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## Philip Selznick: Incipient Law, State Law and the Rule of Law

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# Philip Selznick: Incipient Law, State Law and the Rule of Law

Martin Krygier

## Abstract

If celebratory rhetoric is to be believed, or money devoted to a cause regarded as a sign of its success, ours is the era of the rule of law. No one will be heard to denounce it, leaders of countries all round the world claim to have it, vast sums are spent to spread it. But how is that to be done? Typically, programmes of rule of law promotion focus on state agencies, particularly legislatures and courts. Laws are enacted, judges trained, computers bought, libraries stacked with books, and still, far from atypically, the results are disappointing. This identification of the rule of law with state law is not news, nor should it be surprising.

These observations are perhaps all truisms, but they are often ignored. We still await a sociology of the rule of law, while in the meantime we pour huge sums of money into inadequately grounded, if well meant, attempts to deliver it. Were we to seek such a sociology we would not have a huge number of sources. One place to start is the work of Philip Selznick. That recommendation is at large, and even in relation to this subject could refer to much of Selznick's work. In this essay, however, I will focus primarily on one book that raises these issues most centrally: *Law, Society, and Industrial Justice*. It has nothing specific to say about how to implant the rule of law in societies that lack it and have been little acquainted with it. However, those with such ambitions might well pause to attend to the sociological complexities this work reveals in a relatively modest proposal: to generate the rule of law in a well regulated domain of life, industrial relations, in one of the most rule of law rich countries in the world, the United States. Their reliance on state law, and ignorance of non-state law, might then come to acquire some recalibration. In a world full of lawyers and policy advisers propagating state-centered institutional recipes for the rule of law, and then affecting disappointment that benighted beneficiaries still violate or deliberately ignore

it, a reminder of the complexity of non-state conditions for the rule of law might be salutary.

# Philip Selznick: Incipient Law, State Law and the Rule of Law

If celebratory rhetoric is to be believed, or money devoted to a cause regarded as a sign of its success, ours is the era of the rule of law. No one will be heard to denounce it, leaders of countries all round the world claim to have it, vast sums are spent to spread it. But how is that to be done? Typically, programmes of rule of law promotion focus on state agencies, particularly legislatures and courts. Laws are enacted, judges trained, computers bought, libraries stacked with books, and still, far from atypically, the results are disappointing (see, for example Carothers 2006; Jensen and Heller 2003; Krygier 2006; 2007).

This identification of the rule of law with state law is not news, nor should it be surprising. Lawyers, legal philosophers and political theorists, not to mention ordinary folk looking to find law (or evade it), typically start with official emanations of state agencies, primarily legislatures and courts. They consider links between law and state to be intimate, unseverable, uncontroversial, and exhaustive of the law. Lively questions might remain about the *point* of law, whether these are descriptive questions – what does law do? - or normative ones – what *should* it do? - but rarely about its proper location or source. These, it is assumed, are in centralized, and legally co-ordinated offices of state. Lawyers know that law affects society and some are aware that reciprocal effects also occur, but their expertise rarely extends that far. For them society lies at the end of the road, not the beginning. If the question is whether the rule of law might be extended to non-official institutions, their starting point will be with the official agencies of state and if they move anywhere they will move outwards from there. On views such as these, talk of non-state law is simply a category mistake.

And yet the difficulty of establishing the rule of law wherever one wants to, by the state-centric means commonly resorted to, might give one pause. For even when legislation is at the centre of things, which it often is not, the rule of law has indispensable social conditions and elements that are arguably as important as, or more than, any legislative contribution, or indeed the contribution of state institutions of any kind. The law has to *count* in the society, and whether it does so depends on social facts of many sorts. For the rule of law to exist, still more to flourish and be secure, many things beside state law matter, and since societies differ in many ways, so will those things (see Krygier 2004, 2006, 2008).

These observations are perhaps all truisms, but they are often ignored. We still await a sociology of the rule of law, while in the meantime we pour huge sums of money into inadequately grounded, if well meant, attempts to deliver it. Were we to seek such a sociology we would not have a huge number of sources. One place to start is the work of Philip Selznick. That recommendation is at large, and even in relation to this subject could refer to much of Selznick's work. In this essay, however, I will focus primarily on one book that raises these issues most centrally: *Law, Society, and Industrial Justice*

(*LSIJ*) (Selznick, 1969). It has nothing specific to say about how to implant the rule of law in societies that lack it and have been little acquainted with it. However, those with such ambitions might well pause to attend to the sociological complexities this work reveals in a relatively modest proposal: to generate the rule of law in a well regulated domain of life, industrial relations, in one of the most rule of law rich countries in the world, the United States. Their reliance on state law, and ignorance of non-state law, might then come to acquire some recalibration.

### *1. Selznick, Sociology and the Rule of Law*

Imagine someone were to suggest that the rule of law should be extended to industry. What should that be taken to mean? Perhaps that protective legislation should be applied to factories? That it should be clearly drafted, publicly promulgated, free of contradictions, stable? Perhaps, more adventurously, that it should provide workers in industry with particular legal rights? None of these would be implausible renditions of the claim, but none of them captures what is distinctive of Selznick's argument. And, whatever their chances of success, what they advocate is rather simple. His understanding of the suggestion, for it is his suggestion, starts at the other end, and is anything but simple.

The central questions with which the book is concerned are whether the rule of law might be extended to relations between employers and employees, and if so, whether it should be. His answers, put briefly, are 'yes' and 'yes.' He also has something to say about how this might come about. That may be all a reader in a hurry wants to hear. But it isn't as simple as that. For Selznick's life work is of a piece, and he revisits several of its central elements. From his first writings, we have a focus on the inner life of organizations; and the significance of 'the embodiment of ideals in institutions,' 'the infusion of group life with ... aspirations and constraints,' the 'enlargement of institutional competence.' From his essays on law we have 'a special ideal – the rule of law,' and the claim that it is a value apt to be immanent and at least latent where, as Fuller put it, humans are subjected to the governance of rules. We learn, too, that an analyst must 'look closely at the values themselves, at the characteristic ways they are elaborated and extended,' and 'at the social circumstances that invite or resist them' (all passages come from Selznick 1969, 1). But how do all these themes come together in the particular context of management-labor relations?

How, in other words, do all these macro-themes arise in this micro-context? Perhaps microcosm would be a better word, since so many of the major lines of Selznick's thought come together in the particular enquiry that gives the book its title. Why all this heavy metal, in what can be read, plausibly and at one level, as a work of advocacy with a simple message: organizations should respond better to, better protect and better fulfil, the interests of labor? But why should they? Why now? Can they? Are they likely to? How might they? Can they be made to? How deep will any recommended or legislated ideal penetrate? What sources of resistance can be expected? What are the chances that it will last as a governing ideal? What sorts of slippage might we expect between ideal and real?

