

## Deweyan Democracy, Fugitive Capital and the Policy Formation Process

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### Preface

Thurgood Marshall criticized his colleagues on the U.S. Supreme Court for basing interpretations of the law “upon unfounded assumptions about how people live.” He was also troubled that their interpretation of the facts manifested a “callous indifference to the realities of life.” (US Supreme Court 1973). Saul Alinsky, whose life’s work models a method for political economic change that has come to be known as “organizing,” shared Justice Marshall’s insistence that the world be seen as it is. Together, they have alerted lawyers and organizers of the need to be realists and to see the world as “an arena of power politics moved primarily by perceived immediate self-interests [where] laws are written for the lofty aim of the ‘common good’ and then acted out in life on the basis of the common greed . . . where [people] speak of moral principles but act on power principles. . .” (Alinsky 1971). One of the realities of life and the place of power in it, recognized by both Marshall and Alinsky, is captured in a quote from Frederick Douglass:

If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation . . . want crops without plowing up the ground, they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters. This struggle may be a moral one; or it may be a physical one; or it may be both moral and physical; but it must be a struggle. Power concedes nothing without demand. It never did and it never will. (Cashin 2005).

Most recognize that the world as it is must be made better if there is to be human flourishing, freedom if you prefer. In other words, there must be changes in the relationships of power. In a democratic society, relationships of power are created, sustained, and changed by organizing and by the law.

Karl Polanyi had studied the history, anthropology and economics of the self-regulating market, both as a concept and reality. He has shown how the privatization and commodification of land, labor, and capital have resulted in the escape of capital from social control. (Polanyi 2001).

John Dewey was one of the founders of Pragmatism, “a combination of fallibilism with anti-skepticism, and a naturalist approach to the human mind and its culture that refuses to yield to any kind of scientism.” (Aboulafa et al. 2002). A core notion of this is an emphasis on the consequences of action, as a method of seeking knowledge, of evaluation, and of critique.

Polanyi discerned that the self-regulating market had become the norm, and Dewey discerned that the people who suffered the consequences of policy decisions did not actively participate in their formulation. Each recognized that democracy itself was thus at risk.

In this paper I hope to show how Dewey’s understanding of democracy can capture the fugitive capital uncovered by Polanyi’s analysis and re-embed it in society subject to political control.

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### 1. Whither Goest Longfellow's Village Blacksmith and the Proverbial Mom and Pop Neighborhood Store?

A realistic assessment as recommended by Justice Marshall and Saul Alinsky uncovers the actual policy impacts of globalization on local communities. For instance, in Livingstone, Zambia “a border town of 150,00 dominated by South Africa's capital, there are two large Shoprites, in addition to South African businesses such as the fast food outlets Hungry Lion, Steers, and Ocean Basket; the gas station Engen; and the telecommunications company MTN (which sells Chinese products like Huawei phones). The Protea hotel, one of Livingstone's biggest, was part of a South African corporation until the group was bought out by Marriot in 2014. (A)side from some vegetable and poultry supplies sourced locally, everything else in the (Shoprite) stores is produced either in China or South Africa.” (Carmody 2015).

Similarly, in England, specifically the resort town of Kent, the school, airport, model train factory, pharmaceutical research lab, amusement park, ninety-five percent of the shops and restaurants, the off-shore wind farm, and the water and drainage systems are all owned directly or indirectly by national chains or foreign companies. (Meek 2004).

It has also recently been pointed out that:

- “the world's largest company, Wal-Mart Stores Inc., has revenues higher than the GDP of all but twenty-five of the world's countries. Its employees outnumber the populations of almost a hundred nations.
- The world's largest asset manager, Black Rock, controls assets greater than the national reserves of any country.
- The Gates Foundation spends as much worldwide on health as does the World Health Organization. (Rothkopf 2012).

David Kennedy has described the world as one of struggle; a struggle between and among power, law, and expertise that shaped the global political economy. “The basic elements of global economic and political life . . . are creatures of law. Law not only regulates these things (capital, labor, credit, money, liquidity, power, right) it creates them” In other words, the situations in Livingstone and Kent are not natural inevitable circumstances; rather they are the products of human action, struggle, and power. (Kennedy 2016).

The ongoing disclosures by the International Consortium of Investigative Journalists of the off-shore financial records of Panama not only illustrate Kennedy's point but also expose the corruption, even crime, that accompanies these political-economic “struggles.”

“Files reveal the offshore holdings of 140 politicians and public officials around the world (including) the prime ministers of Iceland and Pakistan, the president of Ukraine, and the king of Saudi Arabia. (Also) more than 214,000 offshore entities . . . connected to people in more than 20 countries and territories” Especially significant is the revelation of the role of major banks as a driving force behind the creation of the hard-to-trace companies operating in these tax havens. (ICIJ 2016).

Thomas Piketty in introducing Gabriel Zucman's The Hidden Wealth of Nations (2015) wrote “Tax havens with their financial opacity are one of the key driving forces behind rising wealth inequality, as well as a major threat to our democratic societies.”

One especially troubling aspect of globalization is that it is developing a “fugitive” legal order within the growing ever more unified economic order. This growing “global, commercial legal order (is) comprised of customary commercial practices, international arbitration, international investment agreements, the rise of multi-sovereign bodies such as the World

Trade Organization (WTO), the Organization for Economic Co-operation and Development (OECD), and regional economic integration such as the Association of Southeast Asian Nations (ASEAN) and NAFTA.”

(Druzin 2014). So rather than the economic order being (re)embedded in the social (legal) order, there is a risk that the social-legal order will be embedded in the global commercial order. This growing recognition of the “discrepancy between highly globalized economies and weakly globalized political structures,” (Augenstein 2014) long ago highlighted by Polanyi, has led to increasingly urgent calls for new theoretic and practical work to close that gap.

Kate Nash of the University of London and Yale University has edited a volume illustrating the kind of critical imagining that is required. It features Nancy Fraser’s essay Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World (2014) and five commentators who address these established and developing global governance structures and practices and how they might be made accountable to the people their decisions affect.

## 2. Polanyi and Fugitive Capital

The basic ideas of Karl Polanyi are that the autonomous, self-regulating market is neither natural nor central to society. Rather the social, political, and cultural institutions shape, and should shape, how the economy works. The market is seen as a means to the Good; not as an end in itself. Instead of Adam Smith’s truck, barter, and exchange, Polanyi sees as the ordering principles of society reciprocity, redistribution and householding. (Polanyi 2001).

Roberto Mangabeira Unger identified three bodies of animating ideas needed to search for alternative institutional forms to better actualize one’s ideals: a credible theory of social transformation, a conception of the ideal, and a conception of the proper relation of law to society. (1983). Karl Polanyi’s double-movement and notion of embeddedness certainly are a part of the core dynamic of social change. His socialism, be it Christian or Owenite, is an ideal. As regards the relationship between law and society, it seems reasonable to conclude that Polanyi sees legal rules and doctrines as defining the basic institutional arrangements of society. Thus his The Great Transformation can be read as a template for the search for alternative institutional forms to the current operations of the global market, and of democracy.

