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Economics and Law in Conversation

Socially Embedding the Market and the Role of Law

an interview with Professor Margaret Somers

by Joshua Curtis, Visiting Fellow at the Lab

Professor Margaret Somers is a Professor of Sociology at the University of Michigan and a renowned expert on the work of Karl Polanyi. She is highly regarded for her writing on a nascent sociology of human rights and its links to theories of citizenship ([Genealogies of Citizenship: Markets, Statelessness, and the Right to have Rights, Cambridge, 2008](#)), and, with Fred Block, on the importance of Karl Polanyi to current debates in economics ([The Power of Market Fundamentalism: Karl Polanyi's Critique, Harvard, 2011](#)). Currently she is focusing on 'The Making of Citizenship Rights', a work of comparative historical sociology with a focus on English legal history.

JC:

In your work you draw deeply on Karl Polanyi, explicating his thoughts on the embeddedness of markets in social reality and the 'double movement'; the two opposing movements that comprise the core dynamic of all market societies, namely the laissez-faire movement to expand the scope of the market, and the protective countermovement to resist the dis-embedding of the economy. Together with Fred Block you have also made important contributions to present debates by demonstrating the deep relevance of Polanyi to current travails wrought by more than thirty years of neo-liberalism, or market fundamentalism. Although economic theory, and its practical effects in and on society, occupy centre stage in both your own and Polanyi's work, you have both approached economics in an indirect way; Polanyi through legal education, politics, economic journalism and anthropology, and yourself through sociological and historical study.

Could you speculate (with regards to Polanyi) and comment (with respect to yourself) on whether those who follow more elliptical career paths around standard economic education are better positioned to contribute more creatively to thinking on economics? Does it enable more radical or grounded theorising?

MS:

I would like first to point to an ambiguity in the question that will affect my answer. The phrase ‘positioned to contribute more creatively to thinking on economics’ potentially contains a number of layers. I assume that by ‘creative thinking’ you mean critical thinking, in the sense associated with a progressive critique of mainstream, or any, economic theory. But, in my mind the greatest irony of the last four decades of neo-liberalism is that the most ‘creative’ thinking in the field of economics is associated with the development of the fundamental justifications of neo-liberal economics itself. To

CLASSICAL POLITICAL ECONOMY ... AS WELL AS ITS MODERN INCARNATION IN NEO-CLASSICAL AND NEO-LIBERAL ECONOMICS, IS A RADICALLY ANTI-EMPIRICAL PROJECT. YET ITS LEGITIMACY RESTS ON ITS CLAIM TO THE MANTLE OF SCIENCE. A GREAT DEAL OF CREATIVITY IS NEEDED TO RECONCILE THESE TWO FACTS.

be clear, I don’t mean creative here in the normatively positive sense of a valorisation of creativity. I mean creative in the sense of literally making things up and the deliberately instrumental use of imagination, what Milton Friedman called economists’ unreal or ‘as if’ assumptions. Essentially, what the early theorists of neo-liberalism

excelled at was the invention of a series of non-confirmable arguments on which are based a certain, and by now familiar, set of economic policy recommendations. Neo-classical economics, on which neo-liberalism is built, is founded on a deductive model constructed through theoretical reasoning. Deductive methodology in economics is epitomised by Friedman’s famous pronouncement that the purpose of modern economic knowledge was to generate powerful and parsimonious economic predictions. This was a goal, he argued, which justifies, indeed necessitates, unrealistic assumptions about utility-maximizing rational actors and general equilibrium.

This fits the notion of creativity in several ways. Classical political economy, going back to Malthus and Ricardo, as well as its modern incarnation in neo-classical and neo-liberal economics, is a radically anti-empirical project. Yet its legitimacy rests on its claim to the mantle of science. A great deal of creativity is needed to reconcile these two facts. This radical anti-empiricism expresses itself as a disdain for the epistemic validity of dis-confirming evidence. This disdain, of course, is not openly acknowledged, but is the inevitable outcome of a theory built by necessity on Friedman’s unrealistic ‘self-evident’ assumptions, which immunise much of the theory from vulnerability to countervailing evidence. Neo-classical economics updated and modernised this theory. For example, it assumed into existence a newly naturalised human agent, an anti-Enlightenment utility maximiser, responding only to material incentives. As a stipulation about human nature, this definition of agency cannot of course be either confirmed or disconfirmed. Along with this fiction of human agency there is a whole infrastructure of underlying assumptions that is empirically untouchable, an epistemic black box, which allows economics to pass itself off as a neutral and objective science while protecting itself against the most rudimentary criteria for scientific testing.

THESE UNREALISTIC FOUNDATIONS REMAIN CENTRAL TO MAINSTREAM ECONOMICS. PAUL KRUGMAN HAS RECENTLY CHARACTERISED THE PRINCIPLES AND PRACTICES OF MODERN ECONOMICS AS ‘FAITH-BASED’.

These unrealistic foundations remain central to mainstream economics. Paul Krugman has recently characterised the principles and practices of modern economics as ‘faith-based’. By this he means that economists place untestable economic logic—justified by a theology of faith in presuppositions

and assumptions—over and above years and decades of historical and sociological evidence. Krugman, in fact, links the economists’ failure to foresee the financial crisis of 2008 to exactly that kind of reasoning.

In response to critique based on observable reality, mainstream economists reject such ‘empiricism’, which they describe as the testing of theory with illusory superficial empirical evidence. This is an expression of theoretical realism, an approach to knowledge that uses rational logic to determine what is real, and rejects what seems self-evidentially real to the rest of us as superficial and surface illusion. Therefore, if reality is a matter of deductive reasoning built from arbitrary assumptions that can neither be confirmed nor disconfirmed by evidence, then knowledge can never be democratically adjudicated, and truth is only discernible to those who claim special abilities to access it. Therein lies the power of neo-classical and neo-liberal economics, and the ‘priests’ that purvey its logic and administer its policies.

The classic case of this kind of creative logic is the discovery of a rationale to stop taxing rich people. This was done through the creative invention of ‘supply-side economics’, which entailed radical tax reductions on high incomes and wealth, allegedly aimed to increase investment in capital, and the

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systematic dismantling of legal, tax and regulatory barriers to the production and distribution of goods and services. This self-evident gain for the wealthy was predicted to ‘trickle down’ into higher wages for all through a virtuous spiral of business expansion, increased investment and the creation of more jobs. By a process of equally creative

‘outside of the (Keynesian) box’ thinking, neo-liberalism justified rolling back the progressive taxation of the rich by inventing the Laffer Curve, which purportedly demonstrated that a cut in tax rates will actually result in an overall increase in tax revenue. The Laffer Curve, like so much else in the political project of neo-liberalism, was basically invented out of whole-cloth with virtually no empirical grounding. This inventiveness was aimed at delegitimising the prevailing thinking at the time, which was based on a demand-centric Keynesianism that stressed government intervention in the economy to stabilise the demand for goods and services, rather than concentrating solely on liberating capital input for their supply. The active use of this ‘creative’ Laffer Curve by the Reagan administration had a very real outcome; it helped to justify the lowering of the tax rate on the top 0.01% of earners in the US in the 1980s from 70% to 30%.

