens and groups, regardless of whether the rules are equally acceptable to all of them in substance or not. The case-by-case approach taken by regulatory agencies, Fuller notes, may in time become divorced from generality. In his view, this can lead to inadvertent exercises of arbitrary power by entire agencies of enforcement (Hawkins 1984: 33–5 for a clear example in Great Britain). Whether agencies' rulings are enforced effectively, therefore, or whether they continue to be accepted subjectively as 'right' or 'lawful' by most citizens, does not somehow render them lawful if they encroach against the principle of generality.

2. Promulgation. Although it is not necessary for every citizen to be able to understand the meaning of every law, citizens who are most interested in or especially affected by a law must in principle have access to law-makers' proceedings. Those affected must in principle

be able to determine authorities' intent. Citizens who are less informed (the majority), after all, tend to be influenced by the acceptance or criticism of law by those who are more informed (the minority).

3. Prospectivity. Within a system of prospective rules, situations may well arise in which retroactive laws are acceptable and necessary, e.g. conferring validity on marriages that had not been conducted properly at the time, judicial overturning of precedent, amendments to the tax code, etc. But retroactive enactments must remain exceptional efforts to fine-tune the effects of prospective law.

4. Clarity. Beyond obligations to not violate explicit constitutional restrictions, any law-making body either in government or in the 'private' sector has a responsibility to draft clear, coherent rules of enforcement so that compliance and noncompliance may be recognized unambiguously by actors and enforcers alike.

5. Non-Contradiction. Laws are seldom in violation of 'contrariety' (i.e. A, not-A, or punishing a citizen for doing what he was ordered to do). But they must also avoid 'contradiction,' or being incompatible or repugnant, and failing to correspond to any sensible legislative purpose. For instance, a right to freedom of assembly is meaningless if groups find it especially difficult to secure permits to stage public demonstrations.

6. *Possibility.* All of the principles of legality, according to Fuller, may be logically reduced to this requirement. Law must avoid requiring conduct of citizens which is beyond their typical abilities to perform. For example, law cannot require individuals to alter their ascriptive characteristics in order to enter the civil service or to escape prosecution. Impossible laws — laws that are secret, retroactive, unclear or contradictory — allow power-holders to selectively eliminate real or imagined political opponents. Since all individuals are in principle placed in jeopardy by such laws, particular power-holders may casually select where and when to enforce 'law' at whim, or regardless of how an individual actually behaves.

7. *Constancy.* This is self-explanatory, but it also provides the basis for the harshest criticism of contemporary rule-making in the USA and advanced societies generally. Across the West, legislatures, courts, professional associations and organizations ceaselessly accommodate interest group lobbying and political party logrolling at the expense of institutional principle or consistency (e.g. Lowi 1969; Vile 1967; Hayek 1973–9).

8. *Congruence.* Declared law must be in congruence with officials' actions. Fuller says this principle is the most complex and the most interrelated with rule-makers' substantive policy concerns. He notes that breakdowns in congruence may be a manifestation of many factors (as examples, mistaken interpretation; inaccessibility of the law; lack of insight into what is required to maintain the integrity of

the legal system; bribery; prejudice; indifference; stupidity; a drive for personal power). The means used to maintain congruence may vary from society to society (as examples, procedural due process; habeas corpus and right to appeal; consistency in constitutional principles).

These eight qualities specify a 'threshold' of irreducible procedural restraints on arbitrary exercises of collective power and on the manipulation of popular opinion and normative 'consensus.' This threshold does not ensure that once arbitrary power is restrained the good society will result in substance. It ensures, rather, that the good society remains a possibility, and that in the meantime the worst types of social order and the most manipulative or onerous manifestations of social control can be successfully avoided. Even a democratic electorate, for instance, cannot encroach against this threshold by voting to acclaim unclear or contradictory laws without their votes and political participation too being reduced to mere instruments of arbitrariness or authoritarianism.

Unlike liberal and Marxist theories alike (Habermas 1963a: 41–82; 1963b; 82–120; 1963c: 121–41 for methodical criticisms of both), therefore, Fuller dismisses the self-serving liberal-democratic view that the procedural integrity of law can only be successfully institutionalized within capitalist or liberal-democratic social orders (1969: 17–18). But Fuller also ridicules the complacency of neo-Marxists who imagine that (a) specialized proceedings devoted to legal interpretation are only necessary to restrain arbitrary exercises of collective power within capitalist systems, and that (b) 'revolutionaries' need not concern themselves with honoring standards of procedural integrity because their own pursuit of substantive justice or substantive rationality somehow stands 'above' mere 'bourgeois' formalities (Lukes 1985 for a recent review, and Lukacs 1920: 256–71 for a typical example).