The political and economic origins of the collapse of 19<sup>th</sup> century civilization, and the resulting transformation are the subjects of Polanyi’s 1944 classic The Great Transformation. The idea of a “self-regulating market” has to be the starting point of any effort to understand Polanyi’s thinking: economic, political, anthropological, sociological, historical, and jurisprudential. A self-regulating market or simply a market economy, sometimes a market system,

“is an economic system controlled, regulated and directed by market prices . . . .An economy of this kind derives from the expectation that human beings behave in such a way as to achieve maximum money gains . . . there are markets for all elements of industry, not only goods (always including services) but also to labor, land, and money . . . (Importantly) nothing must be allowed to inhibit the formation of markets . . . only such (regulatory) policies and measures are in order which help to ensure the self-regulation of the market . . . (Polanyi 2001).

This “utopia,” the self-regulating market was “uniquely derived” from the principle of gain. The self-regulating market, while a central feature of the nineteenth century, operated paradoxically to distort the operation of the other institutions that supported nineteenth century civilization: the balance of power system, the international gold standard, and the liberal state. Polanyi explained that “the gold standard was merely an attempt to extend the domestic market system to the international field; the balance-of-power system was a superstructure erected upon, and partly worked through the gold standard; (and the liberal state was itself a creation of the self-regulating market).” (2001).

Polanyi quotes Robert Owen’s concerns that:

The general diffusion of manufactures throughout a country generates a new character in its inhabitants; and as this character is formed upon a principle quite unfavorable to the individual or general happiness, it will produce the most lamentable and permanent evils, unless its tendency is counteracted by legislative interference and direction. (2001)

In fact, Polanyi described these “evils” as

- The exploitation of the physical strength of the worker
- The destruction of family life
- The devastation of neighborhoods
- The denudation of forests
- The pollution of rivers
- The deterioration of craft standards
- The destruction of folkways
- The general degradation of . . . innumerable forms of private and public life that do not affect profits. (2001).

Not surprisingly, at the same time and in the same spaces there was a movement of “social protection” aimed “at the conservation of man and nature as well as productive organization, relying on the support of those most immediately affected by the deleterious action of the market.” (Polanyi 2001). In this “double movement” laws were both protective of the self-regulating market; and protective of people, nature, and productive organizations.

Polanyi concludes that the laws that constitute and preserve the self-regulating market were and are “planned” and those restricting laissez-faire and the market to protect society, were and are spontaneous, or unplanned. As he phrased it “laissez-faire was planned, planning was not.” (Polanyi 2001).

Polanyi’s anthropological argument that reciprocity, redistribution, and householding have been organizing principles of society throughout human history with market exchange operative at the margins is confirmed by modern evolutionary theories of group selection. E.O. Wilson in his The Social Conquest of Earth (2012) makes a compelling argument based on the latest biological and evolutionary research that “our species is not *homo economicus*,” that we share an innate empathy and cooperativeness; and that there is “a biological instinct for the common good of the tribe.” Wilson adds that while “people must have a tribe (as) it makes the environment less disorienting and dangerous.” (Happily) “the social world of each modern human is not in a single tribe, but rather a system of interlocking tribes”.

Josiah Ober in one of his continuing studies of Greek especially Athenian democracy points out that “there is now a large and growing scholarly literature . . . based on hypotheses about human sociability that weakens the strong assumptions of rational behavior” that the self-regulating market is predicated on. (2015).

### 3. Polanyi and the Dynamics of Social Change

Sven Beckert in his Empire of Cotton: A Global History finds that the “truly revolutionary departure from the past . . . is not the degree of global connection but the fact that capitalists are for the first time able to emancipate themselves from particular national-states, the very institutions that in the past enabled their rise.” (2014).

In The Great Transformation Polanyi began to formulate answers to the questions what is being, should be, and what can be done by and about “fugitive” capital. He described the “double-movement” that operated as both creator of and challenger to the self-regulating market and its resulting evolution. As he explained it:

Briefly, not single groups or classes were the source of the so-called collectivist movement, though the outcome was decisively influenced by the character of the class interests involved. Ultimately, what made things happen were the interests of society through their defense – and exploitation! (two words and exclamation point not present in the earlier MacIver edition) – fell to one section of the population in preference to another. It appears reasonable to group our account of the protective movement not around class interests, but around the social interests imperiled by the market (man, nature, productive organization).

Later in more specificity Polanyi argued:

While the crisis of the inherently unstable system was brought on by both wings of the protectionist movement the social strata connected with the land (farmers and peasants) were inclined to compromise with the market system, while the broad class of labor did not shrink from breaking its rules and challenging it outright. (2001).

Without much further elaboration it is clear that Polanyi recognized that some social change movements abandon everything in search of “the new man” (Marxism); others look backwards to preserve dying ways of life (Luddism); and yet others look both backwards and forwards to seek out progressive change (Chartism). Similarly, he sensed the elliptical nature of concepts in public discourse as developed by Reinhart Koselleck (2004). And, while sometimes with no more than a mere hint, and despite criticisms to the contrary, Polanyi has addressed many of the ambiguities, even contradictions, inherent in people’s understanding of the law; both its legitimacy and its normativity. These understandings were manifested and operative during the 150 years at the center The Great Transformation. Further, it seems to me that the scholarship of James Scott, especially his Weapons of the Weak (1985) confirms the existence of the “protective” motivations and socio-legal forces operative in the double movement.

Craig Calhoun’s recent study of The Roots of Radicalism (2012) presents much of the research on social change movements since Polanyi wrote; for instance, Charles Tilly on the rationality of crowds; Jurgen Habermas and C. Wright Mills on new voices in the public sphere; Alain Touraine on identity and cultural transformations; and E.P. Thompson on history from the bottom. Calhoun devotes several chapters to analysis of the ever growing literature on protest, social change activism and movements. For purposes of this paper the book that provided both context and analysis of this literature was Sidney Tarrow’s The New Transnational Activism (2005). Let me also recommend Political Turbulence: How Social Media Shape Collective Action (2016) by Margetts, John, Hale, & Yasseri. They conclude that

“the political world on social media . . . is too heterogeneous, too individualized, and too unsuited to deliberation to represent the revival of the public sphere. Rather (they) claim that what has emerged is a new form of political pluralism; what (they) call chaotic pluralism.”

A concern has to be that this new pluralism, if that is what it is, is no more inclusive of the poor and marginalized than was the pluralism of Robert Dahl’s New Haven. Additionally, there has to be concern about the distorting effects of the initial position which today is skewed against the poor and marginalized. Further, precisely because the chaos will evoke the human need for order, it may be that Leviathan lurks. Calhoun for himself argues as indicated by the title of his book that these and other researchers have missed the “rootedness” in traditional culture and local communities of such movements; and thus the “embeddedness” insights of Polanyi. (2012).