All of this is central to Polanyi’s critique of 19th Century economic liberalism, which he called ‘a stark utopia.’ He used the term to call attention in a dramatic way to the fact that the foundational concept of

POLANYI CONSISTENTLY INVOKES THE WORD REALITY WITH REGARD TO HIS MOST FOUNDATIONAL CRITICISMS OF ECONOMIC LIBERALISM.

a natural self-regulating market is an anti-empirical act of imagination that can only be realised in theory. Theoretical constructs, however, in the hands of the powerful are not innocent, and the effort to impose an unrealistic self-regulating market onto the reality of society wreaked massive social destruction as it sought to force society to conform to its postulates. Against this ‘stark utopia’

Polanyi juxtaposed the notion of the ‘reality of society’. Polanyi consistently invokes the word reality with regard to his most foundational criticisms of economic liberalism. He insisted that the only way to construct realistic knowledge is to theorise based on observations of the world as it actually is, drawing deeply on his long experience as a person whose life was strongly grounded in the complexity and realities of society, as a teacher, political activist, anthropologist and historian. In the case of ‘society’, Polanyi is making an ontological statement about the social nature of human agency and the interdependence of our collective existence. In the case of ‘reality,’ his critique is epistemological and methodological, and it is directed squarely against economic theory as a form of

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knowledge that is based on abstract logic and unobservable assumptions about human nature and social equilibrium. To see the world as it is in reality, not as we might like it to be in the logic of economic thought, is for Polanyi the only way to fashion public and social policies on moral

and ethical foundations.

Polanyi traces the beginning of ‘the denial of reality’ to the classical political economists’ appropriation of *social naturalism*. This, in the first instance, is an approach to understanding the social world that assumes that human society and the natural world both work according to the same laws of nature, which, in turn, justified social policies designed to trigger (incentivise) biological drives rather than human morality or social responsibility. This radical theory reduces the meaning of humanity itself to purely biological instincts, instincts that the political economists made to serve as proxies for economic motivations and activities. He argues, moreover, that reinventing the social world as a system that works according to the laws of the jungle was among the most significant—and egregious—of classical political economy’s dictates, as it transformed our social world from a

YET THE SAD FACT REMAINS THAT YOU MUST HAVE A DEGREE IN ECONOMICS TO BE TAKEN SERIOUSLY IN POLICY CIRCLES. SOCIOLOGISTS, POLITICAL SCIENTISTS AND ANTHROPOLOGISTS RARELY FIND THEMSELVES IN POSITIONS OF POWER, WHETHER IN THE PUBLIC OR PRIVATE SECTOR. THIS SUGGESTS THAT TO GAIN A CRITICAL PERSPECTIVE ON ECONOMICS YOU HAVE TO SACRIFICE POWER.

system of socially constructed arrangements into one that achieved its own equilibrium no differently from nature’s equilibrium.

To return to your initial question, then, I would suggest that Polanyi’s perspective could only be that of an outsider to the discipline. His status as an outsider enabled his own critical thinking about mainstream economic liberalism as a utopian endeavour. Polanyi’s achievement

was to puncture the delusion that subordinating society to ‘nature’s laws’ would produce harmony. While there are a handful of brilliant critics from inside the discipline, I think it is fair to suggest that the ability to look at economics from a non-economic perspective certainly facilitates truly creative, *qua* critical, thinking about the field itself.

Yet the sad fact remains that you must have a degree in economics to be taken seriously in policy circles. Sociologists, political scientists and anthropologists rarely find themselves in positions of power, whether in the public or private sector. This suggests that to gain a critical perspective on economics you have to sacrifice power. Polanyi is a case in point. He published *The Great*

Transformation in 1944, within months of Friedrich Hayek's *The Road to Serfdom*. While Polanyi is by and large known almost exclusively among a small group of academics, Hayek's book went on to become a core text of neo-liberal theory and policy. There are very few people in power that have made reference to Polanyi, while Hayek was famously close to Margaret Thatcher and Ronald Reagan, was appointed a member of the UK Order of the Companions of Honour, given an audience with Queen Elisabeth II, and awarded the US Presidential Medal of Freedom by George H.W. Bush.

IT WAS NOT UNTIL I WENT TO GRADUATE SCHOOL AND READ E.P. THOMPSON, THE FRANKFURT SCHOOL THEORISTS, AND ABOVE ALL KARL POLANYI, THAT I CAME TO THINK FROM A BROADER SOCIAL HISTORICAL, CULTURAL, AND ANTHROPOLOGICAL PERSPECTIVE, TAKING WHAT SOME MIGHT CALL A MORE 'HUMANIST' APPROACH TO ECONOMICS, BUT WHICH IN TRUTH SIMPLY EXPRESSES THE REALITY OF THE SOCIAL.

To give my personal account, as an undergraduate my general political and moral stance was informed by my passionate opposition to the Vietnam War, which in turn made me deeply concerned about social injustice more generally. After Nixon was elected in 1968, the idea was circulated that the only way to stop the War was to enact a general strike, because the only way that sufficient pressure could be put on the US government to change policy was if everyone stopped working, if the economy itself ground to a halt. I had never thought about that before. This led me to a realisation that the economic basis of society was so powerful. I thus read Marx, Miliband, Poulantzas, Baran and Sweezy, and O'Connor, and became deeply involved with the analysis of modern capitalism and the role of corporate power. I also became a passionate feminist. However, it was not until I went to graduate school and read E.P. Thompson, the Frankfurt School theorists, and above all Karl Polanyi, that I came to think from a broader social historical, cultural, and anthropological perspective, taking what some might call a more 'humanist' approach to economics, but which in truth simply expresses the *reality of the social*.