A legislator who shared Selznick's convictions might ignore all these questions and simply legislate or decree what he sought. Selznick, however, had spent almost thirty years pondering the recalcitrance of people, practices and institutions, the precariousness

of the finest ideals, the complexity and delicacy of attempts at institutional transformation, the ease with which fine motives are refracted in unexpected directions. At the same time, at least since his book on *Leadership in Administration* (1984) it had become clear to him that, while wisdom might begin in recognition of obstacles, neither it nor virtue ends there. Interested above all in the fate of ideals in the world, his life's work has been devoted to exploring 'the conditions and processes that frustrate ideals or, instead, give them life and hope' (Selznick, 1992, x). That might, for example, involve seeking out latent values in social arrangements that may, in the right conditions, develop and even be helped to develop. The time of such values might have come, or be coming. Then again, the times might not be ripe, circumstances might be unfavorable, opportunities of development minimal or less. How to tell? Institutional analysis is needed to recognise and clarify relevant values. It will also examine the extent to which particular historical and institutional conditions favor their development. From the analysis might come diagnosis, prognosis, and prescription.

## 2. *Law and Association*

The problem *LSIJ* addresses, put bluntly, is what law might offer to improve one pervasive consequence of relatively recent social transformations: 'the condition of Administered Man' (Selznick 1969, 37). Most of us in Western societies spend much of our time today in large governmental and non-governmental bureaucratic organizations. As these organizations and their significance have grown, so too has the importance of relationships within them, prominent among them power relationships, and 'new modes of belonging and dependency' (Selznick 1969, 36). The importance of 'freedom of association' had long been recognized in western law; concern for 'freedom in associations' is more recent. Yet the large modern organization has become '*a generic phenomenon*, a locus of authority, commitment, dependency and power. It is the reality of this nexus ... that poses problems of freedom and civic participation' (Selznick 1969, 41). Life in organizations generates sets of in-practice-compulsory relationships within which most of us are enmeshed for our whole working lives, and by which we are, in one way or another, affected for all our lives. Such forms of association are not intermittent or self-chosen, as they once might have been, but systematic, enduring, unavoidable. That leads to strains and opportunities.

According to Selznick, the state law regulating modern non-governmental organizations – primarily the law of corporations, contract and property – was increasingly ill-suited to transformations in the 'condition of Administered Man.' Traditional concepts of the corporation, for example, focussing on consequences of formal legal status have difficulty dealing with the social realities of *institutionalization* in modern organizations.

In one of his most distinctive contributions to organization theory, Selznick had argued that institutionalization is a key transformative process to which organizations are commonly subject. Organizations are institutionalized to the extent that they become '*infuse(d) with value* beyond the technical requirements at hand' (Selznick 1984, 17). He later came to regret the single focus of that definition, for there are other elements besides infusion with value that distinguish institutionalisation (see Selznick 1992, 234; 1996, 271), but he never doubted that it captured the central, key, component of the process. As an organization becomes institutionalized, members come to treat it as more than a

neutral instrument, develop group and institutional attachments, loyalties and rivalries, adopt and promote institutional values, create and adapt to an 'internal social world' (Selznick 1984, 7). Institutionalization also develops as a result of institutions' dealings with their external environment, particularly where they develop stable clienteles there (Selznick 1984, 7).

However it takes place, whether deliberately as a result of leaders' initiatives or spontaneously over time, institutionalization often occurs in large and enduring organizations, whether formally recognized as corporations or not, and it 'sets problems for the legal system' (Selznick 1969, 46). Where an organization becomes institutionalized, as Selznick's organizational writings showed, it 'takes on a distinctive character, competence, or function, and becomes charged with meaning as a vehicle of group identity or a receptacle of vested interests' (Selznick 1969, 44). This, in turn, has law-related significance of various sorts. Rights are claimed for the system (rather than merely for the individuals within it); there is a demand 'for legal cognition of the nature of the institution,' where that nature is not merely a result of legal definition but 'is known by its mission and competence, its commitment and capacity to perform a social function.' That in turn is tied up with 'the social structure of the agency – the roles and relationships, the norms and values, that comprise an operating social system. Types of institutions have characteristic structural attributes and requirements, and the law of associations is continually pressed to develop ideas that fit these realities' (Selznick 1969, 45). Finally, there is a 'strain toward public accountability ... What may have begun as a purely private effort to mobilize resources for particular ends becomes in time a captive of the broader interests that have become implicated in its existence. Sociologically, if not legally, there is a movement from private to public responsibility whenever leadership loses full freedom to manipulate resources and becomes accountable to the interests of others and to the enterprise as a continuing system' (Selznick 1969, 45). Selznick is well aware that any such trends do and must encounter resistance; indeed, 'a great deal of managerial effort is devoted to blocking and overcoming the drift toward institutionalization, with its attendant broadening of responsibility and dilution of power. But the more enduring the organization, and the larger the scale and scope of its activities, the more likely is it that the strain toward public accountability will be manifest' (Selznick 1969, 45).

Selznick approaches the two other key relevant areas of state law – contract and property - with similar sociological and diagnostic attention. Voluntaristic, individualistic contract law expresses a social imaginary inhabited by roughly equal, independent right-and-duty bearing individuals, engaging with each other at arm's length, in specific, self-chosen transactions which are bounded and limited in scope by the participants' choice. Participants pursue their individual projects, co-operating when they choose to; outsiders to contractual bargains are truly, or at least in the contractual imagination, outside. But the modern bureaucratized, *institutionalized* world puts all these assumptions in question, for classical contract law is unable 'to grasp the reality of association' (Selznick 1969, 63).

Property law, too, is alert to possession, domination, and subordination; deaf to association, stewardship, and authority. It has difficulties with collective ownership, that 'invites scrutiny of the inner order of the enterprise, especially the way power over persons is generated and used,' as it does with concentrations of wealth and power in

large and complex organizations 'that are immortal and know no boundaries' (Selznick 1969, 67). All these accumulated changes 'create a demand for restraint and accountability, for countervailing institutions, and for a conception of the organization that yields a theory of authority' (Selznick 1969, 67).