My forty-plus years’ involvement in social change as an activist, board member, and lawyer is inspired by Saul Alinsky, more specifically by the “direct action” organizing approach to social change of the then Illinois Public Action Council and the Midwest Academy.” Direct Action Organizing” as used by the Midwest Academy and others is to be distinguished from civil disobedience. Law breaking implicates values and consequences that are beyond the scope of this discussion. See Essays on Civil Disobedience (Blaisdell ed.) (2016). The three key principles of such organizing are:

Direct Action organizing aims to win real, immediate, concrete improvements in people’s lives.

Direct Action organizing gives people a sense of their own collective power

Direct Action organizing attempts to alter the relations of power (Bobo et al 2010).

The final point, “changing the relations of power” in the society, was also seen as a new direction that moved beyond the single-constituency focus of activism in the sixties toward a more active, inclusive understanding of “make democracy work.” (2010).

Without such strategic targeting social activism is merely a tactic. While often disruptive of the routines of the establishment, tactics alone do not change the existing relationships of power.

#### 4. Resulting Anti-Democratic Thought

While economic theory and practice were disembedding themselves from the then political and societal structures, the political, and thus societal structures were themselves in the throes of change. The vast majority of people were seeking some semblance of meaningful participation in governance; what Hirschman calls “voice.” (1970). These were the early stirrings of democracy as we know it today. At the same time there was an active and substantial anti-democracy sentiment.

Here in one paragraph is Polanyi’s understanding of the early mid-nineteenth century resistance to democratic reform; with references at the end to the continuity of anti-democratic thought by leading proponents of a self-regulating market.

In England it became the unwritten law of the Constitution that the working class must be denied the vote. The Chartist leaders were jailed; their adherents, numbered in millions, were derided by a legislature representing a bare fraction of the population, and the mere demand for the ballot was often treated as a criminal act by the authorities. Of the spirit of compromise allegedly characteristic of the British system – a later invention – there was no sign. Not before the working class had passed through the Hungry Forties and a docile generation had emerged to reap the benefits of the Golden Age of capitalism; not before an upper layer of skilled workers had developed their unions and parted company with the dark mass of poverty-stricken laborers; not before the workers had acquiesced in the system which the New Poor Law was meant to enforce upon them was their better-paid stratum allowed to participate in the nation’s councils. The Chartists had fought for the right to stop the mill of the market which ground the lives of the people. But the people were granted rights only when the awful adjustment had been made. Inside and outside England, from Macaulay to Mises, from Spencer to Sumner, there was not a militant liberal who did not express his conviction that popular democracy was a danger to capitalism. (2001).

This enthusiasm for “economic” democracy, i.e., the market, was coupled with an aggressive resistance to political democracy, even participation by “the people”. These same anti-political democracy views have manifested themselves from the New Deal to the recent “great recession.” (Philips-Fein 2010).

#### 5. Dewey, Democracy and Human Nature

John Dewey was born in 1859. For many he was primarily an education reformer. That work was conducted for the most part at the University of Chicago and his reformist ideas were more or less fully developed before he left there in 1905 to join the faculty at Columbia University in New York. There he formalized the pragmatic philosophy and assumed a leadership position as a public intellectual. He engaged in titanic philosophic and political clashes with, among others, Bertrand Russell over the nature of truth, Randolph Bourne over America’s entry into World War I, Walter Lippman over the nature of and possibilities for democracy, Lewis Mumford over culture and aesthetics, Franklin D. Roosevelt over economic reform, and Reinhold Niebuhr over the role of ideals in human society. John Dewey played a significant role in founding the American Association of University Professors, the New School for Social Research, and the American Civil Liberties Union. In other words, not too much happened in the first half of the 20<sup>th</sup> century in American intellectual life that Dewey did not influence. (Westbrook 1991).

Dewey was a prolific writer. His collected works run to 37 volumes. If that is not daunting enough, his style adds to the challenge of comprehending and summarizing his thought. Oliver Wendell Holmes described Experience and Nature, one of Dewey’s most important books, as “incredibly ill written.” He thought Dewey wrote as “God would have spoken had He been inarticulate but keenly desirous to tell you how it was.” The difficulty of understanding Dewey’s writing may be a function of the fact that he was “perhaps the most cheerfully eclectic thinker ever to be taken seriously as a philosopher.

Dewey borrowed from Emersonian transcendentalism, evolutionary Darwinism, Marxian socialism, fundamentalism, and Christian Capitalism with a fine and even exciting disregard of logic and consequences.” (W.A. Williams 1966).

Dewey from as early as 1908 believed that “the abandonment by intelligence of a fixed and static moral end was the necessary precondition of a free and progressive science of both things and morals.” In other words, an experimental methodology with special attention to consequences; Does It Work? His writings include many references to earlier philosophical thinkers, beginning with the Greeks. He saw in “the great ideas of the eighteenth century . . . along with classic Greek thought, the great ideas of the indefinitely continuous progress of humanity and of the power and significance of freed intelligence . . . borne by a single mother – experimental inquiry.” This focus on experimentation and the actual consequences of action empowered Dewey to see past the idealisms and deductive dualisms that constrained philosophic critique at the start of the twentieth century. (Dewey 1993).

Dewey was fully engaged with the material dynamism of his times. “The recognition that natural energy can be systematically applied, through experimental observation, to the satisfaction and multiplications of concrete wants is doubtless the greatest single discovery ever imported into the life of man – save perhaps the discovery of language.” He identified democracy as “the crucial expression of modern life. He was unequivocal in his convictions that “democracy is an absurdity where faith in the individual as individual is impossible; and this faith is impossible when intelligence is regarded as a cosmic power. It is also impossible when appetites and desires are conceived to be the dominant factor in the constitution of most men’s character.” (Dewey 1993).

He saw an evolution and transformation of thinking and attitude toward a belief that the proper business of intelligence was recognition of the multiple and varied goods discernible in modern ethics. As he put it, the business of ethics/morals was not to “search for one remote aim . . . it is to utilize physiology, anthropology and psychology to discover all that can be discovered of (the individual’s) organic powers and propensities (and) to converge all the instrumentalities of the social arts, of law, education, economics and political science upon the construction of intelligent methods of improving the common lot (in order to) bring to light (Patrick Henry’s “light of experience”) values now dim and obscure.” (Dewey 1993).

This scientific naturalism and references to the positive effects of industry sounded to his critics like a form of economic determinism. In fact, in his Individualism Old and New (1929) he wrote that economic determinism was a fact, not just a theory. But a determinism issuing from the profit motive rather than one coming from social planning. He tempered this in Liberalism and Social Action (1935) limiting the role of experts and planners to the means/implementation role rather than ends/formulation role. Towards the end of his life Dewey acknowledged that he perhaps should have given greater emphasis to individuals as “the finally decisive factors of the nature and movement of associated life.” (Dewey 1993).

Be that as it may be, Dewey saw democracy in anthropomorphic terms; as “a way of life . . . in thought and act”. It was a matter of character “determining desire and purpose in all relations of life . . . controlled by a working faith in the possibility of human nature . . . a belief which brings with it the need for providing conditions which will enable these capacities to reach fulfillment”. He recognizes the role of law, but is vague at best as to what its content might be. As he puts it “I am inclined to believe that the heart and final guarantee of democracy is in the gathering of neighbors on the street corner . . . and in gatherings of friends in the library. . . to converse freely with one another.” (Dewey 1993).

