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Legalism and Devolution of Power in the Public Sphere: Reflections on Occupy Wall Street

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LEGALISM AND DEVOLUTION OF POWER IN THE PUBLIC SPHERE: REFLECTIONS ON OCCUPY WALL STREET

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INTRODUCTION

In the fall of 2011, I spent several months at Occupy Wall Street as an observer, a participant in both the nightly General Assemblies and the Spokes Council, and as an active member of the Occupy Wall Street Activist Legal Working Group. I was also part of the legal team that worked on drafting a brief about the status of Zuccotti Park as a public forum. My reflections in this Essay are based on my personal experience with Occupy Wall Street, and the purpose of this Essay is to examine the peculiar relationship between legalism, the public sphere, and devolution of power that I witnessed there. The implications are larger and relate more generally to consensus organizing and legalism. This is not intended to be an exhaustive study of Occupy Wall Street, but rather an Essay about the culture that I experienced, and so the bulk of the stories and descriptions come from my own experience.

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What interests me is how legalistic, bureaucratic, and process-focused the governance system at Occupy Wall Street became over time. Anyone who spent much time at the park and at the almost nightly meetings of the "Spokes Council" (the body which became responsible for project funds), would be struck by how much time the Spokes Council spent on fairly arcane points of process, and how little time they spent on substantive discussions.[1] For example, after a discussion about the amount of money available for bail for people arrested during protests, there was a lengthy disagreement not about the bail cap, but about whether or not to reopen the discussion about the bail cap. The decision-making body debated the appropriate process to use in determining whether or not to open the debate, with the group responsible for running the meeting repeating the rules of discussion several times, and hewing closely to those rules when they came to what they perceived to be the best interpretation.[2] It was the kind of debate one would imagine in a court, with many references to precedent; this type of discourse is not what one imagines as the grammar of a protest movement. Yet rules and process were discussed hundreds of times in this way, when there were other

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1. *See* Hannah Chadeayne Appel, *The Ritual of General Assembly and the Bureaucracies of Anarchy*, SOCIAL TEXT (Oct. 30, 2011), http://www.socialtextjournal.org/blog/2011/10/the-rituals-of-general-assembly-and-the-bureaucracies-of-anarchy.php.

2. The following exchange is illustrative:

Meeting Facilitator: "So what I'm going to do now I want to see a show of hands. First do we want to reopen the discussion on the bail cap? If you're a spoke raise your sign. Okay signs down. So I'm going to remind that we work by consensus. That's maybe not the best way in this moment but if we do not want to reopen the discussion of the bail cap raise your sign high. So in a straight up and down vote we might be reopening this conversation. That's not how this body operates. That's a choice that you all make. It's up to you. I'm just trying to move this forward."

Representative of Solidarity Working Group: "Can we just make this easy. Just reopen it and let's move on."

Meeting Facilitator: "I am going to close this. I'm really sorry, if we want to work by consensus we do not have consensus on this. I'm sorry we did not move through a consensus process. I want to acknowledge that we didn't take concerns and we didn't take friendly amendments to the question of, 'do we want to reopen the discussion on the bail cap,' so since we don't have consensus on that we cannot, at this time, reopen the discussion on the bail cap. If you want to go there as a full consensus process at the beginning of the next meeting then that."

Operational Spokes Council Minutes, #OCCUPYWALLSTREET N.Y.C. GEN. ASSEMBLY BETA (Nov. 25, 2011, 7:00 PM), http://www.nycga.net/2011/11/25/11252011-operational-spokes-council-minutes/.

possible debates to be had—about strategy, for instance, or ethical debates about the scope of protest.

I use the frame of legalism to explore what I witnessed. The term "legalism" refers to a cultural commitment to following rules, and an association between morality and rule-following.[3] In a legalistic culture, the laws are more important than the reasons for the laws, and rule-following is a greater virtue than being good. At its peak— September 2011 through November 2011—Occupy Wall Street was curious because it was simultaneously legalistic and anti-legalistic. Many of the Occupy Wall Street protesters were committed to unmasking ideologies, including the ideology related to the "legality" of certain practices, and some openly promoted civil disobedience against the rules of the state. At the same time, the internal culture of Occupy Wall Street was a highly legalistic organizing culture, with a highly rigid and quasi-totemic "process" which was frequently referred to and discussed. The rules of expression and rules of decision in the two primary decision-making bodies of Occupy Wall Street, the General Assembly and the Spokes Council (whose processes I describe in the bulk of this Essay), became the common grammar of the movement. Meeting discussions tended to direct themselves to a discussion of rules and rule-following. And morality was implicitly invoked—failure to follow the Occupy Wall Street "process" was sometimes seen as a violation of the community norms, not merely a technical failure.