Together, corporation, contract, property all 'fail to grasp the reality of association,' (Selznick 1969, 63) and in so failing they fail, too, to ground authority. For authority in institutions will wane unless reinscribed in altered terms that do justice to the social realities of the modern work-and-life-space. The search for those terms, Selznick suggests, might be cast as a:

quest for the corporate conscience: its origins, its locale, its sustaining forces, its legal implications, its troubles and limits. ... What is at stake is the capacity of the institution to do justice. That competence is located in the attributes of a social system, conceived as an arena within which authority is exercised and rights are asserted. To grasp the nature of that system, and to draw the legal conclusions, is the major task of a law of associations. (Selznick 1969, 72)

### 3. *Law in Society*

In a review of Fuller's *Morality of Law*, Selznick praised Fuller's capsule definition of law – 'the enterprise of subjecting human conduct to the governance of rules' – on several grounds, among them that it was 'remarkably congenial to the sociological perspective,' in that it did not limit the subject of inquiry to the state. Instead, Fuller had recognized that law was 'endemic in all institutions that rely for social control on formal authority and rule-making. That legal experience occurs in the "private" associations of religious, educational, or industrial life is a postulate of legal sociology, a precondition of much significant inquiry' (Selznick 1965, 947). That observation lends particular significance to the recommendation that we 'grasp the nature' of a social system 'where authority is exercised and rights are asserted,' and 'to draw the legal conclusions.' For it has not been everyone's view of where law might be sought or found.

However, within sociology of law, there is a broad stream with many tributaries, according to which such law is all around us (see Krygier 2007). The tributary to which Selznick contributed, and indeed that he might be said to have been one of the first in the United States to carve, is that called by Marc Hertogh 'rules of conduct within the state.'

In 'Sociology and Natural Law' (Selznick 1961) one of his first and most important articles on law, Selznick had already referred to the sociological truism that 'education, politics, religion, and other social activities are found outside of the specialized institutions established to deal with them. Sociology has located these phenomena "in society", that is, in more informal and spontaneous groupings and processes' (Selznick 1961, 84). He believed the same was true of law. Like Fuller, whose opinion he shared in this as in many things,<sup>1</sup> Selznick conceived of law as a particular sort of practice or enterprise, and like Fuller too he was more concerned to explore the character, imperatives, purposes and requirements of that enterprise than to identify it with one highly visible source.

So formal provenance is not definitive; law can develop in many sorts of non-official locations. Thus, he explains that 'legality does have a central place, for our concern is with the capacity of special-purpose organizations to "establish justice." At the same time, we recognize that the legal potential, if it exists, is to be found in the social

dynamics of the institutions themselves. We can therefore accept the dictum of Ehrlich that “the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself” (Selznick 1969, 33-34, quoting Ehrlich 1936, xv) What might this mean?

Eugen Ehrlich himself, one of the earliest and most intriguing contributors to sociological jurisprudence and the sociology of law, had in mind at least two things. The first is that the sources of the law by which we live, ‘living law,’ as he called it, come not primarily from where it has become conventional to locate them - official legal structures - but from the normative arrangements that govern everyday social life. That can just sound like a sociological platitude, often of little weight since so unspecific, but in Ehrlich’s work it amounted to considerably more. For the ‘society’ to which he referred is not some featureless black box in which everything happens, but a web of the ‘associations’ in which we participate, the ‘inner orders’ of which are *normative* for us. A sociology of law has to attend to those inner orders, rather than merely to the pronouncements of jurists or even, as Pound famously (mis-)interpreted Ehrlich, to the ‘law in action.’ For Pound’s ‘law in action’ is really the ‘law-in-books-in-action,’ that is, what happens to the law-in-books when manifested (or not) in the actual operations of legal officials in the world. But Ehrlich had something different in mind (see esp. Nelken 1984). ‘Living law’ was not in the first instance official state law even ‘in action,’ though it influenced it and in turn was affected by it. The ‘inner order of associations’ remained for Ehrlich still the primary source of normative regularities and problem-solving by which people oriented their lives. Official law was a response to that, sometimes more adequate sometimes less, not the unmoved mover of the social world.<sup>ii</sup>

Selznick cites Ehrlich with approval in several writings, but it is not clear to what extent he was influenced by what he had read (as Chester Barnard, who *did* influence Selznick, had been)<sup>iii</sup> as distinct from agreeing with it.<sup>iv</sup> There were other sources of the points Selznick makes, and those points flow naturally from his earlier organizational writings.

Nevertheless, *Law, Society, and Industrial Justice*, of all his writings on law, shares a number of themes with Ehrlich. First is his insistence that law is ‘generic.’ Law is ‘found in many settings; it is not uniquely associated with the state’ (Selznick 1969, 4). A key task for sociology of law is to attend to the law of such settings in those settings. Selznick accepts this, though he does not follow Ehrlich in according *priority* to the non-official. His ambition is, rather, to *extend* our understanding of law to encompass both official and non-official settings, indeed ‘all institutions *that rely for social control on formal authority and rule-making*’ (Selznick 1969, 7). As so often, when confronted with easy, apparently clear dichotomies, Selznick’s tendency is to be suspicious of the choices they demand. Law often can be found outside the state,<sup>v</sup> but inside it too. To rule that out, or establish *a priori* some universal order of priorities is to blind oneself to complexities, and to sources of useful guidance wherever they can be found. In classic pragmatist fashion, Selznick advocates drawing upon experience wherever it is useful and has been subject to test, and so he writes, ‘(t)o equate law and the state impoverishes sociological analysis, because the concept of law should be available for study of any setting in which human conduct is subject to explicit rule-making; and when we deny the place of law in specialized institutions *we withhold from the private setting the funded experience of the political community in matters of governance*’ (Selznick 1969, 8).

A second theme is the importance of attending to the 'inner order of associations,' a phrase that Selznick adopts and parses as 'the natural settings and adaptive outcomes of group life' (Selznick 1961, 84). That is, associations rather than either society-as-a-whole, on the one hand, or atomic individuals, on the other, and with an emphasis on their *inner order*. Ehrlich and Selznick are sociologists through-and-through: the 'living law' they are concerned with is generated from within the associations that set the particular normative frameworks in which we conduct many of the most important interactions of our lives. These associations are *ordered*, organized in some ways rather than others, and such particular modes of organization matter for how we think, how we act, and how we think about how we and others think and act. For Selznick, this was all the more true, and all the more important, in a world dominated by large-scale organizations, the significance of which he had spent most of his life exploring, with their particular and complex hierarchies, internal orderings, modes of institutionalization, and the attendant centrality of association and membership in the lives of their members.

Thirdly, even within official domains, law should not be conceived narrowly. Understood as a generic phenomenon, it 'extends to administration as well as adjudication,' 'applies to public participation as well as to the conduct of officials,' and so is expansive in its reach through all sorts of activities subject to 'formal authority and explicit rule-making.'