2. Rethinking the polarity between law and morality Rather than simply exposing limitations in other theorists' approaches to law, Fuller establishes the procedural threshold's generalizability in more positive terms. He recognizes, as does Habermas, that if comparative law or comparative political sociology is to possibly escape succumbing to the most vulgar relativism, then some interrelationship between law and reason must be established. Moreover, the standard of reason involved must be as generalizable as Weber's generalizable (but narrow) norm of purposive-rational action. Vulgar relativism results from Weber's ideal types, to recall, because the norm of purposive-rational action and the concomitant standard of rational-legal legitimation are too one-sided or too narrow. In terms of the latter, contemporary Great Britain and the USA as well as the Soviet Union and South Africa are equally 'rational-legal.' All four societies, after all, (a) enforce their laws through agencies which are bureaucratically

organized and (b) adjudicate enforcement using professionals who are trained in their respective country's positive laws. At the same time, Fuller rejects the grand sweep of traditional natural law responses to relativism (which Nonet and Selznick 1978 continue to explore).

In an effort, therefore, to escape the broad references to 'morality' that characterize natural law theories, as well as to escape the easy relativism of positivist theories that presuppose that law is *a priori* separate from a mere residual category that they label 'morality,' Fuller at least exposes where a broader standard of reason may be found by distinguishing between the 'morality of duty' and the 'morality of aspiration.' The two types of morality are distinct and yet inherently interrelated. Their points of interrelationship expose the points at which positive laws and moral principles are inherently interrelated. Fuller aptly refers to these irreducible interrelationships as the 'internal morality of law' (1969: 5–9).

The morality of aspiration is exemplified by the Aristotelian notion of 'praxis' or the 'good life.' Another example is the Marxian vision of praxis, or of laboring that takes place under conditions of disalienation, abundance and laborers' unmediated access to resources. By contrast, the morality of duty is exemplified by basic criminal law. As an ideal of the most basic social duties, criminal law would impose only those restraints upon individuals' social behavior which are absolutely essential for social relationships to possibly be maintained in practice within any society. Fuller's point is that actors' fidelity to such a shared morality must already be in evidence whenever they aspire to realize the 'good life' in practice, regardless of how they may define the latter at any particular moment in time.

Because the morality of duty is so basic to shared social life as such, it may be thought at first that actors' mutual understanding of what their shared duties are is self-evident to them. But *actors' mutual understandings of shared duties is no more self-evident to them than their mutual understandings of the larger category of 'morality'* (1969: 11). Indeed, duty itself is an utterly meaningless notion unless and until its inherent interrelationship to aspiration is recognized: the purpose of actors' shared obligations or duties is, at the very minimum, to secure the most basic social foundations upon which actors may individually or collectively formulate and pursue any grander collective aspirations of any kind.

To attribute any purpose, even an irreducible purpose, to any social enterprise is, of course, to attach a *telos* to it. And any teleology is a 'morality.' This is why Fuller calls actors' shared recognition and understanding of even the most basic social obligations a 'morality.' Put differently, as soon as it is conceded that shared duties only have meaning as the irreducible bases of any grander social aspirations of any kind whatsoever, duty and aspiration, enforcement and interpretation, fact and value have already been interrelated. At

the same time, neither side is utterly reduced to the other. Rather, if enforced social duties are overextended into aspirations, if they are extended beyond obligations that are truly basic, then the horizon of actors' potential aspirations is narrowed unnecessarily. Similarly, if particular actors' aspirations or ideals for social change are treated as enforceable social duties that all actors are compelled to bear in common, then the 'floor' of actors' shared social duties may be needlessly overextended.

Still, neither the narrowing of the horizon of actors' aspirations nor the extending of their floor of shared duties is as such the problem. As lawyers are fond of saying, reasonable men and women can disagree over the significance of such matters. The problem is rather recognizing when collective exercises of power are even possibly reasoned and legitimate and when they are clearly particularistic and arbitrary: when agencies of enforcement move toward either direction or imbalance, their consistency in enforcing social duties becomes more and more difficult for either enforcers or actors to simply recognize in practice. No longer is 'duty' clearly borne by all actors in common. It instead becomes something that clever actors routinely evade. Even worse, those duties that truly are basic no longer appear to be basic to all actors in common. They too are enforced too unevenly for their shared recognition to be a possibility in practice. Enforcement agencies draw from a fabric of 'duties' that is actually comprised not only of truly basic duties but also of enforced aspirations and overextended obligations. As a result, particular enforcers or particular agencies must decide on an *ad hoc* basis which 'duties' they will actually enforce at particular times and at particular places.