One central lesson I took from Polanyi, was that the capitalist market economy depended on the brutal process of what he called 'fictitious commodification'. In order to create a capitalist labour force, human beings needed to be turned into 'labour' which, like all commodities, could be bought and sold on the market. Because true commodities, however, are *things* actually produced for the sole purpose of the market, what we call 'labour' is actually a *fictitious*

ONE CENTRAL LESSON I TOOK FROM POLANYI, WAS THAT THE CAPITALIST MARKET ECONOMY DEPENDED ON THE BRUTAL PROCESS OF WHAT HE CALLED 'FICTITIOUS COMMODIFICATION'. IN ORDER TO CREATE A CAPITALIST LABOUR FORCE, HUMAN BEINGS NEEDED TO BE TURNED INTO 'LABOUR' WHICH, LIKE ALL COMMODITIES, COULD BE BOUGHT AND SOLD ON THE MARKET ... THAT NARRATIVE HAS ALWAYS DEEPLY MOVED ME.

commodity, which is forced to behave and treated as if it is a real one. The consequence is a radical tearing apart of society, as this new fictitious commodity of labour must be ripped from the totality of human social relations and social organisation. Polanyi argues that this cultural devastation wreaked far greater damage than could ever have been offset by a marginal increase in financial wellbeing. He compares the cultural catastrophe that befell the English working people during the

industrial revolution to the terrible coercion of Africans into wage labourers by colonial powers. This required the complete destruction of pre-existing social relations as communities were torn asunder and people were converted into commodities for sale as individualised labour packages. That narrative has always deeply moved me, and it reveals a perspective on political economy that I believe is very meaningful.

Along with political economy my other approach to economics is through my commitment to building a sociology of rights, socio-economic rights in particular. This interest began with my PhD thesis on English history, which took a very long view, back to the 14th Century, on how working people came to see their lives and their future in terms of a system of rights, especially in terms of what T.H. Marshall would call social citizenship rights. I found that those citizenship rights really hinged on what we now call socio-economic rights, because they centred on early wage relations, the ability to impose wage regulations and the legal construction of a minimum wage system on the part of rural-industrial textile workers in the 17th Century. Building from a previous system of maximum wage regulations, organised communities of working families were able to unify and convert this oppressive system into a legally-supported minimum wage requirement. This process demonstrates the complex intersection of individual rights, economic regulations, and participatory capacities.

So to answer your question, yes, I believe this historical approach to equality and rights contributed enormously to my being able to think more creatively and critically about economics and economic policy.

JC:

In Polanyian terms, human rights, and especially socio-economic rights, are presently a core part of the 'double movement' generated in reaction to the latest attempt to remove markets from their social context. This raises fundamental questions of how rights, with respect particularly to their legal valence, might perhaps permanently regulate our economic reality and prevent any future market dis-embedding and its resultant social destruction, if we could just institute them properly. Yet the details of this move with respect to the present policy making process are not easy to discern.

In concrete terms, how might you envision the interaction between human rights as law, political

THE FRAGMENTED HISTORY OF HUMAN RIGHTS HAS BEQUEATHED TO US A VERY SERIOUS CONTEMPORARY PROBLEM REGARDING HOW TO ADVOCATE EFFECTIVELY FOR THE HOLISTIC REALISATION OF HUMAN RIGHTS, WHICH, AS YOU SAY, IF LEGALLY ENTRENCHED COULD PROVIDE A SERIOUS BULWARK AGAINST THE RECURRENT SOCIAL DEVASTATION OF FREE-MARKET FUNDAMENTALISM.

process, and economic policy making? Furthermore, in terms of setting more permanent obstacles against future market dis-embedding, how much can realistically be expected in the absence of strong commitments to substantive and enforceable socio-economic rights?

MS:

I think it is basically correct to frame socio-economic rights in particular as central to the current 'social re-embedding' associated with

Polanyi's double movement. However, it is difficult now to find a narrative that allows us to focus on building up socio-economic rights while at the same time not seeming to prioritise them over civil and political rights. This is a very serious difficulty, and one that is a distinct hangover from the early separation of these two sets of rights and their respective traditional associations. Present efforts to prioritise socio-economic rights today, even just in a practical sense in order to have them catch up to civil and political rights in terms of legal recognition, expose the advocates of such an approach to accusations of anachronistic communism (as a hangover from the Cold War divide) or inherent authoritarianism (as a result of the Asian values debate). The fragmented history of human rights has bequeathed to us a very serious contemporary problem regarding how to advocate effectively for the holistic realisation of human rights, which, as you say, if legally entrenched could provide a

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serious bulwark against the recurrent social devastation of free-market fundamentalism.

In his 1944 State of the Union address, Franklin Delano Roosevelt gave the most important speech of his life, one that no one remembers now. It has come to be called 'The Second Bill of Rights'. This referred to a list of socio-economic rights; housing, education, a fair income,

social security, work, food, medical care, etc. Roosevelt stated that America's civil rights guarantees had been insufficient to ensure equality in the pursuit of happiness, and what was needed was a parallel, complementary set of rights that, together with civil rights, could achieve this aim. In his words, "true individual freedom cannot exist without economic security".¹ In a much earlier campaign speech in 1932 he stated that "an economic constitutional order ... is the minimum requirement of a more permanently safe order of things."² It would seem clear that Roosevelt also believed that legal structures of socio-economic rights were necessary to guide economic policy and contain market ambitions.

One of the most insidious developments that followed the establishment of the Universal Declaration of Human Rights (UDHR) was the subsequent forced separation of the two binding Covenants, the International Covenant on Civil and Political Rights

and the International Covenant on Economic, Social and Cultural Rights, which then proceeded on separate tracks. The lion's share of the blame for this separation must be laid at the door of the US, which to this day has refused to acknowledge the legally-binding nature of socio-economic rights.

ROOSEVELT ACTUALLY THREATENED TO RESIGN FROM THE ORGANISATION IF IT DID NOT DROP ITS DEMANDS FOR BLACK 'HUMAN RIGHTS', WHICH WOULD HAVE BEEN A DISASTER FOR THE NAACP AND AFRICAN-AMERICANS GENERALLY. AS A RESULT, THE ORGANISATION HAD TO RE-BRAND ITS POLITICS, AND FROM THEN ON, TO KEEP ROOSEVELT ON ITS SIDE, FOUGHT NOT FOR 'HUMAN RIGHTS' NEITHER FOR SOCIO-ECONOMIC RIGHTS, BUT FOR CIVIL AND POLITICAL RIGHTS.

¹ Address delivered on 11 January 1944, Washington DC.

² Commonwealth Club Address delivered on 23 September 1932, San Francisco.

The US would not allow the development of a unitary Covenant. This then led directly to the notion of first and second generation rights, which is actually quite an egregious characterisation. Even some scholars who are advocates of socio-economic rights use this regressive and destructive terminology of first and second generation rights.