This observation is particularly interesting because the stereotype of devolved or "bottom-up"[4] organizing is that it is chaotic and does not conform to a rule-following and rule-invoking culture. One need only sift through the various descriptions of Occupy Wall Street to find a consistent strain characterizing the movement as a disorderly one. In November 2011, one editorial in Bloomington called the Occupiers "disorganized bands."[5] A writer for a Phoenix paper said

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3. JUDITH SHKLAR, LEGALISM 1 (1964).

4. *See* Josh Potter, *This Is What Horizontal Democracy Looks Like*, METROLAND, Oct. 6, 2011, http://metroland.net/2011/10/06/this-is-what-horizontal-democracy-looks-like/ (citing an organizer talking about the "messy" nature of the movement which she says is "bottom up"). *See generally* MATT KIBBE, HOSTILE TAKEOVER: RESISTING CENTRALIZED GOVERNMENT'S STRANGLEHOLD ON AMERICA (2012) (recommending that readers "embrace the beautiful chaos of citizen action and, by our movement's success, prove that freedom works," and discussing the "bottom up" change that must happen).

5. Editorial, *'Occupy' Groups Missing Target with Protests*, PANTAGRAPH.COM (Nov. 20, 2011 7:00 AM), http://pantagraph.com/news/opinion/editorial/occupy-

that "Occupy Wall Street is so disorganized it doesn't even appear to have specific leadership, or hierarchy," explicitly associating a state of organization with the existence of an established hierarchy.[6] Perhaps more interesting is the idea that is reflected in these images that bottom-up, grassroots decision-making is likely more disorderly. A writer for Business Insider wrote last fall:

> From the beginning of time two forces have vied for influence over us. One is bottoms-up, decentralized, and emergent. The other is top-down, centralized, and directed. The first force catalyzes change and divergence, while the second tends toward order and convergence. The first gives birth to new ideas, and the second enshrines them.[7]

The association between decentralization of power, devolution of power, and disorderliness and lack of rules exists elsewhere. For example, Amy Cohen writes that political philosophers associate "a rejection of the kind of centralized legal regulation favored by liberal advocates of the New Deal state" with "an embrace of informal, flexible, lay, and even extralegal problem solving."[8] Critics of libertarians Dorf and Sabel, for instance, associate their project with a rejection of law because they place lawmaking and law-creation at a decentralized level.[9]

I do not think there's much doubt that Occupy Wall Street was highly decentralized, with power distributed at the most grass-roots level.[10] Its apparent disorder, however, masked a high degree of rigid

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groups-missing-target-with-protests/article_9e166fcc-1238-11e1-ade6-001cc4c002e0.html.

6. Adam Hartung, *Why Occupy Wall Street Deserves More Attention than the Tea Party*, PHOENIX PRINCIPLE (Nov. 20, 2011 7:43 PM), http://www.thephoenixprinciple.com/blog/2011/11/why-occupy-wall-street-is-more-interesting-than-the-tea-party.html.

7. Adam Ludwin, *From LOLcats to Occupy Wall Street, Everything Is Happening from the Bottom Up Now*, SEFOSSICO (Dec. 8, 2011), http://www.sefossifoco.com/from-lolcats-to-occupy-wall-street-everything-is-happening-from-the-bottom-up-now/.

8. Amy Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 357 (2010).

9*. See, e.g.*, Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 827 (2008) (describing new governance as "a critique of and (for some) an intentional challenge to the rights-based model of legal liberalism").

10. Anthony DiMaggio & Paul Street, *Occupy Wall Street, Mass Media and Progressive Change in the Tea Party Era*, ECON. & POL. WKLY. (Nov. 19, 2011), http://www.epw.in/commentary/occupy-wall-street-mass-media-and-progressive-change-tea-party-era.html.

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rule-following. Occupy Wall Street's example suggests that the association of the devolved with the non-legalistic may be misplaced, especially if the "bottom-up" culture has a commitment to each member having an equal political voice. A "bottom-up" culture dedicated to ensuring that people do not get marginalized—especially one in which consensus is the rule of decision—may lead to rules and rule-following and the culture of legalism that accompany that devolution. The actual experience of Occupy Wall Street poses a challenge to theorists who celebrate the Habermasian ideal of a public forum, or deliberative democrats who idealize political fora in which there is universally recognized political equality and a right to speak and engage. It doesn't undermine their basic moral claim (that such a sphere politically and morally justifies its legitimacy), but it suggests that at least in some instances, a public sphere in which everyone has an equal voice may be a highly legalistic one.