Finally, stressing, as Ehrlich had, that law might grow up gradually out of people's associations rather than descend peremptorily from official imposition, Selznick suggested sociologists must be alert to the possibility of finding within associations what he called 'incipient,' 'inchoate,' 'emergent' forms of law, generated in response to internal pressures, dynamics and demands.

In an essay written at the same time as *Law, Society, and Industrial Justice*, Selznick explained that the sociologist seeking sources of the rule of law should be aware that they will not always be found full blown and ready to go, nor where lawyers are accustomed to look. On the contrary, sociologists, used to ferretting around in 'the problem-solving practices and spontaneous orderings of business or family life,' should be alert for patterns of 'incipient law ... implicit in the way in which public sentiment develops or in any increasingly stabilized pattern of organization; ... a compelling claim of right or a practice so viable and so important to a functioning institution as to make legal recognition in due course highly probable' (Selznick 1968, 55. See also Selznick 1978, 32). Among these he mentions 'some of the private arrangements worked out in collective bargaining agreements, especially seniority rights and protection against arbitrary dismissal.' These were to figure centrally in his exploration of *Law, Society, and Industrial Justice*. Incipient law was important socially, and conceptually too, since it connects social behaviour and legal constraint, inseminated by the former and, in appropriate circumstances, giving birth to the latter. Or, in a less strained metaphor, a focus on incipient law:

bridges the concepts of law and social order without confounding the two; it assumes that law does indeed have its distinctive nature, however much it may rely on social support or be responsible (*sic*) to social change. On the other hand, some law is seen as *latent* in the evolving social and economic order. For example ... the growing importance of large-scale organizations carries with it the

likelihood that new claims of right will emerge, based upon a new perception of organizational membership as a protectable status. (Selznick 1968, 56)

What Selznick is looking for is latent, liminal signs of legal growth and development out of the pressures and changes that occur in social life. Incipient law is one such sign. As it develops, *if it develops*, it can generate in turn 'inchoate' law, that is:

Unordered and unsystematic, often based on *ad hoc* but convergent pronouncements. Instead of a clearly enunciated authoritative principle, there may be many diverse evidences, coming from a variety of official voices, that new claims are being recognized, new powers or expectations affirmed. Thus inchoate law is something more than incipient law. The latter is mainly an attribute of social practice and belief; the former is an attribute of law itself. (Selznick 1969, 33)

Incipient, emergent, inchoate, these legal seeds are potential starting points and stages in legal evolution, of a sort that might both develop legal characteristics within the social settings from which they derive, and then infiltrate official state law itself. Both these unofficial and official developments were important, *legally* important, within a suitably expansive concept of law.

For Selznick also believed that incipient law might, as Ehrlich thought it did and needed to, come to influence and be absorbed into the official legal order. Rather than always start with official legal institutions and end up with individual recipients of legal directives, law spurred by sociological realities within human associations will often come to be taken up by official legal organs; 'Incipient law is emergent *positive* law, responsive to, and made possible by, particular social circumstances' (Selznick 1969, 8).

#### **4. The Rule of Law**

What, then, does it mean to extend the rule of law so conceived? Against a conception of science, which would expel such a question as 'unscientific', Selznick had long argued that a central job for sociology was to seek out the latent values, the 'master ideals,' immanent in social practices. Law, like many fundamental social institutions and practices, has immanent sources of 'envaluation,' normative tendencies provoked and stimulated by the nature of the practices themselves, expectations generated within them and by them, and of them. The relevant values of legal orders, as explained in 'Sociology and Natural Law' (Selznick 1961), and repeated here, are summed up in the concept of the rule of law, defined by Selznick as the 'progressive' reduction of arbitrariness in law and its administration. So, 'to infuse' the 'mode of governance (of an organization) with the aspirations and constraints of a legal order' (Selznick 1969, 8) is to extend the rule of law to and within it, where that means 'to build it into the life of society, to make the master ideal of legality a true governor of official conduct' (Selznick 1969, 35). However little any particular legal arrangement exhibits it, 'the restraint of official power by rational principles of civic order' (Selznick 1969, 11) has salience to law-governed settings, and to the extent that industrial settings are or might be law-governed in the extended sense under discussion, it has salience to them. The argument of the book, then, is that the 'condition of Administered Man' can be improved by an infusion of legality and a consequent reduction in arbitrary exercise of power, and that his circumstances include forces that strain in that direction. What cannot be assumed and what only investigation and theorization can determine, is how strong at any time are these strains

to the rule of law, how strong are forces that pull in other directions and what are the relative weights of force and counterforces. Outcomes are rarely pre-determined.

Selznick admits that the concept of arbitrariness is not a simple one, and he never explicates it in great detail.<sup>vi</sup> Like most who write about the rule of law, he associates arbitrariness with traits such as capriciousness, wilfulness, and most of all, with the absence of reasoned justification. The role of reason as a governor of action varies, and so then does the extent to which action is arbitrary. The task of partisans of the rule of law wherever it occurs, and the task of those who seek to better 'Administered Man's' condition, is to seek 'progressively' to make it less so. This is no small task, for while it 'begins as a principle of constraint ... (it) promises more than a way of moderating the uses of power' (Selznick 1969, 18). It must never slight the former, and importantly so, since '(t)he assumption is that no man, no group of men, is to be trusted with unlimited power.' On the other hand, it should stretch to the latter too, for:

The "progressive reduction of arbitrariness" knows no near stopping-place. The closer we look at that process, the more we realize that it calls for an affirmative view of what it means to participate in a legal order, whether as citizen, judge, or executive. In its richest connotation, legality evokes the Greek view of a social order founded in reason, whose constitutive principle is reason. (Selznick 1969, 18)

### 5. *Legal Evolution*

There is no doubt that Selznick favored extension of rule of law values in the industrial domain. But he did not believe or suggest that they would be extended, simply because that would be a nice idea. The argument that they might be so developed is based on quite other, sociological, premises. In this argument is a strong suggestion of movement and direction over time. This is not inadvertent. He believed as a matter of general theory and specific observation that forces were at work which pressed – not in any sense inexorably, but really, 'objectively' – in the direction of legal transformations in the industrial field. The job of institutional assessment was to discern their weight, direction, and prospects.

It was, of course, possible that these prospects would turn out to be nil. Societies are littered with legislative dead letters that went nowhere but seemed good ideas at the time, because someone thought them smart in principle and/or because they thought they suited the times. How to tell, and what to do?