The history of the relationship between the African-American community and human rights is very instructive here. In the 1940s one of the first organisations dealing in the discourse of rights was the National Association for the Advancement of Colored People (NAACP). The NAACP, which was at the vanguard of a new group of rights-based organisations, first defined itself as an organisation fighting

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explicitly for human rights, which they defined as socio-economic rights. The NAACP tried to get these rights specifically integrated into the drafts of the UDHR. However, the Soviets soon adopted a course of attacking the US for its violation of human rights—specifically, as a country based on racism and

apartheid--advocating that the UDHR should have the power to reach beyond domestic barriers to force American racism into the open, all in the name of human rights. In the US, then, the phrase 'human rights' became associated with the Soviet Union. At the time, Eleanor Roosevelt, who we are used to lauding for her promotion of the UDHR but who actually played a destructive role in the struggle for the recognition of specifically black human rights, was on the Board of Directors of the NAACP. Roosevelt actually threatened to resign from the organisation if it did not drop its demands for black 'human rights', which would have been a disaster for the NAACP and African-Americans generally. As a result, the organisation had to re-brand its politics, and from then on, to keep Roosevelt on its side, fought not for 'human rights' neither for socio-economic rights, but for civil and political rights. Now we all know the movement that the NAACP spearheaded as the 'civil rights movement', which gained universal currency at the expense of socio-economic rights in particular and human rights in general. By the time that the human rights movement was revived in the 1970s by President Carter and the Helsinki Accords, socio-economic rights had been all but completely eviscerated from the very concept of human rights, such that the only thing that was really revived was a more universal application of civil and political rights.

Despite this history, we nevertheless must keep pressing forward to establish properly the importance and prominence of socio-economic rights. The application of rights to economic policy is a central site at

THE APPLICATION OF RIGHTS TO ECONOMIC POLICY IS A CENTRAL SITE AT WHICH THIS HOLISTIC DISCOURSE ON HUMAN RIGHTS IS NOW BEING STRENGTHENED AND IMPLEMENTED.

which this holistic discourse on human rights is now being strengthened and implemented. The UN Committee on Economic, Social and Cultural Rights has begun to advocate the mainstreaming of civil and political rights within the process of decision making on economic policy directly affecting socio-economic rights. For example, the Committee has recommended to states that the formulation of national strategies and policies on education and housing should involve high levels of participation and information exchange with those affected by these policies. In the US, in reaction to the destruction of New Orleans by hurricane Katrina and the racism, poverty and inequality that was dramatically exposed in the government's slow response, the crush of neo-liberal social policies

appears to have finally catalysed a change in the once-dedicated civil rights community to return now to its original holistic human rights agenda, to fight back against poverty and socio-economic inequality. Many current leaders in black communities are now addressing their socio-economic exclusion by calling attention to the expected 'basic minimum' of international human rights as reflected in the UDHR.

I also believe that the project of strengthening the holistic reality of human rights may be furthered

... THE PROJECT OF STRENGTHENING THE HOLISTIC REALITY OF HUMAN RIGHTS MAY BE FURTHERED THROUGH LINKING THIS TO THE DISCOURSE ON PUBLIC GOODS ... PUBLIC GOODS MAY BE THOUGHT OF AS CONDUITS TO ESTABLISHING PEOPLE'S STATUS AS RIGHTS BEARERS.

through linking it to the discourse on public goods. While public goods are forms of social provisioning, it is important to note that for every public good there is a corollary *right* and therefore a distinct legal framework around it. The issue then becomes the obligation of the state to provide the right *and* the content of the public good at the same time. Therefore, public goods may be

thought of as conduits to establishing people's status as rights bearers. Sadly, this also means that we need to see the politics of austerity as not merely a successful attempt to redistribute resources and wealth upwards through the erosion of public goods. We must also recognise it as a project of *de-democratisation* and the undermining of human rights. Destroying public goods and relocating the wealth of a state into higher economic brackets is not just a political process, but also a deeply anti-rights process.

The privatisation of many public goods, from health to education, is thus a central dynamic in the erosion of rights. Transferring public goods into private ownership turns rights into privileges, which are no longer given but must be earned and which will only be conferred on the 'worthy'. Instead of rights bearers, people become supplicants in direct relation to private actors and to their own government. This turns the actual provision of rights into a matter of discretion on the part of the economically and politically powerful. It removes any form of due process or legal enforceability, and converts citizens and rights-holders into undeserving social parasites. In particular, the poor are redefined as people without moral worth, no longer deserving of legal entitlements. At the end of the process, they are no longer recognised as moral equals and rights-bearers.

Public goods and socio-economic provisioning are therefore very much dependent on the degree to which there is a legal infrastructure supporting them. Yet, we should not lose sight of the fact that it is not just socio-economic rights and public

THE TWO SETS OF RIGHTS WILL ULTIMATELY EITHER STAND TOGETHER, OR FALL APART ... SOCIO-ECONOMIC RIGHTS ... ARE STILL NO SILVER BULLET. ONLY A COMBINATION OF THESE RIGHTS AND POLITICAL VIGILANCE AND ACTIVISM WILL ENSURE THAT THE MARKET IS KEPT IN CHECK.

goods, but civil and political rights that are under great threat. In the US, numerous laws are being passed at the state level that are actively undermining our democratic and participatory rights. Voter suppression, which has gained very significant momentum in Republican-dominated states, is a deliberate programme to take certain sections of society, mainly the poor, African-American, and Latino voters out of the political equation. It should be noted that a strong set of socio-economic

rights would impede the current removal of civil and political rights in the US. Again, we see clearly the fundamental interdependence of human rights. The two sets of rights will ultimately either stand together, or fall apart. While the nature of socio-economic rights as legal rights may provide an extra bulwark against the ambition of capital to be free of social regulation they are still no silver bullet. Only a combination of these rights and political vigilance and activism will ensure that the market is kept in check.

JC:

Your theory of citizenship and social inclusion, based on a foundational 'right to have rights', echoing Hannah Arendt, is a central element of the particular response to market fundamentalism that you describe in your work.

Which particular legal entitlements form the necessary core of the 'right to have rights' as envisioned by your theory, if such a core exists?

MS:

In my opinion socio-economic rights are the foundation of citizenship rights, and even of human wellbeing in an existential sense. Most certainly, it is these socio-economic entitlements that are most directly connected with, and even constitutive of, the first order necessity of social inclusion, which is synonymous with the right to have rights, in the Arendtian sense that

THERE IS AN INTERDEPENDENCE AMONG PRIMARY SOCIAL INCLUSION, SOCIO-ECONOMIC ENTITLEMENTS AND THE RIGHT TO HAVE RIGHTS ... THE LEGAL ENTRENCHMENT OF CIVIL AND POLITICAL RIGHTS HAS PROVED INADEQUATE; ON THEIR OWN THEY CANNOT ESTABLISH A PERMANENT 'RIGHT TO HAVE RIGHTS'.

rights emerge not from natural human nature but from inclusion in a political community. There is an interdependence among primary social inclusion, socio-economic entitlements and the right to have rights.