   Habermas developed the ideal of a communicative sphere in which there would be critical discussion leading to consensus around matters of common concern.[11] The deliberative democratic political theorists, likewise, are proponents of radical political equality and the possibility of consensus.[12] Like Habermas, deliberative democratic theorists argue that political legitimacy derives from open rational discussion in which speakers are presumed to have political equality. Occupy Wall Street was an extraordinary experiment in the public sphere ideal and deliberative democracy, and it suggests that while such processes might work, the pathologies of legalism may appear to threaten the process. Political equality and consensus norms may—not must but may—lead to rule-based communicative culture instead of a public morality.

   I want to frame the discussion of Occupy Wall Street within two mid-century critiques of popular culture. The first is Judith Shklar's critique of the culture of legalism.[13] The second is Jürgen Habermas's critique of rationalized, commercialized, and feudalized public discourse.[14] What I find so interesting is that a movement that almost

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   11. *See* James Bohman & William Rehg, *Jürgen Habermas*, *in* STANFORD ENCYCLOPEDIA OF POLITICAL PHILOSOPHY (2011), *available at* http://plato.stanford.edu/entries/habermas/.

   12. *See generally* JON ELSTER, DELIBERATIVE DEMOCRACY (1998) (outlining the basic shared principles of deliberative democratic theorists).

   13. SHKLAR, *supra* note 3, at 1–20.

   14. 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 350–70 (Thomas McCarthy trans., 1989). To be fair, Habermas' idea of "consensus" is not necessarily actual political consensus achieved through deliberation coming to

precisely matches Habermas's essential elements would end up having so many of the features of legalism that Shklar critiques, and some echoes of the "juridification" that Habermas critiques.[15] In Part I, I briefly describe the rules and communicative culture of Occupy Wall Street and the legalism that I witnessed there. In Part II, I introduce the idea of legalism and the idea of the public sphere. In Part III, I provide several tentative hypotheses explaining the existence of legalism at Occupy Wall Street.

I. PROCESS AT OCCUPY WALL STREET

Within the media, Occupy Wall Street was often associated with disorder, chaos, and a lack of structure. Occupy Wall Street was often described in terms of its spontaneity and amorphousness. Some critics called the encampment "amorphous" and "leaderless" and described it in terms of the lack of a clear vision or set of demands.[16] The language of press articles often suggested an absence of process. While Occupy Wall Street was leaderless, however, it was not without structure. People could just show up and speak, but in order to speak they had to abide by a strict set of rules of engagement. They could only speak by signing up on a "stack," only speak on the topics that were on the agenda, only speak for two minutes, and only speak about the agenda items in a highly constrained set of ways. They could not introduce a new proposal, for instance, without having previously gone through a committee that would allow them to introduce a proposal. They could only speak to whether or not they supported a proposal during one specified time period; at other times they could ask clarifying questions about a proposal or provide amendments. In short, Occupy Wall Street was governed by a fairly formal set of communication rules.

It was also governed by a formal set of structures, divided into three primary groups. The core political decision-making body was

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agreement, but the mental, emotional, political and moral consensus of those who have been through the process. *See also* JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (1990) (responding to the skeptical approach to the possibility of consensus).

15. 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 350–70 (Thomas McCarthy trans., 1989) (discussing the "juridification" of the "lifeworld" through bureaucratic processes).

16. Ruth Davis Konigsberg, *People Who Live in Glass, Fixed-Rate Mortgage Houses Shouldn't Throw Stones at Occupy Wall Street*, TIME (Nov. 1, 2011), http://ideas.time.com/2011/11/01/people-who-live-in-glass-fixed-rate-mortgaged-houses/ (citing accusations of "the encampment" being amorphous).

the General Assembly.[17] The General Assembly was the only body that could make strategy decisions, and for the first six weeks it was the only body that could allocate funds. The secondary political decision-making body was the Spokes Council, which was introduced in late October. The third set of decision-makers was comprised of the fifty to one hundred "working groups" of different sizes that met and had their own purposes. Most of the working groups followed the same discussion structure that the General Assembly established. Working groups were responsible for sanitation in Zuccotti Park, for planning protest actions, providing music and culture, for planning an alternative banking system, for running a free outdoor library, and for running a kitchen which provided food three times a day.