Frankly Dewey’s reliance on “human nature” as grounding and assurance of democracy is surprising. As he stated often in his writings man is “becoming” not a fixed being, Dewey’s lexicon was one of “ing” words, not “ism” words. Is there a “there” there in human nature?

Dewey saw “value” as intrinsic and discernable in the quotidian activities by means of which men live. Normativity is imminent in action preceded by “hypothesis,” by a free imagination of possibilities. Value in the sense of “good” is inherently connected with that which promotes a course of activity. “Right” is connected with that which is needed to maintain the course of action. (Dewey 1993).

Very early on (1888) he referred to every individual as king and priest. Later in his book Art As Experience (1934) he added to those roles that of prophet. In that same book he spoke of “friendship and intimate affection (of) sympathy through the imagination . . .” he posits participation in the values of life as the requisite for true communication, be it on the street corner or the living rooms or the factory floor or a legislative chamber. (Dewey 1993).

I think one can connect king, priest, and prophet with the transcendentalist, the good, the true, and the beautiful without too much of a stretch. This giving of classical Greek value content to a theological understanding of the governance authority of humans is in a sense encouraged by the French language itself: bon (good); bien (true); beau (beautiful). In any event the frequent use of the terms “human nature” and “hypothesis” suggests that Dewey had some substantive content in mind. Not as a teleos but as “ends in view;” in other words a “natural teleography”. (Rockefeller 1991). In Anti-Naturalism in Extremis (1943) he wrote “the worth and dignity of men and women (is) focused in human nature itself, in the connections, actual and potential, of human beings with one another in their natural social relationships”. In The Public and Its Problems (1927) he excoriated slums, discontented careers, poverty, excessive wealth, and exploitation of nature. Clearly if we invert these there is a clear substantive sense of what the inherent “worth and dignity” of persons requires. (Dewey 1993).

Perhaps the better view of this tension between various assumptions and assertions of Dewey is to distinguish between “human nature” as a pre-political, pre-socialized biologically given nature; and “human nature” as socializing and growing; and then asking with “the head, the heart and the gut” what are the capabilities available for human flourishing. (Rockefeller 1991).

More than a little surprisingly Dewey did not really get much beyond these various abstractions about democracy in action. He spoke of majority rule, of popular and frequent elections, short terms of office, freedom of speech and especially of association. Nevertheless, he clearly recognized the inherent weakness of what Polanyi called the self-regulating market that “the idea of a natural individual in his isolation possessed of full-fledged wants of energies to be expended according to his own volition, and a ready-made faculty of foresight and prudent calculation” is a fiction. (Fried 2001). In other words, *homo economicus* does not exist!

In words suggestive of Polanyi’s “fugitive capital” Dewey expresses deep concern that “the local face-to-face community has been invaded by forces so vast, so remote in initiation, so far-reaching in scope and so completely indirect in operation, that they are, from the standpoint of the members of local social units unknown” and unaccountable. (1927). In fact, Dewey was very familiar with Polanyi’s work and considered that Polanyi had met and refuted the arguments of the Austrian economists (Mises and Hayek) in their formulation and defense of what is today referred to as neo-conservative economics. (Westbrook 1991).

## 6. Dewey’s Theory of Law

The following from Robert Ellickson’s Order Without Law: How Neighbors Settle Disputes (1994) illustrates the elements of a normative system of social control

Controller	Rules	Sanction	Combined System
1. <i>First Party Control</i> Actor	Personal ethics	Self-sanction	Self-control
2. Second Party Control Person Acted Upon	Contracts	Personal self-help	Promise-enforced contracts
3. Third Party Control Social Forces	Norms	Vicarious self-help	Informal control
Organization	Organization rules	Organization enforcement	Organization control
Government	Law	State enforcement	Legal system

Bidet, Quere, and True argue that according to Dewey self-determination of peoples is not achieved through the law; “rather, it is honored in the public collective experience, supposedly able to orient and to guide itself through the formation of values.” (2011).



To understand just what that might mean and what Dewey's ideas of democracy and "more democracy" might also mean it is necessary to develop a picture of Dewey's understanding of Law.

Dewey developed, classified, and explicated his understanding of the law during his two year stay in China (1919-1921). Most of what follows is from or based on an earlier article about Dewey's experiences in China. (Kendall 1995).

Dewey recognized the importance of theory; but he insisted that humans

Do not construct theories – about our customs and habits and institutions until some sort of difficulty or obstruction raises questions in our minds about the ways in which we have been carrying on our group activities. It is always the social institution which precedes the theory; not the theory which precedes the institution.

He asks which effects theory has after it has been formulated. "The extreme idealist emphasizes the ideal, holding everything results from theory. . . . The extreme materialist, on the other hand, holds that a theory is an effect, not a cause.

But what about his view? According to Dewey, it is incomplete to say that

Hypotheses and theories are, in their initial stages, the results rather than the causes of practice. [Because] – and this is the essential difference from the two points of view discussed earlier – as soon as a hypothesis is formed, or a theory begins to take shape, no matter how crude, it becomes sort of the practice which produced it.

It is all well and good to describe theory and practice as elliptically related, but can the function or effect of theory be more precisely identified? Dewey, admitting some oversimplification, finds all social and political theories reducible to two functions. "The first function of theory is to give permanence to that which is initially temporary or accidental, to provide stability for ways of thinking and doing that are wavering and shaky." The other function, "particularly in those cases in which theory constitutes an ideal, is that in time of crisis it can generate facts and cause people to sacrifice their property, and even their lives, for something in which they believe deeply."

Thus theory is not a verbal formulation of some truth; rather, it is functional as both means and end. This view means there must be an emphasis in all thinking, whether as theory or action, on experimentation, on individual events, and on social change.

To clarify his view, Dewey distinguishes between pure science, which can be studied only with the attitude of a spectator, and applied science, where the observer is "one of [the] components" of that which is observed. Dewey says "all social sciences are applied sciences."

The reason for dwelling on Dewey's view of theory is because it seems that if one substitutes the word "law" for "theory" the statements become accurate descriptions of his views of law. This is not as surprising as it might otherwise seem because, in Dewey's view, legal codes or rules are 'tools' for analyzing a special situation, the right or wrong being determined by the situation in its entirety, and not by the rule as such. To see this more clearly, we must first elaborate Dewey's views of life in society. "[P]eople with common interests naturally form themselves into groups . . . . No group is independent and isolated, and no person is ever a member of only one group. . . . Society is in a state of imbalance because these many groups do not and cannot develop equally." In other words, "society is composed of many groups of people, not merely of individuals in the aggregate. From this definition follows the definition of social conflict as disparity among the interests sought by groups of people." This does not mean that one group will not dominate others; but as was said above, individuals are members of more than one group so there is the possibility of an escape from the domination. Both within each group and in relations between groups, some kind or form of organization, some rules and regulations, some governance of behavior, is necessary to deal with this inevitable conflict.

Dewey believed "only in a democracy can collective ethical estimates be effectively translated into positive legal codes." This makes law "the most nearly central" idea of political and social philosophy.