As we have discussed above, the legal entrenchment of civil and political rights has proved inadequate; on their own they cannot establish a permanent 'right to have rights'. They have not succeeded in guaranteeing social inclusion, and have failed to prevent the deep erosion of citizenship. It seems clear that we need not only substantive democratic rights as legal obligations on the state, but also substantive socio-economic rights that act to maintain certain levels of equality and social protection from powerful private actors and market forces. That is, we should endeavour to lock-in, through legal means, whatever advances in living conditions and equality that are made by social democracy. Over the past decades there has instead been a legal locking-in of gains made through neo-liberal market fundamentalism for the wealthy and the privileged, mostly through economic and financial laws and regulations at the national and international levels. This strategy should be overturned.

JC:

Market fundamentalism arguably has free reign at the international level. Even if an adequate citizenship regime is installed at the national level, democratic control over the economy would still be subject to international regimes of hard and soft economic law that presently reflect market fundamentalist logic. At this level there is no clear polity to grant inclusion, no formal political structure, and only a weak and nascent global civil society through which to enact resistance.

How do you view the interaction of economics and law at this level, and do you see any avenues for the ‘upgrading’ of something like the national citizenship regime to act as an international bulwark against the depredations of market fundamentalism at the global level?

I WOULD LIKE TO FOCUS ON ONE MAJOR THEME, MODERN FREE TRADE AND INVESTMENT AGREEMENTS, AND THEN USE POLANYI TO DRAW A PARALLEL TO THE UNDERLYING CONDITIONS THAT CREATED FASCISM IN THE EARLY 20TH CENTURY, BECAUSE MY CONCERN IS THAT OUR CURRENT INTERNATIONAL ORDER IS HEADED IN THAT DIRECTION.

MS:

Here I would like to focus on one major theme, modern free trade and investment agreements, and then use Polanyi to draw a parallel to the underlying conditions that created fascism in the early 20th Century, because my concern is that our current international order is headed in that direction.

We live under conditions of radical asynchrony between a global economic regime of capital, which is increasingly interwoven through a network of complicated treaties and institutional arrangements, and the nation state-based reality of democratic politics. This represents the separation at the international level of politics from the economy that is the utopian ideal of neo-liberal theory. A space without politics, moreover, is by definition a global space of effective rightlessness. For the moment I will bracket the question of whether rights are being protected through regional human rights courts. Suffice to say for now, that these courts still ultimately rely on nation states to enforce their rulings, and so rights are therefore ultimately attached to the will of national governments. Frankly, I’m not optimistic.

In this environment it is my contention that modern trade and investment treaties, such as the Transpacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), are our current equivalent of the gold standard from the 19th and early 20th Centuries. The gold standard was an international monetary agreement to fix the value of a nation’s currency to a certain value of gold, together with a commitment freely to exchange the former into the latter. The gold standard was conceived as the actualisation of the self-regulating market at the global level. Under the gold standard it was theorised that currency values internationally would automatically and autonomously stabilise, bringing stability and harmony to international market relations more generally. It is important to note that this arrangement was entirely created and supported through law. In my

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view, modern trade and investment agreements are intended as the new actualisation of the self-regulating market at the international level. They are there to serve the same purpose as the gold standard, and are also inherently creatures of law.

When most people think of the negative implications of these treaties the focus is on the destructive impact that they have had on labour rights and labour relations, the manufacturing bases of the developed countries, and the environment. All rhetoric aside, most of the labour and environmental protections have been either excised from these treaties or relegated to non-binding, peripheral and ineffective side agreements.

THE LAW IS BEING USED IN THESE TREATIES TO CREATE A FRAUDULENT NOTION OF GLOBAL JUSTICE ... THESE (ISDS) TRIBUNALS ARE EFFECTIVELY ARBITERS OF ECONOMIC JUSTICE, AND THROUGH THE LAW THEY PLAY A LARGE ROLE IN THE CONCRETE DISTRIBUTION OF THE WORLD'S RESOURCES AND WEALTH.

But what I think is more important is the way that the law is being used in these treaties to create a fraudulent notion of global justice. We have had the World Trade Organisation's (WTO) tribunals for 20 years and now we are seeing the increasing importance of ad hoc investor-state dispute settlement (ISDS) tribunals throughout bilateral investment and free trade treaties. These tribunals are effectively arbiters of economic justice, and through the law they play a large role in the concrete distribution of the world's resources and wealth. In the event of disputes, they decide who gets what with regard to the proceeds of a given set of economic transactions and productive processes. In a very real sense they (re)allocate the benefits of economic activity, which is ever increasingly becoming global or international by nature. These tribunals are therefore both extra-legal and legal at the same time. They are not courts, so generally they do not display the procedural and substantive qualities and characteristics that we demand of our national courts. In fact, particularly in the case of ISDS tribunals, they are basically corporate driven systems. Only transnational corporations may bring cases, and the nation state is always the defendant. As such it is regularly the outcomes of local

THE EFFECT OF THESE TREATIES IS TO ESTABLISH AN INTERNATIONAL ORDER WHICH IS AS INSULATED AS POSSIBLE FROM DEMOCRATIC INTERVENTION ... TODAY'S TREATIES ARE MORE ABOUT REMOVING INTERNAL OR NON-TARIFF BARRIERS TO TRADE AND INVESTMENT, WHICH ARE VERY OFTEN EUPHEMISMS FOR THE REGULATORY OUTCOMES OF LOCAL DEMOCRATIC PRACTICES.

democratic processes that are being challenged by corporations for allegedly violating their property rights protections of investors established in the treaties.

Fundamentally then, the effect of these treaties is to establish an international order which is as insulated as possible from democratic intervention. The argument that these treaties are intended primarily to establish free trade is almost

nonsensical now, as the vast majority of the world's trade is already almost fully liberalised through the treaties we already have. Tariff barriers are already about as low as they can get. Today's treaties are more about removing internal or non-tariff barriers to trade and investment, which are very often euphemisms for the regulatory outcomes of local democratic practices. As this increased, anti-democratic legalisation of the international sphere is now stalled in the WTO, we are seeing an intense push from the wealthy countries to continue the establishment of our modern day 'gold

standard' through bilateral and regional trade and investment agreements. Through democratic weight of numbers and the sense of shared fate that is generated in a multilateral institution, developing countries have been able to halt that process in the WTO.