The General Assemblies were held outside in Zuccotti Park and anyone could attend and participate. General Assemblies had to follow this set of processes: anything on the agenda, unless it was an emergency, had to be submitted to the Facilitation working group and posted on the Occupy Wall Street website for at least twenty-four hours prior to a decision. At the General Assembly, the following agenda was followed every night: First, the rules of engagement were reiterated.   Second, working groups would report about their activities.   Third, proposals would be presented.   After being presented, there would be a time for asking questions and clarifications, a time for discussion, a time for friendly amendments, and then the facilitators would "test for consensus."

All of these bodies used the same communication signals to make decisions. If someone spoke up in a way that the members of the general assembly supported, those members who supported the response would raise their fingers in the air and flutter them, with the fingers pointing sky-ward. If members of the assembly disagreed with the statement, they would raise hands in the air, point the fingers downward, and flutter their fingers.

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17. All of the following rules and practices come from my own observations. For a few other good sources for these practices, see Carolina, *Quick Guide on Group Dynamics in People's Assemblies*, TAKE THE SQUARE (July 31, 2011), http://takethesquare.net/2011/07/31/quick-guide-on-group-dynamics-in-peoples-assemblies/; Neal Gorenflo, *Occupy Wall Street's Consensus Process [VIDEO]*, SHAREABLE: CIVICSYSTEM   (Oct.   14,   2011,   6:29   PM), http://www.shareable.net/blog/occupy-wall-streets-consensus-process-video; *About*, #OCCUPYWALLSTREET   N.Y.C.   GEN.   ASSEMBLY   BETA, http://www.nycga.net/about/ (last visited December 20, 2012); Ekai, *Consensus Decision-Making Hand Signals Explained at #OccupySF*, YOUTUBE (Oct. 8, 2011), http://www.youtube.com/watch?v=R2yYiULZ0hA.

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If a participant had a question they needed to clarify they would raise their hands and create a "C" like shape with their fingers. If they had a point of information that would add factual depth to the discussion, they would raise a single finger. If, during the decision-making process, they believed that a particular motion could pose a threat to the safety or integrity of the community to such a degree that if it passed, it would cause them to think about leaving the movement, they would cross their hands in front of their chests and create a "block." After making a block, the would-be blockers would have a chance to express the reason for their block and any material things that could change in the proposal that would make them rethink the block.

The facilitators would measure consensus through something called "temperature checks." In a temperature check, the facilitators would ask the assembly to either wave their fingers towards the sky or towards the ground, to get a sense of how close the assembly was to consensus. The proposer, upon seeing that there was not anything approaching consensus, could then choose to drop or table the proposal or demand that the facilitators take another official consensus check.

In order to speak, individuals had to get their names on a list called the "stack" and wait to express their support or concern regarding the proposal at hand. There was a strict two-minute time limit. If someone went over the time limit, the facilitator would indicate that they had to stop both by telling the individual to stop and also by using physical gestures. If someone violated the process and continued to speak, openly disrespecting the rules, the facilitator would loudly say "Mic Check." The audience then would repeat "Mic Check" loudly to drown out the voice of the participant who was continuing to speak, and then would announce the name of the next person on "stack." The same "Mic Check" procedure would be used to regain control if someone did not follow process and spoke loudly during the meetings.

This General Assembly model operated for several months with relatively little variation. The number of people who attended General Assembly grew and then dwindled. There were many frustrations with the slowness of the General Assembly process and the ease with which participants could block proposals, but during the peak period the basic rules remained fairly stable.

The General Assemblies were run by a group of people known as facilitators, who were selected by a working group called the

Facilitation Working Group to run the meetings. Anyone could join the Facilitation Working Group, which, as per the rules of the Occupation, was required to post its meeting times publicly online and to be open to new members. The facilitators were responsible for managing conversations and decisions and deciding when the assembly had sufficient support to promote or oppose a decision. A proposal that was presented less than twenty-four hours prior to a general assembly would be rejected unless the Facilitation Working Group agreed that the proposal was an emergency proposal. From discussions with members of the Facilitation Working Group, I gather that the Facilitation Working Group largely saw itself as being constrained by the rules of the process, and did not imagine that it had substantial leeway to structure the order of discussion or the proposals that were to be discussed.[18]

The rules of discussion and decision-making were laid out at the beginning of each General Assembly. This process often took five to fifteen minutes. The laying out of the rules appeared to have two social functions: first, it introduced new attendees to the appropriate way to engage in the discussion; and second, it reinforced the rules of engagement for attendees who had been there before. The repeated invocation of the rules came to be expected as part of the process of each new meeting.