And “the function of law . . . [becomes] to direct the use of force into channels such that, when translated into physical manifestations, the possibility of conflict is reduced and the danger of wasted energy is obviated.”

Dewey sees the quest for law in human nature. “[B]ecause human beings require justice

. . . [w]hen two [people] come into conflict, they must find a third person to decide who is right . . . . for it is difficult for people to be fair in their judgments when they are themselves involved in dispute.” Obviously, if one of the disputants is able to choose, and to impose its view through force, then there is no law.

In another lecture discussing the rights of individuals, Dewey says there “are two main functions of law: first, people are granted a number of rights by law; and second, law imposes upon people a number of obligations.” In other words, “the law prescribes the scope or range of behavior – the things a person may do, those he must do, and those he must not do.” Both formulations obviously sound like a denial of natural rights, but that would be an incorrect understanding of Dewey’s view. He identifies three categories of rights: personal or natural, civil, and political.

“Personal rights are those which belong to an individual as a person.” The four fundamental personal rights are: the right to life, the right of movement, the right of property ownership, and the right to make contracts. These rights precede the state and are, in a sense, those powers that are constitutive of society.

Civil rights “define relations which exist among people in a given society, but they also define the relationship between the people and their government.” In a sense, these are process rights and they “are derived from personal rights.”

“Political rights are the most basic of all rights.” It is only when people are granted their political rights that their enjoyment of [personal and civil rights] can be guaranteed.” Furthermore, “the most important single one of [the] political rights is the right of suffrage.”

Dewey then emphasizes

That the rights and powers we are discussing have no meaning if we choose to consider the individual apart from the society and the state. . . It is absolutely fundamental that the concept of individual rights be considered with reference to the society which grants them and to the state, which, through the agency of law, enforces them.

Dewey does not limit rights to “negative liberty.” It should be clear from the above that this is so. If not, he makes it clear.

Another way of saying the same thing is that the problem has changed from that of seeking individual rights themselves to one of seeking the opportunity to exercise these rights; the goal is no longer stated as “a person should have such and such a right,” but rather, “he should be provided with such and such an opportunity to exercise his rights.”

In talking about the ‘agency of law’ which enforces these rights, Dewey has in mind both procedural and substantive dimensions. Procedurally, he sees the law as an expression of the general will of the majority. He sees the legal standard coming into being through “public investigation, discussion, and amendments.” Dewey sees the law as rational or “scientific,” rather than tradition, custom or habit.

This notion is made even clearer in another lecture where Dewey explains what he means by democracy. He identifies and then elaborates on four types:

(1) *political democracy*: The power of government is restricted and regulated by the constitution, and the common will of the people is expressed through their elected representatives.

(2) *democracy of rights*: All the people are guaranteed certain rights, such as freedom of speech, freedom of publication, freedom of religion, freedom of movement, and others.

(3) *social democracy*: Democracy implies equality and demands the abolition of unequal social distinctions; it calls for equality of persons before the law and in personal relationships.

(4) *economic democracy*: Democracy demands the right of every [person] to a decent standard of living, and aims at the progressive elimination of marked differences in the enjoyment of resources by the rich and the poor.

Dewey recognized the Jeffersonian ideal about the least and best government, but argued that with the exhaustion of “free land” and “the emergence of unequal social classes,” “the American people have learned that the true function of government is to serve people . . .

. [and] that the ideal of equality can be achieved only through the instrumentality of government.”

Dewey was quite explicit that “a little reflection will enable us to see that the roots of the problem we face today and the fact that it becomes ever more pressing, lie in the development of factories.” Dewey was not rejecting modern industrialism; rather, he was emphasizing that fundamental change in economic circumstances requires reassessment of previous certitudes.

Thus, the political-economic changes and the resulting ideological changes required that the questions of “how can there be public order without there being a monarch or some other form of coercive government” and “by what means can we promote the loyalty of individuals to society” had to be addressed. In other words, how can society and government be structured so that the natural or essential fellow-feeling of individuals is able to function fully?

As Dewey developed his larger democratic notions of the relationship between the state, government, law, and rights, he identified “public opinion [as] the supreme power by which the government of a democratic country rules; it plays the ultimate role.” This view is not a naïve one. Dewey, even before Lippman’s Public Opinion (1922) and his own The Public and Its Problems (1927), recognized that there was no automatic transmission of opinions into public policy. In fact, he labeled the governmental law-making bodies as “of secondary importance.” It was education which was of primary importance.

Dewey recognized that “it is impossible for the government to know the needs of all the people.” He saw, as an essential of democratic politics, that “rights exist only where people are willing to struggle for them.” In other words, he saw democracy as essentially a struggle. His sense was that “democratic politics, in any full sense of the term, is still in its beginning stages.”

This sense of infancy and uncertain development caused Dewey to see many difficulties, especially with the “state” – even a democratic one. He saw law as central to good government, but he also saw it as “always a means, never an end in itself.” He saw law as “viable and effective only when people understand and accept the spirit and purpose of the enactments.” Dewey clearly distinguished the rule of men from the rule of law. He saw the risk of the rule of men as capricious. He saw the risk of the rule of law, which otherwise is better in part because “obviously any sort of social organization can function effectively only when certain rules or laws are observed”), as greater because it tended toward authoritarianism.

The ideals of consensus and discussion that Dewey praises are not however the descent into discourse to which much modern theory leads. For Dewey, unlike Habermas, “truth” is the outcome of experimentation, not consensus. Dewey’s idealism was Platonic, but activist. “Plato was saying that we must not only have ideals, but that we must put them into practice.

Aristotle differed from his teacher on this, as on other points. For him the activity of contemplation was the ultimate good of life.” While Dewey acknowledged “that Aristotelian logic, with its emphasis on systematization and classification, is the most important single development in the history of thought,” thought alone could not find truth; action was a necessary dimension of truth seeking.

Thus Dewey emphasized the empiricist dimensions of these problems. “In Locke’s philosophy only the individual person has the status of real existence; society and the state are merely convenient abstractions created by the operations of human intellect; law, morality and other concepts are likewise artificial generalities or universals brought into being by mind through its function of abstraction.”

Again, action is ultimately the key. “There is [a] grave fault in empiricism, which is its view of experience as being passive rather than active.” Clearly then, Dewey recognizes an essential role for theory: “the use of a general principle or *law* is to organize chaotic masses of facts, to systematize them, to connect them, and to make it possible for meanings to be derived from them; but in the end, “action is the test of the truth or validity of observation and inference.”

Fundamental to the Deweyan scheme is the conviction that human nature is malleable, “that human nature is modified by institutions.” What this means is that the law modifies human nature, i.e., that it is educative. For Dewey, “the role of democratic institutions [including law] is to link freedom and fraternity.”

Law does that – links freedom and fraternity – by performing all of the functions discussed:

- Gives permanence to that which is initially temporary or accidental; provides stability for ways of thinking and doing which are wavering and shaking;
- Generates faith in times of crises and causes people to sacrifice their property and even their lives for something in which they believe deeply;
- Directs the use of force into channels such that, when translated into physical manifestations, the possibility of conflict is reduced and the danger of wasted energy is obviated;
- Grants rights and imposes obligations -- in other words prescribes the scope or range of behavior – the things a person may do, those he must do, and those he must not do;
- Serves as the agency of the state for the enforcement of rights.