In short, aspirations and duties cannot be reduced to each other. They remain distinct. Yet they are invariably interrelated. The problem becomes whether actors (or observers) can possibly recognize when authorities either are overextending duty into regimentation or are overextending aspirations into arbitrary decrees of enforcement? Even more, can they possibly recognize either imbalance in practice even when either occurs inadvertently rather than by purposeful design? Given the differentiation and complexity of all modern societies, and the concomitant difficulties of establishing or maintaining any shared recognition of such imbalances or encroachments, Fuller insists that the very institutional integrity of any enterprise of rule-making — within any organization at any level of society — hinges ultimately upon whether the enterprise at least maintains fidelity to the eight procedural restraints in both its internal operations and in its external actions (Fuller 1969: 27–30; Meyer and Rowan 1977 for the vaguer notion of 'institutional environment').

Put differently, a rule-making body's most basic duty, its activity of simply maintaining its own institutional integrity as an enterprise that

is not utterly reducible to enterprises of mere effective enforcement, is simultaneously one of its highest aspirations as a distinct institutional enterprise. Once any rule-making body anywhere in society violates any one of the eight principles, it loses its integrity as a distinct institution. It abandons its most minimal institutional responsibility. It fails to ensure that shared social duties are at least understandable. It simultaneously loses the groundwork upon which it could possibly maintain its own institutional autonomy and integrity against the competition between, and drift of, substantive group interests both within and outside of the rule-making body (this was Lowi's 1969 criticism of pluralism in the USA).

Fuller's procedures mark something of a contemporary 'Archimedean point.' He notes that powerholders on one side, and actors on the other, must each face an implication of encroachments against this procedural threshold. Actors must realize that once powerholders encroach against the procedural threshold, there is no longer any reasoned basis for actors to *feel* morally obligated to obey 'laws.' Law-makers, after all, are already operating on the assumption that actors are incapable of reasoning about, or taking responsibility for, understanding and honoring shared obligations. In turn, law-makers must face the fact that they have indeed crossed a most significant threshold of normative restraint. Having done so, they can no longer be reasoned in continuing to *feel* obligated to comply with, or to assume a fiduciary responsibility for upholding, any other remaining principles of legality or of normative restraint. This is why Fuller notes that:

> [I]nfringements of legal morality tend to become cumulative. A neglect of clarity, consistency, or publicity may beget the necessity for retroactive laws. Too frequent changes in the law may nullify the benefits of formal, but slow-moving procedures for making the law known. Carelessness about keeping the laws possible for obedience may engender the need for a discretionary enforcement which in turn impairs the congruence between official action and enacted rule. (Fuller 1969: 92)

A critic may respond, of course, that Fuller's principles may be violated in the interest of 'substantive justice' or in the interest of a revolutionary party's vanguard strategy. But Fuller's concern remains unaddressed, and its fundamental importance undiminished: in what possible sense could actors simply recognize and understand in common whether substantive justice or the strategy of revolution is really being attained? Given actors' functional differentiation, regional and ethnic heterogeneity, normative relativism, and material inequalities (e.g. 1969: 33 ff), how could they know whether such aspirations are even being attempted rather than simply being feigned?

VI FOUNDATIONS OF SOCIETAL CONSTITUTIONALISM: INTERRELATING PROCEDURAL LEGALITY AND COMMUNICATIVE ACTION

1. Regarding Habermas' oversight of Fuller's procedural threshold Habermas sees liberalism's 'rational natural law' tradition, its tradition of private property rights and free contract, as the 'first to meet the [modern] demand for a procedural grounding of law, that is, for a justification by principles whose validity could in turn be criticized' (1981a: 264; 1963b: 85–6). This *attempt* is instructive enough for Habermas that his entire reading of 'bourgeois legality' is rendered ambivalent rather than remaining one-sidedly critical. In his view, all legal and moral theories which fall within the category of 'cognitivist ethics' (such as liberal contract theory and Kantian morality) seek 'abstract universality' for their normative statements rather than simply acceding to the relativism of actors' substantive beliefs and interests. Habermas places his own theory of communicative action or 'procedural reason' within this same category.