THIS EFFICIENCY ARGUMENT NEVERTHELESS UNDERGIRDS AN INTERNATIONAL LEGAL REGIME THAT AMOUNTS TO A *DISPLACEMENT OF ECONOMIC JUSTICE BY THE LAW ITSELF.*

The basic belief that motivates states to bind themselves and ultimately subordinate democratic processes to the dictates of this market-based international legal regime, is the argument that *in the aggregate* all states together will be better off. This is a basic neo-liberal efficiency argument, which only takes into account what is called aggregate welfare, in this case the welfare of all state parties to the relevant treaties. It does not take into account the distribution of the economic gains, and by law it trumps prior democratic outcomes. This efficiency argument nevertheless undergirds an international legal regime that amounts to *a displacement of economic justice by the law itself.*

Moving to Polanyi, he grew up in the atmosphere of the rise of fascism in Europe, and lived much of his life in its shadow. *The Great Transformation* is a book written to explain the fundamental causal factors in the rise of fascism. He argues that the idea of the self-regulating market, the original premise of classical political economic theory, is a 'stark utopia', which is unrealisable in society. This

FREE MARKET CAPITALISM TENDS TO CONSUME THE VERY SOCIAL FOUNDATIONS ON WHICH IT RESTS.

is why the attempt to realise it will inevitably undermine the very foundations that enable a market society to function. Free market capitalism tends to consume the very social foundations on which it rests.

In terms of European history, the time that this self-consumption became significantly intensified was in the late 19th Century after the imposition of the gold standard, when massive unemployment at the national level became increasingly common as a result of the constraints of this standard on national economies. This began a serious conflict between national and international demands. At the national level there came strong demands for pensions, for unemployment benefits, for retraining, and for a rebalance to the destruction of living standards. However, these demands could not be met within the discipline demanded by the international standard. The national social

POLANYI'S ARGUMENT IS THAT FASCISM WAS A RESPONSE TO THE UTOPIANISM OF THE GOLD STANDARD, WHICH INEVITABLY DESTROYED NATIONAL DEMOCRATIC POLITICS. IN OUR PRESENT ERA, WHERE WE HAVE THE SAME KIND OF INTERNATIONAL LEGAL REGIME THAT IS ALSO UNDERMINING NATIONAL DEMOCRATIC POLITICS, WE ARE ALSO WITNESSING THE SETTING OF THE SCENE FOR ANOTHER POSSIBLE RISE OF FASCISM.

pressures paved the road to World War I, but the gold standard was re-instituted immediately following the War, and the same process began again. However, this time it was far worse because of the massive sovereign debts incurred by the War, which narrowed the space for domestic social spending even further. What occurred in response is markedly similar to our present era. Austerity was imposed on a very large scale, enforced by the dictates of the gold standard, without any

ability at the national level for citizens to be protected from its imposed suffering. This then led to a collapse at the national level of democratic institutions, for which increasing numbers of desperate people no longer held out hope. This set the conditions for the rise of populist fascist dictators, promising all kinds of benefits if they are only given the power to abolish the democratic order, which, conveniently, seemed semi-useless anyway.

Polanyi's argument is that fascism was a response to the utopianism of the gold standard, which inevitably destroyed national democratic politics. In our present era, where we have the same kind of international legal regime that is also undermining national democratic politics, we are also witnessing the setting of the scene for another possible rise of fascism. Fascism replaced political controls for what were inevitably failed utopian market mechanisms. The first thing that Hitler did when he came to power was to reject the gold standard and to adopt a form of Keynesianism by massively increasing the expenditure of the state, in this case through rearming Germany, which revived the whole economy but led directly to World War II.

THE TEMPLATE THAT POLANYI POINTS TO IS THE AMERICAN NEW DEAL, WHICH ACTIVELY RE-SUBORDINATED THE MARKET TO SOCIAL AND DEMOCRATIC PRIORITIES. THE NEW DEAL AND FASCISM, THEREFORE, ARE ACTUALLY THE TWO BASIC RESPONSES TO A GLOBAL MARKET UTOPIANISM ... THESE ARE THE TWO ALTERNATIVES NOW FACING US

For Polanyi, the only alternative to fascism is the reassertion of democracy and the re-subordination of economics to democratic processes. This may often take the form of the adoption of 'protectionist' measures, which have such a pejorative connotation in our neo-liberal world, but which have the simple effect of actually protecting society against an undemocratic imposition of market discipline at the international level. These are perhaps better termed as anti-austerity measures, particularly in the present era. The template that Polanyi points to is the American New Deal, which actively re-subordinated the market to social and democratic priorities. The New Deal and fascism, therefore, are actually the two basic responses to a global market utopianism. What divides them is a commitment to democracy, freedom and rights. These are the two alternatives now facing us, and it will be one or the other, because modern trade and investment agreements are essentially replicas of the gold standard.

JC:

In your work you describe an ideal where the state, civil society and the market operate in a balanced equilibrium. Nevertheless, you allude to one caveat in this regard: that the position of civil society should in some way be privileged, as a little 'more equal' than the state or the market.

What particular contribution do you envisage for human rights law in establishing and cementing this elevation for civil society? Could you expand a little on the reliance of civil society on the state that is thereby exposed?

MS:

The priority of civil society is a normative one: It is the sphere that ideally embodies the aspirations of social solidarity and shared fate. In political and institutional reality, however, an equal balance of

power among the triad of state, market, and civil society is necessary for the functioning of a democratic society. Today, however, this triad has collapsed into the rule of two spheres-- primarily the economy, and secondarily the state, now almost entirely in service to capital. The dynamics of neo-liberalism, or market fundamentalism, over the last three decades have deeply undermined democratic citizenship regimes, leaving civil society especially subordinated to the state and the market economy. The dictates of austerity and neo-liberalism have

undermined the social state as a provider of public goods and services, which has generated extreme inequality, high degrees of economic volatility, and extensive social exclusion. Meaningful citizenship rights and full social inclusion, while always subject to the violence and violations of racial and gender exclusions, have now more than ever been converted from rights into a set of contingent privileges, ultimately dependent on one's economic means and market exchange value.

From this perspective it is clear that a concept of citizenship based only on formal legal entitlements will be inadequate to the task of ensuring the solidarity and social provisioning necessary for a robust civil society. Formal legal arrangements, including even civil and political rights, must be backed by broader social practices and institutions, strong mechanisms of solidarity and reciprocity, and effective means of participation. In my work on citizenship in 17th and 18th Century England, I have shown that popular and inclusive citizenship rights have only been successfully established in participatory public spaces joined in tandem with relationally robust civil societies. The laws necessary to support rights are free-floating forms of empowerment and political resources, the practical meaning of which depends on the power of social relationships to press them into the service of democracy. Citizenship rights are relational social practices, not things.

If there are a full set of human rights entitlements established in law, both socio-economic and civil rights, the dynamics between the two will go a long way towards ensuring the broader societal conditions that I am referring to. The full set of human rights is needed to give the citizenship ethic its appropriate normative influence over both market contractualism and state bureaucratisation and militarisation. Socio-economic rights are of particular importance here, again, because they better encapsulate the collective dimension of shared fate that is central to the health of civil society.