Even though, as we have seen, Selznick had enumerated vulnerabilities to which members of organizations were exposed, and holes in legal protection of them, it was not from these difficulties by themselves that he thought change would be generated. Nor would it be enough for some benevolent legislator to take heed of the vulnerabilities and legal gaps that Selznick had exposed, and pass laws to deal with them. For Selznick understood that you cannot expect to legislate successfully to an unreceptive society. He had long assimilated from Chester Barnard notions of the interplay of authority and consent. His experience of the university turmoil of the 1960s highlighted the ways that law needed to be *responsive* to social realities and demands, both because that would be a good way to behave and because commands are impotent if people ignore them. Indeed the (complex and uncertain) virtues of responsive institutions became a central question of his next book (Selznick 1978).

On the other hand, there were trends, moments, opportunities, possibilities in the world, that one could seek to understand, at times exploit and sometimes further and fashion. He believed that normative theory needs to be alert to such developments. Where they were favorable:

The rise of new centers of potential oppression may be less important than (1) the changing aspirations of the community and (2) the opportunity to do something about them. Subordinate and dependent men have always been treated badly by their masters. The contemporary situation is different in this, that new expectations are penetrating areas hitherto closed to scrutiny or immune to challenge; and modern organizational settings make possible new ways of asserting claims and institutionalizing victories. (Selznick 1969, 39)

Selznick emphasizes, then, that ideals cannot be grafted onto institutions simply because *we* would like it. All his institutional investigations told against that, and it goes very deep in his thought. But Selznick's evolutionism has a positive aspect, too. While 'progress' is never inevitable, it is also not simply random, accidental. For the logic of institutional development often produces the *strain* he has often written about, to realise immanent values. Such logic is never inexorable, it competes with other forces, values, tendencies; it will often be defeated. There are no guarantees of success, either metaphysical or empirical. And yet, such a logic can be discerned in many contexts, and theoretically explained. And, then, it might be supported. There is nothing inevitable about an acorn becoming an oak tree, still less a thriving one, but there is a disposition which, in appropriate conditions might flourish. And a poppyseed needn't try. Horticulturalists identify such conditions and seek to furnish them, or at least support and nurture them. Less expertly, perhaps, and often with more fervent hope than deep understanding, so too do many parents. Failure is not unknown in either endeavor. Nor, however, is success.

Normative systems are driven to develop in part by internal tensions, the resolution of which provides pressures apt to propel the system to higher stages. Moreover, when certain things occur, whether as a result of conflict or other sources of development, others can be contemplated, people do contemplate them, and often something can be done about them. Sometimes that is a matter of new possibilities, as is common in the evolution of technological systems, but also in human and other ways of maturing. Sometimes, and also common in institutional development, new dissatisfactions arise at particular stages of development in the light of possibilities revealed that were earlier unconceived, indeed inconceivable. Tensions are generated by new demands and criticisms made by participants angry that previously unheard-of values are ignored or traduced. Maturity may not occur, dissatisfactions may simply be ignored or suppressed, but a new disposition is available which was not there before. It creates a strain to and, in congenial circumstances can lead to, novelty.

In the specific case of law, a key source of development lies in the dynamics of legitimacy. Legitimacy can be claimed on all sorts of grounds, only some of them connected with legality. Yet:

legitimacy carries the lively seed of legality, implanted by the principle that the exercise of power must be justified. From this it is but a step to the view that reasons must be given to defend official acts. Reasons invite evaluation, and evaluation requires the development of public standards. At the same time,

implicit in the fundamental norm that reasons should be given is the conclusion that where reasons are defective, authority is to that extent weakened and even invalidated. (Selznick 1969, 30)

Selznick emphasizes that nothing inevitably propels a legitimate order to the rule of law. Notwithstanding the sources of itchiness immanent in the very idea of legitimation, not every sort of legitimacy is as itchy as every other; 'If power is justified on the basis of hereditary succession, for example, it is difficult to find the leverage for calling officials to account' (Selznick 1969, 30). Normative social theory does not pretend that tradition leads necessarily to the rule of law, just as Weber did not think it necessary that 'patrimonial administration' led to bureaucracy. However there was what might be called a social logic of values at work in both cases, and in particular circumstances that is how things worked out. Again, there are plenty of legal orders where rule of law values are scarcely recognized, plenty where they are outweighed by competing values. The claim is just that there are immanent tendencies in the 'enterprise of subjecting human conduct to the governance of rules' which, given congenial conditions, will incline toward the values of legality and that a legal order is more successfully developed to the extent that those values are manifest in its operations.

Attributes of existing practices, then, as well as expectations and frustrations engendered by them, produce that 'strain' towards more elaborated developments of the ideals, of which Selznick had earlier written. He refers to Durkheim's theory of social development, Piaget's and Mead's of individual moral development, Weber's of the development of society and institutions, Mary Parker Follett and Chester Barnard of developments within organizations. In each he discerns a story of moral development 'understood as a natural process, a kind of maturation' (Selznick 1969, 19). Each in their own context and way postulated development, whether over the life course of individuals or over generations in societies and institutions, toward a 'morality of cooperation ... a morality of rational rules, interdependent activities, and autonomous individuals.' Even Weber, so notoriously ambivalent about the 'rationalization' he saw sweeping the world (as indeed is Selznick himself) and so determined to keep evaluations and science apart, 'nevertheless ... did trace a pattern of change in which a received morality of constraint – traditional norms and forms of authority – was replaced by a new morality founded in the requirements of rational action. A basic feature of that morality was the reduction of arbitrariness in official conduct' (Selznick 1969, 23). A morality of cooperation emphasizes personal autonomy and competence; norms rooted in experience (rather than, say, deference to authority figures or traditions); dialogue and problem solving, rather than demands for conformity. The *strain*, in other words, is toward 'an ethos of problem-solving .... (and) ... strongly opposed to a morality of constraint, which imposes solutions and limits alternatives' (Selznick 1969, 25).

That ethos and that evolved morality, Selznick believes, fit closely with the rule of law insofar as each 'abhors arbitrary judgment and constraint, presses for justifications, invokes the authority of agreed-upon purpose, and values the competent participant' (Selznick 1969, 25). These features of morality and legality add up to a constellation that is not merely what Selznick values (though pretty clearly it is that too), but rests 'on a natural foundation and has objective worth. It may lose out in competition with other values, or be blocked by the absence of congenial conditions, but the legal ethic finds its warrant in the contribution it can make to human growth and self-

realization' (Selznick 1969, 25). A disposition in this direction is likely 'where rational forms of social organization prevail,' and these forms themselves militate against arbitrariness. Directed movement occurs because '(w)hen the ethic of cooperation makes sense historically as the preferred way of organizing human relations, a dynamic toward legality is created. For this reason, we see legalization as a peculiarly salient issue for the modern special-purpose organization' (Selznick 1969, 28).