In another lecture, Dewey discusses the concept of justice and elaborates his view of rights. It is in this lecture that Dewey is most clear about the creative or affirmative function of the law. While it is difficult to formulate a precise definition of right, it is clear enough that “it refers to something not susceptible to interference or abrogation; it is something which everyone is entitled to have by virtue of his being human.”

As regards justice, Dewey links it to rights by law. “The purpose of the law is to insure justice; we might say that justice is embodied in the law. . . . [J]ustice means the maintenance of and respect for others rights.” (and) this implies the necessity of using the law to compensate for the inequalities of natural endowment, so that these inequalities are not accentuated and multiplied. Our law must provide safeguards against the suppression of the weak by those who are strong, the domination of the ignorant by those who [are] endowed with high intelligence.”

So, we have arrived at the ideal of “associated living . . . the highest ideal of social development.” Its foundation is the “free participation by each member of the society in setting its goals and purposes, full and willing contribution by each person toward the fulfillment of those goals,” by and through a civil society of many and varied organizations. In a sense, a federal-like structure based on the principle of subsidiarity.

Thus, it seems clear that a democratic, equalitarian and participatory system in which law is the central idea, is Dewey’s ideal.

To return to the statement of Bidet, Quere, and True in the Call for this Conference:

Self-determination of the citizen community is not considered through the exercise of popular sovereignty, through the legitimate production of norms, including the law. Rather, it is housed in public collective experience, supposedly able to orient and to guide itself through the formulation of values.

I hope it is clear however while values are formed collectively in action by what can be called “democratic knowledge” (Ober 2008) that Law is “central” as both cause and consequence across a wide range of social circumstances “linking freedom and fraternity.”

## **7. Power in the Policy Formation Process**

We have now reviewed Polanyi’s demonstration of how capital has escaped democratic control and illustrated the impact of fugitive capital on community.

We have also tried to understand John Dewey's theory of democracy and how it might re-embed capital in a democratic legal order. In this penultimate section of the paper we will isolate from the spectrum of the political-electoral system of democracy the institutional dynamics that formulate the policy agenda that gets to the law-making/legislative institutions. We will look at how fugitive capital distorts the process. Finally, we will offer some reforms to democratize the policy formulation process.

Recognizing limits and failures of democracy Dewey referred to the old saying that the cure of the ills of democracy was more democracy. This might suggest refining and perfecting current workings. "But the phrase may also indicate the need of returning to the idea itself and employing our sense of its meaning to criticize and remake its political manifestations." (Rice 1993).

G. William Domhoff has been studying and publishing on class and power at least since 1967. In The Powers That Be: Processes of Ruling Class Domination in America (1979) he identified four general processes through which economically and politically active members of (society) (Domhoff in fact talks of ruling class domination) are able to influence the law and policy considered and adopted by the various governments in the United States. Despite his focus on the U.S. the process itself and the kinds of participants discussed should be suggestive of similar disparities of influence, power across governments.

One of the processes identified is the policy-formation process, the process by which general policies of interest to (organized associated persons and groups) are developed and formalized for presentation to the makers of law and adopters of policy (executive, legislative, judicial and regulatory bodies.) Most significant for our purposes, there is no place for people's power in the diagram. That is what we seek to remedy.

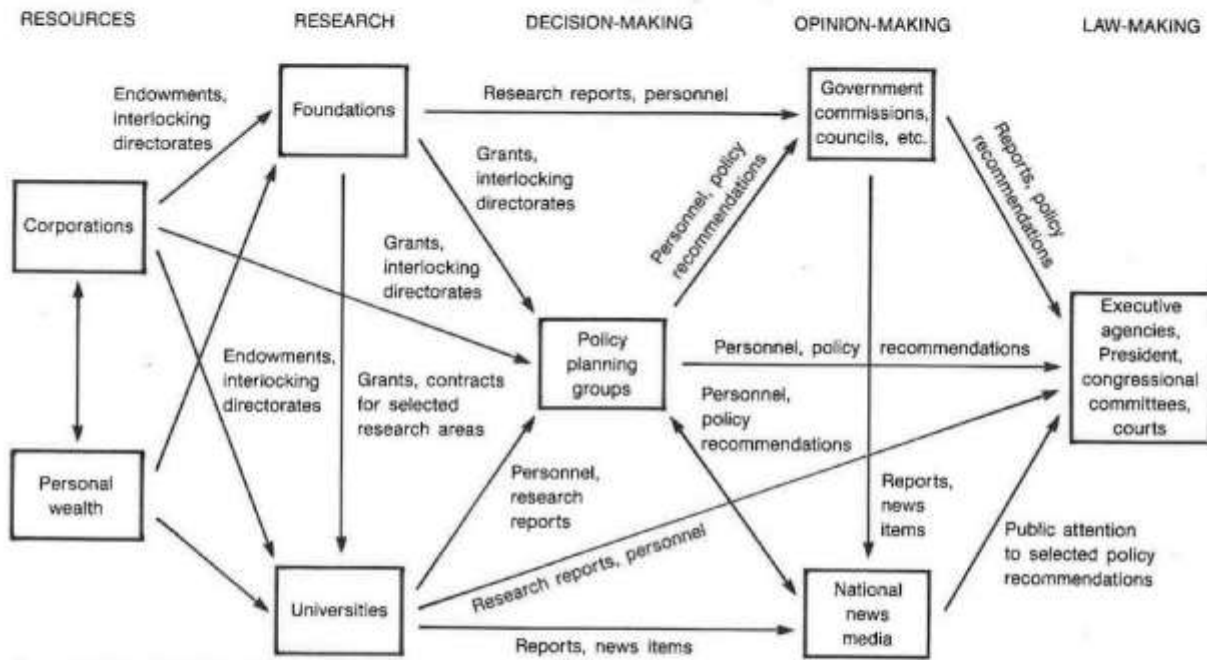


Figure [20.]2 The Policy Formation Process.

Source: G. William Domhoff, *The Powers That Be* (New York: Vintage Press, 1979), p. 63.

Power can be understood simply as the ability to achieve social outcomes. It is readily recognized as operative at the point of policy adoption or law-making itself. It is now equally recognized that power influences institutional agendas and priorities. Less so, but critically it also influences the cultural context in which people sense their well-being and formulate their grievances. Raymond Williams' "structures of feelings" come to mind. (1977)

Domhoff identified four inputs to policy formulation that precede law making itself (resources, research, decision-making, and opinion-making). He also identified seven institutions exercising power within these dynamics (persons of wealth, corporations, foundations, universities, policy planning groups, government commissions, and the media). He further identified four networks (political, economic, religious and military – PERM).

Today people's organizations need to added. Racial, gender, sexual orientation, disability and other "liberation" groups and counter-groups have created what has been called a "social movement society."