CITIZENSHIP RIGHTS ARE RELATIONAL SOCIAL PRACTICES, NOT THINGS.

IT IS CLEAR THAT A CONCEPT OF CITIZENSHIP BASED ONLY ON FORMAL LEGAL ENTITLEMENTS WILL BE INADEQUATE TO THE TASK OF ENSURING THE SOLIDARITY AND SOCIAL PROVISIONING NECESSARY FOR A ROBUST CIVIL SOCIETY. FORMAL LEGAL ARRANGEMENTS, INCLUDING EVEN CIVIL AND POLITICAL RIGHTS, MUST BE BACKED BY BROADER SOCIAL PRACTICES AND INSTITUTIONS, STRONG MECHANISMS OF SOLIDARITY AND RECIPROCITY, AND EFFECTIVE MEANS OF PARTICIPATION.

THE FULL SET OF HUMAN RIGHTS IS NEEDED TO GIVE THE CITIZENSHIP ETHIC ITS APPROPRIATE NORMATIVE INFLUENCE

Very importantly, human rights are not only mechanisms of power, they are also central factors in identity formation, whereby peoples and

communities can conceive of themselves as capable rights-bearing agents in political struggle as well as deserving recipients of social benefits. But these rights and other formalised legal entitlements, must be embedded in community and in solidarity with others, in broad coalitions, thereby entrenching in practical reality a strong and socially robust civil society that is necessary to provide a

counter-weight to the neo-liberal state and market.

CIVIL SOCIETY WITHOUT A REGULATIVE SOCIAL STATE IS LIKELY TO BECOME A ‘CONSERVATIVE COMMUNITARIAN CHIMERA,’ SUCH AS BRITAIN’S CONSERVATIVE ANTI-STATIST “BIG SOCIETY” PROGRAM.

I do not, however, advocate the full subordination of market and state to civil society. Civil society requires the social state to provide adequate market regulation, social protection and social insurance, reliable public

services, appropriate public institutions and progressive tax regimes. Civil society without a regulative social state is likely to become a ‘conservative communitarian chimera,’ such as Britain’s conservative anti-statist “Big Society” program. Another anti-statist version of civil society is found in the market-driven concept of ‘social capital,’ a concept that embodies the attempt to convert social relations into utility streams. Advocates of an all pervasive civil society are in reality extolling the virtues of privatisation, whereby civil society would take up the fundamental tasks previously allotted to government--home schooling to compensate the removal of funding for public education, forced over-reliance on family and community solidarity and ‘care-taking’ to compensate for the phasing out of social security and pension schemes, etc. This vision of civil society is one in which the utility-maximising sphere of social relations would be forced to absorb the externalities of the market, now that this responsibility has been relinquished by the state. Those who extoll institutional domination by civil society are extolling a world in which the people are separated from the sources of political power and market regulation. Ultimately, a social world cut loose from the regulative and enforcement power of the social state and the law is a world without rights. State and civil society must be inextricably linked in the project of building and enhancing democratic citizenship regimes and human rights.

JC:

We are used to treating the economics and human rights discourses as inherently counter-posed to one another, even if we are beginning to build bridges between them.

However, going beyond the metaphor of bridges, to what extent would you envision the possibility of creating a new discourse, a third discourse, distinct from ‘economics’ or currently conceived ‘human rights’, that may be capable of underpinning a new social movement or a new politics?

MS:

Let’s start with the human rights side of the equation. Human rights discourse is philosophically rooted in political liberalism going back to Hobbes and Locke. This classical philosophical liberalism takes as its starting point an already constituted human, and ascribes to this human a set of rights that are said to be given in nature, which are attached to or possessed by this full human being. The key here is that because she is stipulated from the start to be a fully recognised, and recognisable,

human, she is by definition a rights-bearer. Today we rely more on a positivist ontology of rights, rather than a naturalist ontology. However, a pre-constituted human is still the starting point for rights discourse. But here is the problem: Most of the tragedies and crises of humanity have resulted only secondarily from denying others their human rights, and first from *denying others the right to be recognised as equally human in the first place*. I mean this

in a very literal sense. Whether the issue is social exclusion and extreme poverty, or ethnic cleansing or genocide, history teaches us very clearly that it is the prior act of non-recognition, or the refusal to endow targeted individuals with the right to be recognised as fellow humans, that has always paved the way for massive human rights violations.

The important point is that we are all only *contingently* human, and we only actually become human once we are recognised as such. The crucial question then is not what rights are ascribed to humans, but *who gets to be counted as human in the first place*. Once we identify the preconditions for a being to be considered as human, and therefore to be recognised in the Hegelian sense as a creature of equal moral status, then we can have a higher-level conversation about rights.

Moving towards economics: History teaches us that egalitarian social policies, especially what we think of as social democratic welfare policies, have only survived—indeed even been established and institutionalised in the first place—when there is sufficient moral worth attached to the beneficiaries of those policies. Neo-liberalism’s successful dismantling of existing protections for the economically powerless has ultimately been accomplished only alongside general ideational agreement in elite opinion that the recipients of welfare were no longer morally worthy, when they were successfully recast as social parasites, lazy and undeserving.

TO UNDERSTAND HUMAN RIGHTS WE NEED TO FOCUS ON WHAT I CALL A POLITICAL ECONOMY OF MORAL WORTH ... THE QUESTION OF MORAL WORTH IS DEEPLY EMBEDDED IN POLITICAL ECONOMY.

By recognizing the degree to which progressive social policies rise or fall on the question of imputed moral worth, we can begin to link political economy to the essentially contingent nature of who gets to be

designated as fully human.

Thus, to understand human rights we need to focus on what I call a political economy of moral worth. The question of moral worth is not adjudicated on the grounds of moral philosophy, as one might expect; it is not based on one’s existential humanity. The question of moral worth is deeply embedded in political economy. Thus with respect to poverty policy in New Deal America, and certainly in social democratic Europe, there was an agreed upon Keynesian political economy that understood issues of poverty to be problems of macro-economic disorder and structural imbalances—big picture problems if you like. Under this political economy it was understood that people turned to welfare when they had a loss of income caused by these structural imbalances, such as wide-scale unemployment.