The category of cognitivist ethics begins to reveal why Habermas' reading of bourgeois legality is ambivalent. Another indication is contained in the following passage:

> Legal proceedings and the working out of compromises can serve as examples of argumentation organized as disputation; scientific and moral discussions, as well as art criticism can serve as examples of argumentation set up as a process of reaching agreement. (1981a: 35)

Rather than treating courtroom proceedings as simply another form of strategic or manipulative action that is altogether divorced from reason and communicative action, Habermas sees courtroom proceedings 'as a special case of practical discourse' (1981a: 412 n. 49).

> Thus, *all* arguments . . . require the *same* basic form of organization, which subordinates the eristic means to the end of developing intersubjective conviction by the force of the better argument. (1981a: 36, my emphasis)

This is what renders his evaluation of bourgeois legality ambivalent: like speech within any deliberative body, even argument within the courtrooms of liberal-democratic societies also retains at least some *elements* of communicative action.

Even with this ambivalence, however, Habermas' fails to appreciate the distinctiveness and critical potential of the Common law tradition. Fuller's principles are not tied exclusively to either liberal contract theory or to the practice of classical liberalism. Rather, they can credibly claim generalizability, as theoretical or conceptual principles, beyond the particularity of their historical origins. To read the jurist Sir Edward Coke, for instance, as an unwitting apologist for the

liberal society strictly depicted by Thomas Hobbes is as great a distortion as to read Hobbes as a theorist who was preoccupied with procedural restraints on arbitrary power![8] Put differently, Habermas has never addressed the possibility that Common law procedural principles of restraint on arbitrary exercises of collective power can credibly claim 'abstract universality' beyond liberal-democratic society, just like Habermas' own principles of procedural reason. At the same time, the former principles, unlike the latter, are eminently practicable rather than idealized or 'unreal.' Habermas has not seen, that is, that *the more practicable procedural restraints on arbitrary power are an irreducible threshold (that is, a duty) which actors must institutionalize in practice before they can possibly attempt to realize Habermas' much more idealized procedural aspiration of communicative action.*

The issue can be put to Habermas even more directly: even if all actors who aspire to realize communicative action in practice were as 'rationally motivated' as Habermas could ever hope to expect, *they would none the less genuinely and sincerely disagree at every moment along the way as to whether their actions are indeed progressing toward or regressing from the ideal.* Regardless of the generalizability of universal pragmatics, actors do not share an 'intuitive' ability to recognize and then to restrain either purposeful or inadvertent encroachments of arbitrary power into more and more sectors of their social lives. Indeed, should actors aspire to realize Habermas' ideal of communicative action without first institutionalizing Fuller's practicable mediation or threshold, *they would invariably extend arbitrariness and authoritarianism rather than possibly realize the ideal.*

The lofty aspiration of conforming to Habermas' idealized procedures without mediation, coupled with the usual ambiguities, misunderstandings and miscommunications that actors experience in all collective enterprises within modern societies, offers an unnecessarily wide latitude to demagogues. It is quite an easy matter for demagogues to simply mouth fidelity to the integrity of 'communicative action,' as one projected goal within some purported long-term 'plan' of social democracy or of libertarian license. Even worse, they may cite the authority of what Habermas calls 'therapeutic critique' to silence those critics who question the sincerity of this self-declared fidelity (Habermas, 1968a: chaps 10–12; 1971: 28–32, 37–40; 1981a: 20–1, 41–2). Yet the same actors, with the same demagogues among them, may readily and unambiguously recognize in common, and at every step along the way, whether leaders are indeed maintaining fidelity to, or encroaching against, the integrity of Fuller's eight principles.

As an irreducible threshold or 'Archimedean point,' the eight principles of procedural legality allow actors (or observers) to sharply differentiate between actors' authoritarian or manipulated social control and their possible social integration. Even more, the threshold

allows them to do so by exposing the direction of change of entire patterns of social actions being taken by particular organizations or institutions within particular sectors of modern societies, rather than leaving them no alternative except to attempt to plumb participants' motivations or intentions at particular points in time. Fuller's principles are a procedural morality of the most minimal duties of rule-making bodies (even though Fuller himself fails to emphasize this point, e.g. 1969: 40–6). As such, whether actors who aspire to realize communicative action in practice already uphold the integrity of Fuller's eight principles may be unambiguously recognized by them as well as by observing social scientists. Actors' motivations (as well as the presuppositions of social scientists for that matter) may otherwise remain quite heterogeneous, and even inconsistent or incompatible.