In the literature movements have been defined as "collective challenges to existing arrangements of power and distribution by people with common purposes and solidarity in sustained interaction with elites, opponents, and authorities." (Meyer & Tarrow 1998).

Networks by contrast are "characterized by voluntary, reciprocal, and horizontal patterns of communication and exchange." (Keck & Sikkink 1998).

However, the Midwest Academy and others distinguish between organizations and movements. Social movements occur when something happens, a tipping point, and large numbers of people/organizations arise to challenge the world as it is, seeking to create a world as they want it to be. A movement is temporary and spontaneous. How people take advantage of that movement determines the outcome. If there is only a tactical response it can become a flash in the pan. If people understand and exercise their collective power strategically systems/laws/institutions can be changed and those changes institutionalized.

As one can see from the diagram a page or two earlier the policy formation process is elliptical, both within and across networks. Two books have been published this year which are basically case studies of the role of fugitive capital in the policy formation process as well as in the legislation adoption and administrative implementation processes – Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (2016) by Jane Mayer and The Profiteers: Bechtel and the Men Who Built the World (2016) by Sally Denton.

The Bechtel book is about the several generations of one family who built and lead a huge privately held company that started with one machine in 1898, was part of the corporate construction coalition that built the Hoover Dam and has grown into a worldwide conglomerate with subsidiaries, divisions, or corporate units operating in engineering and construction, mobile telecom, water delivery, disaster relief, urban planning, nuclear waste, facilities management, homeland security, nuclear submarines, aircraft carriers, counter-terrorism technologies, environmental remediation, data collection, megaproject financing, e-commerce and more.

Despite their anti-government libertarian philosophy almost all of their business has been and is pursuant to government contacts. Ironically they are effectively an agent of government.

Bechtel has mastered the governmental contract processes. It is not uncommon for a company to actually write the specifications for the proposed project; and in a way that precludes some or all of its competitors; conceptualizing a project to fit within the legal guidelines for a no-bid contract; benefit from a low bid on a cost plus contract; benefit from a turn-key contract (a fixed fee where all the cost savings go to the contractor); use of the GOPO model (government owned, privately operated laboratories within the Department of Energy); and loan guarantee provisions as an upfront financing aid; being given access to classified information.

Bechtel through the years has hired former CIA and Defense Department officials including former Directors and Secretaries. It also had Henry Kissinger under contract.

George Schultz a former Secretary of Labor, of Treasury, and head of OMB, was hired by Bechtel and served on the boards of directors of General Motors, Sears, Morgan Guaranty, J.P. Morgan, the World Bank, Inter-American Development Bank, Asian Development Bank, Dillon Read, the Council on Foreign Relations, the Trilateral Commission and the Business Roundtable among others.

Bechtel officials have served on government boards and commissions, they have funded think tanks, they dominate trade associations, they helped write the 1980 Republican Party platform on nuclear power, and served on the Reagan transition team for the Department of Energy. They have funded private research through the Hoover Institute and Heritage Foundation among others. An earlier study of nuclear weapons referred to the military-industrial complex as operating as a ‘threat inflater’ to increase demand for its services and products.

Jane Mayer’s Dark Money is focused on the Koch brothers and how they have created and operate a libertarian anti-government network: Mellon, Scaife, Cooks, Bradley, Olin, Templeton, and other family foundations.

Lewis Powell, corporate lawyer and President of the American Bar Association, about to be nominated to the U.S. Supreme Court, with money from the Chamber of Commerce wrote a plan for “guerilla warfare” by corporate America against “enemies: the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences (and) politicians.” He proposed efforts to rewrite student textbooks and to control faculty hiring at universities.

Heritage Foundation, Manhattan Institute, the American Enterprise Institute, Acton Institute, Cato Institute, American Legislative Exchange Council, National Right to Work Committee, and more. Almost \$600 million to launch and amplify the voice of the corporate elite. Google any of these groups or the 100+ organizations and universities sponsoring a similar agenda on the inside and back cover of this book.

Efforts to transform the culture, public opinion generally, the positions of electoral candidates and the law are ubiquitous. Interestingly these groups “discovered (they) needed boots on the ground to sell ideas, not candidates” and they adopted the tactics of “Saul Alinsky, Gandhi, Martin Luther King.” These efforts include an “Astroturf” strategy. Using “a fake populist movement secretly manipulated (and run) by corporate sponsors” in an effort to “sell the yarn that . . . housewives, farmers, small businessmen, professionals, wage earners – not big business organizations” were behind whatever corporate/libertarian idea was being promoted. As regards the use of “front” organizations one of their minions acknowledged that their tax-exempt giving was a “shell game;” that philanthropy was preferable to paying taxes . . .

. . . if they didn’t give it to their causes, they would have to give it to the government. At least this way they control how it’s spent . . . It’s really another form of lobbying.”

Just one example from the many creative policy analyses that flow from such sources as those uncovered by Jane Mayer will have to suffice.

In 1997, for instance, the EPA moved to reduce surface ozone, a form of air pollution caused, in part, by emissions from oil refineries. Susan Dudley, an economist who became a top official at the Merit Center came up with (this argument against the proposed rule). The EPA had not taken into account that by blocking the sun, the smog cut down on cases of skin cancer. She claimed that if pollution was (reduced) it would cause up to eleven thousand additional cases of skin cancer each year.

Along the way, I taught a law course Law & Economics applying microeconomic market theory, rational choice theory to legal doctrine. Little did I know about the following use of “dark money.”

The Olin Foundation’s most significant beachheads, however, were established in America’s law schools, where it bankrolled a new approach to jurisprudence known as Law and Economics. Powell, in his memo, had argued that “the judiciary may be the most important instrument for social, economic and political change.” The Olin Foundation agreed. As the courts expanded consumer, labor, and environmental rights and demanded racial and sexual equality and greater workplace safety, conservatives in business were desperate to find more legal leverage. Law and Economics became their tool.



As a discipline, Law and Economics was seen at first as a fringe theory embraced largely by libertarian mavericks until the Olin Foundation spent \$68 million underwriting its growth. Like an academic Johnny Appleseed, the Olin Foundation underwrote 83 percent of the costs for all Law and Economics programs in American law schools between the years 1985 and 1989. Overall, it scattered more than \$10 million to Harvard, \$7 million to Yale and Chicago, and over \$2 million to Columbia, Cornell, Georgetown, and the University of Virginia.

It revealed that the Olin Foundation was paying students thousands of dollars to take classes in Law and Economics at Georgetown Law School and to attend workshops on the subject at Columbia Law School. Despite this ethically dubious situation, only one law school, at the University of California in Los Angeles, turned the Olin funds away, arguing that by plying students with grant money, the foundation was “taking advantage of students’ financial need to indoctrinate them with a particular ideology.”

### **8. Capturing the Fugitive: Diminishing the Influence of Capital**

Some not so random thoughts on how the institutions identified by Domhoff as engaged in the policy formation process might be reformed to operate in a manner more consistent with the pragmatic presuppositions for critical discourse recommended by Habermas, supplemented by a Deweyan essential: active and potentially effective participation.