Notwithstanding these fairly abstract and apparently idealistic formulations, Selznick has concrete social processes in mind. As even in his earliest academic writings, but obviously freshened by the 'Berkeley events' of the 1960s,<sup>vii</sup> Selznick takes an example from the modern university. Demands are increasingly made for legalization, and restriction of the arbitrary power of university officials. Where this is successful, the rules are formalized to specify rights and obligations, reduce administrative discretion and spell out the rules of the game; 'Having made what they conceive to be a transition to rule-governed administration, the university officials congratulate themselves – and await obedience.' Selznick 1969, 29). But that is not how things turn out, for :

Unfortunately for the administrators' peace of mind, the quest for law generates new aspirations and more comprehensive goals. Once the rules become problematic, authority is in disarray. There is a demand that the rules be legitimate, not only in emanating from establishing authority, but also in the manner of their formulation, in the way they are applied, and in their fidelity to agreed-upon institutional purposes. The idea spreads that the obligation to obey has some relation to the quality of the rules and the integrity of their administration. A critical spirit emerges which insists that decisions be justified and that channels be available for effective review and the hearing of grievances. When discipline is imposed, it is demanded that due process be protected ....

As awareness expands and the dialogue is pressed, issues of academic "law and order" merge into larger questions of governance. Attention turns to the distinctive nature of the academic polity ... law is the servant of polity not its master. It follows that legal procedures and rules are not self-justifying, even if they are offered as extrapolations from the ideal of legality. The contributions they make, and the costs they exact, must be assessed in the light of substantive ends. (Selznick 1969, 30)

There is no train that takes you direct from latent to manifest, no guarantees, no certainties. There are just dispositions and circumstances. Whether the dispositions have formed, how far they have emerged, whether they are being deflected or redirected, are questions to be answered in part empirically, by evidence of 'incipient' and 'inchoate' signs in the development of the persons, institutions or societies under scrutiny. One looks for signs of emergence, and then one asks questions directed by theory:

First, the social viability of the practice is in question – its functional significance for group life and especially for new institutional forms – must be considered. Second, the contemporary evolution of relevant legal principles must be assessed to see whether the new norm can be absorbed within the received but changing legal tradition. Thus incipient law is not based on abstract postulates; nor does it reflect the moral preferences of the observer. Incipient law is emergent *positive* law, responsive to, and made possible by, particular social circumstances. (Selznick 1969, 33)



## 6. *Incipient Law*

Much of the book is therefore a search for 'incipient,' 'emerging,' even if yet 'inchoate' signs of legality in the life and law of modern industrial organizations. Selznick finds many, particularly in transformations in organizational management, the impact of collective bargaining on the organization, expectations of employees, and in the relationship of public policy to once 'private' institutions.

He draws upon Weber's theory of bureaucratization, and rationalization more broadly, to characterize the social and organizational transformations from social orderings dominated by 'kinship, fealty, and contract' to ones where 'the principle of *rational coordination* dominates the scene' (Selznick 1969, 75). He is aware of Weber's complex and ambivalent appraisals of rationality, and of the latter's many-layered consequences. Nevertheless, Selznick agreed with Weber that bureaucratic forms of organization contained seeds of legality. Whether the seeds would grow or not could not be determined with certainty, but bureaucracy contained them in a way that other forms of organization did not. For Selznick emphasizes 'one striking feature of the bureaucratic model, with its stress on objectivity and impersonality. *In theory, bureaucratic administration is the antithesis of arbitrary rule.* Bureaucracy formalizes every facet of decision-making and in doing so sets an ideal of limited discretion' (Selznick 1969, 80). This is central to Weber's account of bureaucratic authority as 'legal-rational,' a feature of modern bureaucracies, whether or not they are offices of state; 'the "legality" of bureaucratic authority does not necessarily derive from the public status of the agency or enterprise ... *The source of these attributes is internal; the dynamic they create calls forth the ideals of legality*' (Selznick 1969, 81).

Selznick sees similar developments, 'a strain toward internal legality,' (Selznick 1969, 82) with the decline of family-based firms in American industry: '(p)re-bureaucratic management was typically one-man rule ... The pre-bureaucratic business leader was impatient with formal rules and procedures. He liked to keep his accounts in his hat and to run the organization from day to day without clear-cut policies ... The bureaucratic way is directly contrary' (Selznick 1969, 83). This should systematically push toward managerial self-restraint. So too the 'flowering of "personnel policy" and a concomitant elaboration of rules and procedures ... (that) limit the arbitrary exercise of managerial prerogative' (Selznick 1969, 84), spread of seniority as a criterion of decision, formalization of disciplinary procedures. Bureaucratization is no sufficient condition for the rule of law, still less for democracy. On the other hand, for all their differences in form and purpose, Weber was right to see that both bureaucracy and modern law were part of the same larger historical story, and had affinities which did not exist between legality and, say, charismatic or traditional ways of running organizations. And development does not stop there. Post-bureaucratic tendencies are generated that seek to temper bureaucratic rigidities with flexibility, and such developments too have their own logic. That logic applies broadly.

This is not just preaching, but diagnosis and prognosis, according to Selznick. He finds contract law pressed by the changes in the social and organizational environment. It is subject to transformative pressures in industrial settings, with the development of new forms of labor law, including collective bargaining, which no longer is envisaged as a creature of 'the intentions or expectations of the founders' but creates new and continuing institutions, new and irreversible commitments ... brings into being a system of

government' (Selznick 1969, 151, 152). That in turn generates rule-making for the continuing administration of the agreement, and so "creates" a system of government ... by helping to reconstruct the managerial process. Management becomes more conscious of rules, more conscious of rights, *and more capable of building that consciousness into the routines of institutional life*. The administration of "things" becomes the governance of men as this reconstruction proceeds' (Selznick 1969, 155).

Other straws in the wind abound. 'Human relations' teaching has brought a 'new image' of the worker, and 'new ideas that are reconstructing the premises of management' (Selznick 1969, 100). Grievance arbitration 'and the legal evolution to which it has contributed, lend much support to the governmental analogy. For in this institution we see a response to the need for lawfulness in the day-to-day administration of the large enterprise.' (Selznick 1969, 155). Creative arbitration, many of the principles of which Selznick seeks to review, 'adapts generic legal experience to the industrial setting' (Selznick 1969, 178). All of this contributes to a development from the 'master's' prerogative to something far more directed and constrained:

Once it is accepted that reasons and justifications are to be offered, prerogative must give way to policy. The idea that management can do as it pleases simply because of historic privilege loses credibility and therefore weakens in authority.