On the other hand, in our present neo-liberal era welfare recipients are embedded in a different political economy. In a revival of 18th and early 19th Century classical political economy, essentially Malthusianism, welfare recipients are not enlightened or rational actors but are biologically-driven,

FRED BLOCK AND I CALL THIS THE ‘PERVERSITY THESIS’, WHEREBY PROGRESSIVE SOCIAL POLICIES HAVE BEEN CHARACTERISED BY NEO-LIBERAL POLITICAL ECONOMY AS IMBUED WITH PERVERSE OR ‘MISALIGNED’ INCENTIVES, WHICH INEXORABLY CREATE MORE OF THE VERY SOCIAL ILLS THEY WERE DESIGNED TO

and therefore not motivated to work in conditions of non-scarcity. In the logic of this political economy the only way that such biological creatures can be ‘incentivised’ to work is by restoring the natural state of scarcity. Only under scarcity will the biological instincts to survive kick in. This creates what I call ‘homo-incentivus,’ and a new political

economy based on incentive management. The removal of welfare is necessary to induce-to ‘incentivise’--the desired behaviour. Fred Block and I call this the ‘perversity thesis’,³ whereby progressive social policies have been characterised by neo-liberal political economy as imbued with perverse or ‘misaligned’ incentives, which inexorably create more of the very social ills they were designed to solve. In this political economy, it is welfare that causes poverty, not poverty that causes people to turn to welfare.

Through this set of causal links, neo-liberal political economy defines the welfare recipient as without moral worth. Welfare has ‘incentivised’ the poor into being dependent, slothful, and promiscuous. This used to just be a conservative, right-wing approach to welfare, but welfare ‘reform’ only became viable when the new political economy of moral worth crossed ideological lines. Liberals became convinced that they were not condemning the poor as *innately* undeserving. Rather, their demeaned moral status was inflicted upon them by a ‘wrong-headed’ welfare system

THE LEGAL DOCTRINE ENSHRINED WITHIN ‘LAW AND ECONOMICS’ INSTITUTED A DEFINITE LEGAL SEPARATION BETWEEN ISSUES OF ECONOMIC EFFICIENCY AND ISSUES OF DISTRIBUTION AND JUSTICE, LIKE A RUBICON BETWEEN THE TWO. WE ARE STILL STRUGGLING WITH THE DEEP AND INGRAINED LEGACY OF THIS CONSCIOUS SUPPRESSION OF DISTRIBUTIONAL ISSUES FROM LEGAL PROCEEDINGS CONCERNING ECONOMIC MATTERS.

and ‘morally blinded’ political economy that instituted a set of ‘tragically misaligned incentives’. Even liberals thus came to believe that only ending welfare would make it possible for the poor to restore their own moral worth. It is fundamentally impossible to understand the modern US political economy of welfare without an appreciation of neo-liberalism’s political economy of moral worth.

This establishes a clear link between the two fields of political economy

and human rights, which normally do not talk to one another. It is political economy that determines the scope and distribution of human rights, as it effectively selects who has the right to have rights and who gets to be categorised as fully human—morally worthy, that is—in the first place.

³ Margaret Somers and Fred Block, ‘From Poverty to Perversity: Ideas, Markets, and Institutions over 200 Years of Welfare Debate’, *American Sociological Review*, Vol. 70 No. 2, 2005; also Ch. 6 of Fred Block and Margaret Somers, *The Power of Market Fundamentalism: Karl Polanyi’s Critique*, Harvard University Press (2014).

In the field of economics, the foundational assumption is that of the primacy of the self-regulating market--the notion that markets only function correctly when they are autonomous from politics and law. This entailed the original invention of two separate spheres--the economy (market/private) on the one hand, and politics (governance/law/public) on the other. This separation of spheres was always a fictitious construct, as was that of the self-regulating market itself. In the 1970s, with the rise of neo-liberal theory, we saw a

THE DISPENSATION OF WEALTH AND RESOURCES IS NOW EFFECTIVELY COMPLETELY SHIELDED BY LAW FROM DEMOCRATIC INFLUENCE ... TO A LARGE EXTENT THE LAW HAS BECOME AN IDEATIONAL CODIFICATION OF NEO-LIBERAL ECONOMIC THEORY, CONFERRING ON IT THE POWER OF ENFORCEMENT.

superficial rapprochement of these two spheres in the school of 'law and economics', emanating from the University of Chicago. A new concept of efficiency became the all-purpose yardstick against which all economic and administrative policy, as well as law itself, came to be measured. Efficiency is defined in a very narrow, neo-utilitarian economic sense, as that which achieves maximum aggregate economic growth, output and productivity, and ultimately profit. All previous social criteria for measurement and assessment were overturned by efficiency theory. The legal doctrine enshrined within 'law and economics' instituted a definite legal separation between issues of economic efficiency and issues of distribution and justice, like a Rubicon between the two. We are still struggling with the deep and ingrained legacy of this conscious suppression of distributional issues from legal proceedings concerning economic matters.

Thus legal doctrine requires the exclusion of questions of distribution from consideration of the public good. The dispensation of wealth and resources is now effectively completely shielded by law from democratic influence, as, for the last 30 years, legal doctrine has been remade by an ideology in which economic efficiency trumps all else. To a large extent the law has become an ideational codification of neo-liberal economic theory, conferring on it the power of enforcement.

Law and economics thus failed to lead to any real discourse between the two spheres of economy and law. It became rather a justification for subordinating the law (public) to the economy (private) through the principle of economic efficiency.

THERE IS A NEED TO FIND A KIND OF A THIRD WAY DISCOURSE BETWEEN HUMAN RIGHTS AND ECONOMICS, ESPECIALLY AS BOTH THE ECONOMIC AND LEGAL SPHERES ARE CURRENTLY SO COMPROMISED ... WE NEED TO DETERMINE THE SOCIAL PRECONDITIONS THAT WILL SUPPORT A POLITICAL ECONOMY THAT RESTORES MORAL WORTH TO ALL HUMANITY.

In sum, once we deconstruct both the fields of human rights and of economics we find they converge around a political economy of moral worth. Distributional issues are subordinated to a legal doctrine that prioritises aggregate wealth. In effect, it justifies an austerity regime, because social austerity and the denial of moral worth are the

underside of the ideal of efficiency. A scientific justification for a particular political economy has restructured the category of 'human', which in turn determines the dispensation of moral worth, wealth and human rights.

This is all to answer your question somewhat obliquely. I agree with you that there is a need to find a kind of a third way discourse between human rights and economics, especially as both the economic

and legal spheres are currently so compromised. I have tried to present an analysis of why they are so compromised, especially focusing on the role of law and economics, which has not been studied enough by critics of neo-liberalism. I think lessons can be drawn from this analysis that can inform something like a third discourse. Progressive legal efforts, such as the drive to rebuild a political infrastructure of socio-economic rights, and progressive economic efforts, such as post-Keynesian and heterodox economics, will also undoubtedly play a necessary part. We need to determine the social preconditions that will support a political economy that restores moral worth to all humanity. This is where I believe the critical intervention needs to be made. Grounding a sociology of human rights in political economy will play an important role in establishing and instituting an alternative and inclusive approach to human rights, which I think is the driving motivation behind your question.

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