Fuller's procedural threshold differs in two important respects from Habermas' procedural aspiration, therefore. First, Fuller's standard is not 'unreal.' It may be, and indeed it has been, institutionalized (however temporarily at times) within many sectors of many modern societies. Beyond courts, legislatures, boards and commissions, Fuller's threshold standard has been institutionalized at least in some part within universities, public and private research centers, research divisions of private corporations, professional associations, intellectual, literary and artistic networks, and even within selected corporate boards of directors (Useem 1984 documents this in Great Britain and the USA, but his conceptual apparatus fails to bring its implications into view). By contrast, Habermas' standard has never been institutionalized, nor can it ever be.

Second, ruler-makers may use physical and material sanctions to uphold Fuller's standard against violations without necessarily placing all actors in jeopardy of repression under arbitrary exercises of collective power. Indeed, sanctions employed in support of Fuller's threshold are genuinely integrative, even if coercive. Such sanctions cannot be reduced, in other words, to the sanctions of mere social control (Giddens 1985 for a simple, absolutist critique of 'surveillance,' and Wiley's 1987 call for greater balance). By contrast, should one set of actors attempt to use sanctions of any kind to somehow support Habermas' ideal standard against encroachments by others, arbitrary power would result invariably — unless the threshold specified by Fuller is already being upheld and restrains those wielding sanctions.

2. Interrelating the procedural threshold and the procedural ideal Fuller's procedural threshold of reasoned social action also provides a basis for critically reevaluating Habermas' absolutist critique of contemporary institutions and his resulting thesis of legitimation crisis. This basis also closes off any casual reversion to (a) the dogmatism of neoMarxism's absolutist critiques of ideology and alienation (e.g.

Lukacs 1920: 256–71; 1922: 83–222; Horkheimer and Adorno 1944; Marcuse 1964) or to (b) the complacent relativism of either Weberian ideal types or surveys of actors' subjective opinions about the legitimacy of social and political institutions. Fuller's threshold opens the way to specifying the points at which particular liberal-democratic institutions and practices lose reasoned justification, become arbitrary, and contribute to manifest or latent authoritarianism in social life. Indeed, because Fuller's standard is both practicable and irreducible to the very possibility of actors' mutual understanding of shared social duties of any kind, the resulting examination of liberal-democratic institutions and practices may well be more critical and radical than Habermas' broad, absolutist critique.

The resulting synthesis of Fuller's floor of procedural duties and Habermas' ceiling of procedural aspirations contributes one important part of a new critical theory called societal constitutionalism. Societal constitutionalism is decidedly and uncompromisingly nonMarxist, and yet its approach to the study of organizations and institutions within liberal-democratic societies is radical rather than apologetic. Like other conceptual frameworks currently used in comparative research, societal constitutionalism too is designed to orient researchers' descriptions and evaluations of the substance of social and political actions. It has nothing to do, for instance, with either the formalities of written constitutions or typologies of forms of government. But unlike other comparative frameworks, societal constitutionalism attempts to address the epistemological limitations that were raised at the beginning of this paper by specifying a threshold of procedural restraints on arbitrary exercises of collective power in society that is generalizable. It is applicable to any exercise of social power by groups and institutions within any sector of a modern society. As such, it allows researchers to sharply differentiate between possible instances of actors' genuine social integration in practice and clear instances of their manipulated social control or latent coercion — and it does so regardless of whether liberal-democratic institutions are otherwise present in a modern society or not.

Put differently, societal constitutionalism is unhesitatingly critical of many specific practices and institutions within contemporary liberal-democracies, and it is at least open-minded regarding changing situations outside of the West. That is, unlike liberal-democratic and even social-democratic theories, societal constitutionalism remains open to possibilities for actors' genuine social integration within sectors of the Third World and even within sectors of the Eastern bloc. Institutions and practices within the latter societies can be expected to remain quite different from those found within the West in general and within Great Britain and the USA in particular. Yet, some sectors of selected Eastern bloc countries are likely already genuinely integrative in practice rather than being reducible to

authorities' successful enforcement of social control. At the same time, however, other sectors of the same Eastern bloc countries may well have become more and more subjected to latent authoritarianism and manipulation, even as manifest coercion is no longer in evidence.