- No one capable of making a relevant contribution has been excluded
- Participants have an equal voice
- They are internally free to speak their honest opinions without deception or self-deception.

A - Corporations – they were first created to serve public purposes. When the form became more common and private there was still a public aspect operative. In exchange for a license from the State to operate with immunity from personal liability for harms caused in operation, corporations in effect agreed to perform in a manner more or less specified by the State creating it. As long ago as the 17<sup>th</sup> century Matthew Hale, Chief Justice of the King’s Bench in England, considered the operation of wharves as affected with a public interest. In the U.S., the Supreme Court considered the operation of grain elevators as a business affected with a public interest (Munn v. Illinois) Certainly banks, insurance companies and companies using working in or on “the commons,” among others affect the general public in ways that differentiate them from a purely local small business.

Such companies should have in their internal public policy formulation processes some form of public voice with substantial authority. For instance, some companies have ombudsmen; THE NEW YORK TIMES has a public editor in that role.

Such quasi-public businesses acting in their corporate capacity should not be permitted to participate in electoral politics.

Such entities should have to pay this employer a “. . . living wage.” Perhaps such quasi-public employment should be more secure than the insecurity of at-will employment. They would be more likely to internal critics and external whistle-blowers.

Such requirements might be imposed as a pre-conditions processes to public stock exchanges.

It would be very beneficial to local communities if they could tie absentee, outside employers and businesses to the community. A commitment to stay a fixed period or to give reasonable notice of intent to leave in the initial grant of authority to operate locally.

B - Foundations – typically they are set up for tax avoidance or to control wealth after death. Both purposes have public justice significance so foundations are quasi-public entities like many for profit business entities. Foundations should have specific narrow mandates that justify the benefits the public grants them; and they should be limited to those specific activities. In addition to reforms like those above, the source and use of all foundation funds should be public information. Finally, they should have limited lives. By the end of a generation they should be required to have spent all their money and go out of business.

C - Media – in return for the kind of affirmative free speech rights recognized in many countries the media should have to provide “equal time” to persons directly affected by their news or opinion coverage. They should also have to provide free space to candidates during election or referendum campaigns. There should also be kind of independent fact checker.

D - Universities – The Association of University Professors (AAUP) an organization John Dewey helped found has developed detailed principles and guidelines across long years of considering questions of academic freedom and faculty governance. As a former State Chair of AAUP I recommend their “Red Book” for specifics.

Certainly the activities referred to by Jane Mayer in Dark Money about the billionaires’ efforts to place courses on Law & Economics in law schools should be considered inappropriate. Can the professorate have the neutral almost disinterested mindset demanded by Julian Benda in The Treason of the Clerks (1928)? I doubt it. But each professor should feel obligated to know and articulate the “other” side of any controversial matters within the discipline as well as the other can for itself.

E - Government commissions of inquiry – The membership of the body should reflect the conflicting and alternative interests embedded in the subject matter of the inquiry. Frederick Wilmot-Smith begins his recent essay in the LONDON REVIEW OF BOOKS (March 17, 2016) with a statute of Edward I from 1276 authorizing coroners to conduct official inquiries into sudden deaths. Legislative and public inquiries are not trials; rather they are investigations, so all the procedure of litigation ought not be required. Wilmot-Smith discusses several recent public inquiries in Britain and the question of the proper participation of persons criticized in the “draft” stage of the commission’s work. He concludes that a policy/practice of giving any person or interest subject to explicit or significant criticism an opportunity to respond, but not necessarily access to the wording of the Report before finalization would “get the balance about right.”

F - Policy deciders – all governmental entities having a “final” say in policy should be required to include as part of their determination a statement of their reasons and reasoning process specifying what and how they considered as evidence and the impact of their decision on those affected by the decision. This would be something like the Environmental Impact Statement required of most economic regulatory bodies in the U.S. In an earlier essay I proposed that the Courts require the government to submit a statement describing how the interests of poor people were presented to and determined by the legislature in formulating the law that is being challenged before the Court.

As Aristotle recognized, all rules if applied without specific attention to consequences can result in injustice. Schumpeter recognized that the market operated similarly. Creative destruction, like the law can result in injustice. Lawmakers in any determination and application of a law should explicitly articulate recognition of this limit the justice of the law. And, there should be a formal mechanism for what the common law tradition calls “equity”; a “common sense of the injustice of application of the norm in the present circumstances of these particular persons”. Thus, the “state of exception” becomes a principle of justice, not an act of sovereign power.

G – Despite the marvels of social media and the increasing access to the world’s knowledge and its greatest thinkers, there are still large inequalities of access to basic research and analytic tools. Two “openings” that would help reduce the inequalities and increase participation by people: public libraries as conceived by Andrew Carnegie are an underutilized part of the Commons; and free auditing access to college and university courses for non-traditional students and others. H – Cultural Apparatus – C. Wright Mills used that term to refer to the arts, entertainment, and media fields; more generally to intellectual work (writers, scientists, inventors) (1963); in other words, the cultural commons. Such work needs to be subsidized, amplified, spotlighted, and actualized (produced).

I – As the Anglo-American justice system developed, the direct participation by people was central. The jury system gave the people the final say on guilt and innocence for increasing numbers of crimes and civil wrongs. Today there are fewer trials and the jury selection process is anything but a random selection of fellow citizens of the locality. Thus the ultimate check by the people has been lost.

J - Finally, three related thoughts on the inequality of capital. One as suggested by Zucman in his book on tax havens is “the creation of a worldwide register of financial wealth, recording who owns what in stocks and bonds.” Another suggested by Thomas Piketty is a global wealth tax. Certainly this idea is worthy but it is ex post. To prevent disproportionate wealth being accumulated requires ex ante restraints. Certainly “subsidies” to businesses and persons should be scrutinized carefully. The government contract game played so successfully by Bechtel described earlier overpromotes wealth accumulation by the contracting company; as do all forms of monopoly.

### **Conclusion**

The utopian faith in the myth of the market needs to be replaced by a recognition that everything is related to everything else. Perhaps not Lovejoy’s Great Chain of Being, but connected in a meaningful sense. There are thus in every market transaction externalities, a third person so to speak. There may also be an invisible hand but it is not self-evidently the hand of Good. This inter-connectedness also suggests that everything “outside” the immediate relationship between those directly involved can be thought of as the Commons from which and in which the transaction occurs. Certainly the physical, cultural, and normative infrastructures are drawn upon as if from the Common pool. This demythification of the self-regulating market and the enlargement of the Commons (recognition of interconnectedness) certainly will facilitate the de-commodification of nature, people, and money (land, labor, and capital) and the re-embedding of the economy, especially fugitive capital in society as urged by Polanyi.

Hirschman’s brilliant phrase “exit, voice, loyalty”, especially his emphasis on voice is essential. However, each of the three terms has to be complemented. Exit or choice needs to be coupled with entrance or inclusion. Voice needs to be active, heard, and have the means to be effective. Loyalty within “self-revolutionizing” limits circles back to Exit. Transforming the policy formation process by making participation more egalitarian and associational is a step towards capturing fugitive capital and re-embedding it in society; towards Deweyan democracy.

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