For such an idea cannot meet the test of dialogue. It is a conversation-stopper, inviting an early test of power and a retreat from reason.' (Selznick 1969, 182)

Selznick draws on other pieces of evidence as well, to show the existence of a '*receptive institutional setting* within which further legal change may take place,' (Selznick 1969, 243) and in the last chapter of the book he sketches what he calls 'the emergent law,' whose substance is a 'law of governance.' And this connects to an old theme in his work, at least since *Leadership in Administration*: just as law does not stop with the state, nor does politics, nor indeed is it inappropriate to conceive of a non-state *polity*. In relation to that, the state polity and its laws have a crucial role, however, partly as exemplar and partly as instrument; *not* as the sole locus of legality but rather as a source and inspiration for building the rule of law 'into the life of society,' infusing governance 'with the aspirations and constraints of a legal order.'

### **7. Transition to Polity**

What, then, is governance, and where is it to be found? Here there are broad analogies with Selznick's approach to law: seek out function, don't obsess about location. Selznick sees a number of sources of convergence between what are conventionally understood as 'public' and 'private' domains. Central among these is the decline of the persuasiveness and symbolic power of 'sovereignty' of the putatively public institutions. Again, the enormous growth of large-scale institutions, in private as much as in public spheres, has eroded the distinctive state-orientation of public law. Similarities come to blur differences, both in the sense that 'governmental' powers can be found, and that 'nongovernmental' activities occur, in both state and non-state organizations. Governance is not simply a product of what we call 'government': state-relatedness is neither necessary nor sufficient for it. Not everything that governments do involves 'the distinctive functions of a sovereign' (Selznick 1969, 246), not everything private organizations are involved in should be understood as private. To the extent that non-state institutions both themselves 'become to some degree political communities' and affect participation in the larger polity, issues of governance are potentially engaged within

them; 'This raises the question whether we have a theory of public law adjudication adequate to deal with the group structure of modern society' (Selznick 1969, 246).

Concepts of public law, he argues, should be applied 'wherever the social function of governing is performed, wherever some men rule and others are ruled' (Selznick 1969, 259). That relationship is not confined to state-citizen relations but nor does it extend to every relationship, not even every relationship where there are asymmetries of power. It occurs where there is '*a special form of human association,*' different from kin relations, yet equally not the same as pure contractual association. It shares features of both: with contract it involves 'objective and impersonal standards, determined by the requirements of that system'; with kinship (and citizenship) membership as a source of social identity: Here the logic of institutionalization returns and generates a demand for recognition of *status*:

Participation thickens, it takes on a new dimension, as people in organizations strive for personal satisfactions and for protection against threats to their personal security. ... minimal affiliation ripens into membership. As this occurs, we see a movement from contract to status. What matters is who you are, what position you occupy, what role you play, rather than what voluntary agreements you may have entered. Nor is this only a product of personal psychology. Other forces, at least equally important, are also at work. Wherever there is an effort to create and sustain a going concern – based on continuing relationships rather than discrete transactions – a drift to status may be expected. (Selznick 1969, 271)

With this development of status in organizations where governance occurs, it will be both appropriate *and demanded* that rights of employees be put on a secure and adequate basis, adequate to the status of members of these organizations; 'With the emergence of status we may expect a claim of right' (Selznick 1969, 272). This bears analogies to the rights of *citizenship*, which is 'a special kind of group membership. It is known by the public rights accruing to the individual who occupies that status ... minimally, the right to a civic identity and to civic participation' (Selznick 1969, 249). Contexts where it makes sense to speak of *citizenship* occur in both state and non-state settings, then, where membership of the association is a source of social identity and a basis for social demands.

In response to such developments, it becomes appropriate to seek contribution from the side of state law, at the same time to legality and to governance. Such a contribution can be made by the public law of due process, the principles of which Selznick explores and explicates, and takes to represent '*a common law of governance*' (Selznick 1969, 256) whereby 'the rule of law (may be extended) to areas hitherto controlled only by concepts of private law' (Selznick 1969, 250).

Of course, as critics have observed, Selznick commends and recommends these developments. But it is too swift to dismiss this whole enterprise as a wish list with sociological trimmings. True, Selznick does not try to hide what he hopes for, and that goes way beyond due process minimally understood. Thus, he suggests, the key is personal adherence, status, the shift from 'minimal affiliation' to 'membership.' As that sense of connection deepens and broadens, so too will grow demands of a political character, demands for recognition of members as persons, demands for protection from arbitrary power; 'the transition from an administered machine – in which human beings are deployed as fully manipulable resources – to a system of governance will have begun'

(Selznick 1969, 273). And there is more in store. For not only might we expect (or at least have reason to hope for) a richer legality within organizations, but it is possible that further evolution might bring in train something more than legality:

Legality has a strong affinity with the ideal of political democracy, and ... a legal order should be seen as transitional to polity. It follows that there is latent in the law of governance a norm of participation. Due process strains to take account of all legal interests, provide opportunities for the offering of proofs and arguments, and deepen the legitimacy of authority. These premises invite new forms of legal and political participation. Without yielding the position that democratic forms are not to be imposed mechanically on uncongenial settings, the perspective of governance sounds a note of caution and of hope: In the end, the quest for justice may be indistinguishable from the quest for civic competence and personal autonomy. (Selznick 1969, 275-76)

On the other hand, you can't always get what you want. In the particular case, Selznick is sceptical that all that he would wish to come to pass is likely to; 'we can speak with far greater assurance about the social foundations for limiting arbitrary power than for sustaining democratic decision-making. By the same token, it is easier to see a basis for managerial self-restraint than for affirmative social responsibility' (Selznick 1969, 275).