The point of societal constitutionalism is to convert these issues into researchable problems that can be explored quite independently of whether Eastern bloc countries otherwise adopt or fail to adopt Western liberal-democratic institutions. Comparative political sociologists who use the inherited conceptual frameworks of the right and the left have simply lacked the concepts and categories that could permit them to dispassionately recognize and document such changes of events in the world.

Moreover, for purposes of debate among social theorists, societal constitutionalism's synthesis insulates both Fuller and Habermas from the most important criticisms that they have been unable to rebut in isolation. On Habermas' side, there are the long-standing criticisms that (a) his communication theory cannot inform research and cannot be linked to political practice and that (b) his references to 'therapeutic critique' as a model of communicative action are vague and thereby available for misuse by demagogues (e.g. McCarthy 1978: 211–13; Gadamer 1967: 32–3; Ottman in Thompson and Held 1982: 94–7; Nielsen 1979: 278–9). As noted above, Habermas' idealized procedures can retain their generalizability and yet be brought to political practice by being linked to Fuller's threshold standard. The same linkage removes the availability of Habermas' ideal for demagogic misuse.

On Fuller's side, there is the criticism (e.g. by Hart 1965) that his legal theory elevates the particular practices of Common law institutions to a 'generalizable morality' which is not really generalizable but is rather merely posited by Fuller without being grounded theoretically. Lacking grounding, it is not a 'scientific' basis for comparative study but a mere normative ideal. As noted above, however, Habermas' critique of Neopositivism and resulting communication theory ground Fuller's standard of procedural legality today against these criticisms.

Fuller's critics are generally unfamiliar with Habermas' works, including Habermas' criticisms of Weber's sociology of law and legal positivism. They are also unfamiliar with Habermas' rationale for turning to a consensus theory of truth. As a result, critics fail to appreciate the formidable theoretical grounding to which Fuller's procedural principles may appeal for support today. Indeed, Fuller saw the need for just such a grounding (1969: 138, 184–6). When drawing upon Wittgenstein in response to Hart and other critics, he noted, for instance, that his legal theory requires a communication theory in order to establish its grounding and generalizability beyond the Common law tradition. Habermas' elaboration, reformulation

and extension of Wittgenstein's work on 'language games' (also Apel 1980) provides the grounding today which Fuller envisioned in the 1960s but never developed himself.

That a great many contemporary rule-making institutions and organizations routinely violate the integrity of Fuller's procedural threshold within the Third World, the Eastern bloc and even across many sectors of the Western liberal-democracies does not mean that the threshold is normative. It does not mean that the threshold is ideal and relativistic rather than practicable and grounded. Quite to the contrary, the frequency and extent of violations of the threshold today means merely that even the most minimal shared duties of rule-making as such are indeed also institutional aspirations. Social and political enterprises of rule-making may very well lose rather than retain their institutional distinctiveness. Whether law-making remains a distinct institutional enterprise within any sector of the modern society always remains a strictly voluntaristic project (Sciulli 1986). It never becomes somehow 'determined' by systemic processes, or by indices of economic output, political participation, or even tolerance for groups' diversity in beliefs, interests and ways of life. Organizations and institutions can be tolerant of diverse interests, beliefs and ways of life and yet be quite manipulative or even authoritarian (in Brazil, for instance, e.g. McDonough 1981).

Put differently, most institutions within modern societies are not dedicated to, nor very adept at, formulating rules which are understandable or interpretable. They also cannot be expected to ever become very adept at this distinct enterprise unless and until they are compelled to do so, either by their own participants or by those groups in society that are affected by their actions. As both resource mobilization theorists in the study of social movements (McCarthy and Zald 1977, Oberschall 1973) and population ecology theorists in the study of organizations (Hannan and Freeman 1977) correctly point out, most organizations and institutions within modern societies (whether familial, economic, political or religious institutions) are dedicated to effectively controlling their own participants, and to efficiently producing or otherwise attaining the material goods and services that they need for effective control (and for possibly attaining collective goals). But, as John Meyer has been insisting for over a decade (e.g. Meyer and Rowan 1977), not all organizational and institutional practices can be reduced to such concerns. Societal constitutionalism sharpens Meyer's point. It emphasizes that those particular societies which contain institutions and organizations that generally uphold the integrity of Fuller's principles are insulated from legitimation crisis (and from the reductionism just noted) in ways that Habermas and the other theorists just mentioned have yet to appreciate: the minimal threshold standard of procedural integrity is today *sufficient* for there to be *reasoned* legitimation of institutions and

organizations by any standard Habermas and the others may wish to cite. The contemporary problem — in practice rather than in theory — is that too many contemporary alternatives to Western formal democracies (within the Eastern bloc in particular) simply fail to secure, or even to aspire to institute this threshold of minimal restraints on arbitrary power.

3. Challenges to critics and to Habermas To criticize Fuller's procedural standard of law in the 1980s, empirical researchers must be prepared to take at least one of three steps. They must demonstrate, first, that Habermas' critique of Neopositivism and resulting procedural standard of communicative reason are not generalizable but relativistic. That is, they must demonstrate that a copy theory of truth or of reason is more credible than an emphasis upon the procedural integrity of communication communities. Or they must demonstrate, second, that Fuller's eight principles are not consistent with Habermas' standard of communication reason. They must demonstrate that communicative action may be realized in and through collective action more directly, or without being mediated by prior fidelity to Fuller's procedural threshold. Or they must demonstrate, third, that Weber's notion of 'rational-legal legitimation' may be substituted for Fuller's principles of law, and yet empirical researchers can still avoid the most vulgar relativism of placing Great Britain, the USA, the Soviet Union and South Africa into the same category of rational-legal (as opposed to traditional or charismatic) legitimation. Either of the latter two steps would require researchers to establish that *substantive* norms of restraint on arbitrary power may somehow be unambiguously recognized (copied) in common by heterogeneous actors in modern societies, despite the increasing systemic pressures of rationalization and fragmentation.

Aside from specifying a threshold which separates possibly responsible uses of collective power from clearly arbitrary and manipulative uses, Fuller's principles also put two important issues to Habermas. These issues at least suggest why societal constitutionalism is a nonMarxist and yet critical theory. First, because Fuller's principles are an irreducible threshold of restraint on arbitrary power, they may well be institutionalized within modern societies which otherwise lack liberal-democratic institutions of private property, national elections, competing political parties and even unrestrained freedom of speech and assembly. In short, the threshold restraints neither inherently support nor even indirectly accommodate or tolerate possessive individualism or 'capitalistic modernization.' With its precision, moreover, it radicalizes comparative research in ways that Habermas' thesis of legitimation crisis overlooks. For instance, liberal-democratic institutions which encroach against the threshold may be characterized not simply as unreasoned and manipulative, as Habermas would have

it. They may also be demonstrated to be authoritarian, whether latently or manifestly. Opposition to and eventual rebellion against such liberal-democratic institutions may be demonstrated to be both reasoned and responsible (rather than ideological or deviant) whereas failure to oppose arbitrary encroachments against the procedural threshold may be demonstrated to be irresponsible and unreasoned.

Second, because Fuller's procedural restraints represent a threshold that is irreducible to the possibility of actors' genuine social integration, they must be institutionalized within the decision-making units of any social movements whose members are self-characterized as seeking 'emancipation' from manipulation and distortion. Put differently, procedural legality must be institutionalized as part of 'discourse' and 'communicative action' in Habermas' sense. Discourse or communicative action which violates the integrity of Fuller's threshold is simply an oxymoron.

Habermas' concerns about legitimation crisis will remain unimportant empirically (Weil 1987) until some political and socioeconomic system emerges which can compete at least to some extent with the Western formal democracies materially, and which can also securely institutionalize Fuller's threshold. This is not in principle beyond the capabilities of nonWestern societies. To reveal this is to already reveal the foundations of an ideal type of nonliberal 'democracy,' or better put of nonliberal social integration. The synthesis of procedural concepts found in Fuller and Habermas holds out the promise of allowing comparative researchers to finally fairly describe and evaluate the direction that political and social changes are taking in the Third World and Eastern bloc. Comparativists need no longer presume either that the nonliberal-democratic is invariably the authoritarian, or that Western liberal-democratic institutions exhaust the possibilities for actors' nonauthoritarian social integration in modern societies.

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NOTES

* A longer version of this paper was presented at the 1985 Annual Meeting of the American Sociological Association in Washington D.C., at a session chaired by Morris Zelditch, Jr. of Stanford University. He provided excellent type-written commentary and criticisms. Comments presented at the session by Professor Seligman of Hebrew University on all four session papers were critical, to the point, cogent and helpful. In my view a model of the commentator's craft. Finally, thanks to Dean Gerstein for circulating the longer version of this paper to colleagues in Germany at the first German-American Social Theory

Conference, and to Jeffrey Alexander, Frank Lechner and Russell Dynes for general discussions and encouragement.