More generally, and crucially, none of this can simply be imposed by some enthusiastic Selznickian legislator. What is required, to repeat, is a '*receptive institutional setting*,' without which legislators are just whistling in the wind. And if they wish to learn when and where their performances might be heard and heeded, they must be prepared to understand the specific settings in which they hope to intervene. And that must involve concrete institutional *assessment*, not merely an assumption or some abstract theorization:

Where these conditions are approximated, *not as a result of external constraint but as the outcome of the group's own problem-solving*, we may speak of the evolution of government. Therefore we cannot argue from an abstract ideal to an institutional prescription. The whole point is that the conditions for governance must be found in the life of the institution itself. On that basis, the law of governance may be invoked. Without that basis the law is irrelevant, its application self-defeating. (Selznick 1969, 273)

This is, after all, merely to apply to the particular case the general point about state legislation and non-state law, which underlies this work of depth, complexity, and broad implication:

If social evolution has taken place, it does not follow that legal change is not needed or expected. On the contrary, the legal order is pressed to put into practice ideals that have always had an abstract validity but which may not, in the past, have reflected the institutional competence of the society. Law works best when appropriate social foundations exist, but those foundations do not obviate the need for legal support and direction, to confirm rights and to extend them. (Selznick 1969, 275)

## 8. *Conclusions*

There is room for debate about many things in this work. There is the very enterprise of mixing analysis and evaluation, which is at the heart of Selznick's 'humanist

science' and anathema to positivist social scientists (Black 1972; Hertogh 2004). There is the theory of institutional evolution that Selznick has elaborated in several of his works, and that has aroused the ire of many empirically minded critics (Feeley 1979, 901; Blankenburg 1984, 281-84). There is the book's particular assessment of the character and development of American industrial law (Bainbridge 2002). There are matters of methodology where some prefer Ehrlich's 'bottom-up' empirical methods to Selznick's allegedly 'top-down' normative theorizing (Hertogh 2004). There are evaluative matters too: is what Selznick clearly favours an example of, perhaps a contributor to, that 'creeping legalism' that Lon Fuller so opposed? Donald Black predicted that Fuller might think so (Black 1972, 714), and for once, perhaps just once, he was cleverer than he knew. In correspondence between Fuller and Selznick, that is exactly (though without that phrase) what Fuller complained of.<sup>viii</sup> And one might develop, inspired by Selznick's book, an analysis of the interaction of public and private that points in quite a different sort of outcome than the colonization of private by public that he hopes for and in part expects. Thus, Lauren Edelman sees organizations setting up internal grievance procedures to deal with allegations of discrimination, which they don't do very well, but then courts defer to these internal practices and take their existence without more, as satisfying the requirements of anti-discrimination legislation. As a result, Edelman argues, this practice of 'legal endogeneity' 'allows patterns of injustice that become institutionalized in the organizational realm to be incorporated into – and legitimated by – public legal rules and norms' (Edelman 2002, 201).

There are important issues here, both of principle and of empirical detail. Some of them have to do with American industrial and employment law, on which no enlightenment can be had from me; some I aim to explore in another place; some are legitimate differences that are the stuff of routine academic disputation. But some of the deepest matters that divide Selznick from many mainstream social scientists have to do with a sustained program of thinking about actual and desirable social, legal and political developments, how to understand them, and what is involved in analysing them in depth. Moreover, in a world full of lawyers and policy advisers propagating state-centered institutional recipes for the rule of law, and then affecting disappointment that benighted beneficiaries still violate or deliberately ignore it, a reminder of the complexity of non-state conditions for the rule of law might be salutary. The rarity of such reminders suggests that we still await a 'social science that does not quite yet exist.' It might, as Australian electoral posters used to have it, be time for a change.

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<sup>i</sup> See, for example, Fuller 1969, 123 ff. They did not always agree, however, in particular – as we shall see - on the normative theses of this book.

<sup>ii</sup> For two fertile and influential more recent elaborations of this theme, see Galanter 1981 and Moore 1981.

<sup>iii</sup> Chester Barnard's work on administration in the 1930s, greatly influenced Selznick's earliest work in organizational theory, including *TVA and the Grass Roots*. Barnard had in turn expressed his debt to a 'chance reading of Eugene Ehrlich's *Fundamental Principles of the Sociology of Law*,' a book which emphasized the *social* rather than doctrinal and formal roots of legal orders, and countered what Barnard took to be the prevailing 'legalism that prevents the acceptance of essential facts of social organizations.' (Barnard 1938, xxx,xxxix) Barnard clearly discerned a kinship and overlap between his understanding of organizations and Ehrlich's of law, and Selznick did so too. He refers to Ehrlich in his first article on sociology of law and later several times returns to him.

<sup>iv</sup> In correspondence with me, he has recently reflected: 'about Ehrlich, I think the point is that he and I shared a sociological perspective. I don't think that his writings were a big influence on me but it was helpful to refer to him as someone who expressed the significance of a sociological perspective for jurisprudence. So I would not say that I depended in any way on Ehrlich's authority but I did see him as sharing the same point of view.' (personal correspondence, 21 May 2007).

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<sup>v</sup> As he puts it in his Selznick 1968, 'In context, this approach is more than an appeal to bring law into closer relation with social practice; it is an assertion that *authoritative* legal materials are to be found in the realities of group life. In other words, it questions the claim of the state to be the sole receptacle of legal authority.' (p. 51)

<sup>vi</sup> A fact of which he was quite conscious, reflecting in interviews that he had never managed to tie it down conceptually. In his discussion of the principles of due process, near the end of *LSIJ*, (Selznick 1969, 253], however, he suggests some examples: 'Rule-making that is based on evident caprice or prejudice, or that presumes the contrary of clearly established knowledge violates due process. Procedure cannot be 'due' if it does not conform to the canons of rational discourse or if it is otherwise outside the pale of reasoned and dispassionate assessment. Thus legislative classification of persons or groups may be struck down as arbitrary and against reason if they have no defensible connection with, or inherently frustrate, the professed aims of the legislation. Similarly a host of administrative actions, though they may enjoy large grants of discretion, are subject to this ultimate appeal.'

<sup>vii</sup> 'My view of law and authority has certainly benefited from the stirrings of the sixties, especially on the campuses, where there has been a quest for enlarged student rights and for the reconstruction of authority,' (Selznick 1969, Preface, v)

<sup>viii</sup> Lon L. Fuller letter to Philip Selznick, January 12, 1972: 'If I have one fundamental criticism it is that in dealing with institutional procedures (such as adjudication) your thesis assumes a kind of continuum, and that one can be "adjudicative" in one's approach to a problem in varying degrees. Or again, it assumes that procedures of decision and authoritative direction can be "legalized" along a kind of continuum, with no clear stopping places en route.

Coupled with this is a tendency to disregard the costs of judicialization and legalization. ... There is, in the book, little sense of dilemma and none of tragic choice. ...

I have been suggesting that your book does not recognize sufficiently the costs and disadvantages of legalization and judicialization. ...

... processes have an internal integrity that cannot be violated without damage to their moral efficacy. Plainly this is true of contracts, elections and deciding issues by lot. I think it is also true of adjudication. ...

I am disturbed by what seems to be a too free-wheeling disposition toward the internal integrity of adjudicative forms.'