1. These institutions and practices include: competing mass political parties, pluralist interest associations, democratic elections for public offices, the state's recognition of actors' formal rights of speech, assembly, equal opportunity, and, of course, private ownership and control of capital. Sartori (1962) for a standard discussion.

2. It is curious that despite his masterful critique of Neopositivism (1968a; 1973c), Habermas has never noted the debate in the late 1950s between Fuller and Ernest Nagel on the fact-value distinction in science and law: Fuller (1956; 1958b); Nagel (1958); Fuller (1958c); Nagel (1959). It is even more curious that despite his critique of Weber for succumbing to legal positivism, Habermas has never referred either directly or in footnotes to Lon Fuller. Niklas Luhmann, surprisingly, cites Fuller (e.g. 1972: 290, 345, 348, 363, 370) as well as the Hart-Fuller debate (1972:20). But Luhmann does not demonstrate that he understands the implications of Fuller's procedural approach to law. Habermas refers indirectly to H. L. A. Hart (1974: 234 n. 54) and he has discussed or referred to contract theorists from Hobbes and Locke to Rawls (e.g. 1963b: 84 ff; 1974: 184, 205; 1981a: 230, 263–5; cf. 1977b: 273). He has not discussed Common law jurists such as Sir Edward Coke. Hart is likely the most widely read and influential contemporary legal theorist (MacCormick 1981 for a recent review of Hart's ideas). He and Fuller engaged in one of the most famous debates in contemporary legal theory, precisely over the question of the place of positivist (enforcement) and normative (interpretation) aspects of law. The chronology of the Fuller-Hart debate is as follows: Hart (1958); Fuller (1958a); Hart (1961); Fuller (1964); Hart (1965); Fuller (1969: chapter 5).

3. The second foundation is comprised of (a) a reformulation of Talcott Parsons' early concept of voluntaristic action and then (b) a demonstration of its relationship to Parsons' later work on 'procedural institutions,' including 'collegial formations' (Sciulli 1986).

4. Habermas' reading of Weber's sociology of law is used as a backdrop for two reasons. First, it is a convenient way to introduce Habermas' terminology and some of his rationale for a 'procedural turn.' It also supports the discussion of Fuller's legal theory in an important way. Fuller dismisses Weber's sociology as law as an apologia for authoritarianism, and yet Weber's approach remains influential for many political sociologists today. If Weber's sociology of law were not first reviewed, sociologists reading the discussion of Fuller would likely assume Weber has more to offer comparative researchers than in fact he does.

5. Habermas has expressed reservations about his formulation of motivation crisis (1982: 279–83). He nonetheless stands by his thesis of legitimation crisis.

6. Habermas is today exploring (e.g. 1984) how law's formalization in this narrow sense, as mere procedures of consistent enforcement, undermines actors' social relations. He refers to this as 'juridification.'

7. Habermas' most recent, major discussions of his communication theory may be found in 1973c, 1976a, 1977a, 1977b: 185–212, 1981a,b, 1982:219–83, 1983: 251–69. In addition, see several statements by Karl-Otto Apel (1972, 1977, 1980). Fine commentaries and elaborations include McCarthy (1978: esp. chapter 4), Dallmayr (1974, 1976, 1977), Bernstein (1978), Wellmer (1976: 231–63), plus the collections by Thompson and Held (1982), Geraets (1979), and O'Neill (1976). Radnitzky (1968) places both Habermas and Apel within a masterful discussion of philosophy of science, and Bernstein (1983) provides an update. Alexander (1985) for a pointed critique of Habermas' use of J. L. Austin's concepts. Sabia and Wallulis (1983) contains several essays summarizing Habermas' works. For overviews of Habermas' relationship to the Frankfurt school and Marxism, see Shroyer (1973), Held (1980), and Bottomore (1984).

8. On Hobbes and the arbitrariness inherent in liberal contract theory, see Arendt 1951: chapter 5; Habermas 1963a:

62–76; Macpherson 1962. When Weber points out that American Common law represents a combination of two 'non-rational' types of legal practice — which Weber labeled Khadi justice and empirical law — he tells comparative researchers literally nothing at all about this tradition of law, either about its theoretical tradition or about its application and practice. Moreover, Weber's vision of strictly 'formal legal rationality' is neither clear nor compelling (e.g. Kronman 1983: 72–95).

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