After the facilitators laid out the rules of engagement, they would introduce a set of proposals to the group. After the introduction of any given proposal, the Assembly would have an opportunity to ask questions about the proposal, then an opportunity to propose amendments to the proposal. Finally, they would have a chance to talk about the substance of the proposal and then choose whether or not to pass the proposal. Instead of calling for a vote, the facilitators would call for "temperature taking" and "moving towards consensus." The terminology was designed by some to be a rejection of the language of voting and representation. When people brought up the word "vote," it would almost always be quickly rejected or replaced. During the discussion, the general assembly would create constant feedback to the topic being discussed and the responses to the topic. Responses were subject to time limits.

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18. This may have been even more important because of the regular accusations that the Facilitation Working Group was abusing its power, which arguably led to the Facilitation Working Group being very sensitive to its own use of power and discretion.

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A. The Spokes Council

The Spokes Council was created through consensus at the General Assembly.[19] It emerged in response to concerns about the inefficiency of dealing with financial matters through the General Assembly, leading to a radical slow-down in the workings of Occupy Wall Street.[20] During the debate about its creation, the example was used of a lengthy discussion about obtaining $300 of funding for sanitation trucks. The argument was that there was already consensus among the most active members, and so the need for going through the General Assembly's extensive process was trivial.[21] Moreover, there was an expression of a desire to have the General Assembly operate more like a discussion forum for philosophical questions about the nature of financial institutions and the future of the global economy. From speaking to some of the people who supported the Spokes Council, however, I gathered that another reason for the shift to the Spokes Council was a desire for a body of "true" activists to manage the process.

The Spokes Council had the same rules for deliberating and speaking as the General Assembly, and it maintained the same ninety percent consensus voting rule, but a different category for who could speak and who could participate in decision-making.[22] Rather than allowing all people to speak, the Spokes Council only allowed an individuals to speak if they were "spokes" of a working group.[23] In that role, they were supposed to reflect the views of the working group, not only their own views.[24] Those who were present but not part of any working group could not speak. Spokes Council meetings

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19. *See   Consensus   in   Large   Groups*, SEEDS   FOR   CHANGE, http://files.uniteddiversity.com/Decision_Making_and_Democracy/Consensus/Consensus_in_Large_Groups.pdf (last visited Oct. 26, 2012); *Spokes Council Proposal*, #OCCUPYWALLSTREET N.Y.C. GEN. ASSEMBLY BETA, http://www.nycga.net/spokes-council/ (last visited Oct. 26, 2012).

20. *See Draft Proposal for Fri 10/28 General Assembly: Structure*, #OCCUPYWALLSTREET N.Y.C. GEN. ASSEMBLY BETA, (Oct. 27, 2011), http://www.nycga.net/2011/10/27/draft-proposal-for-fri-1028-general-assembly-structure/.

21. Rosie Gray, *Occupy Wall Street Debuts the New Spokes Council*, VILLAGE VOICE (Nov. 8, 2011, 10:12 AM), http://blogs.villagevoice.com/runninscared/2011/11/occupy_wall_str_25.php; Harry Siegel, TWITTER (Oct. 28, 2011, 7:10 PM), https://twitter.com/harrysiegel/status/130104199949193216.

22. *See Liberty Square Adopts a Spokes Council*, OCCUPY WALL STREET (Nov. 3, 2011), http://occupywallst.org/article/occupy-wall-street-adopts-spokes-council/.

23. *Id.*

24. *Id.*

were also run by members of the Facilitation Working Group, and often began with a meditation upon the "agreements" that the community had coming together. The basic community agreements were to listen and not interrupt, to consider "Why am I talking?" (WAIT), to stay on process, to be respectful, to refrain from shouting people down, to rotate spokes, to abstain from name-calling, and to agree that only spokes were allowed to speak to the full group.[25]

The representatives of the various working groups then would debate the content as the Spokes Council. These meetings were typically held indoors, at least three evenings each week.[26] In order to enable the people speaking to be heard, and because there was limited space, groups did not tend to socialize with other groups but instead sat with their own Working Group Members. The fact of a ninety percent decision rule created an extremely high barrier for the passage of proposals. The Spokes Council had a slightly different tone than the General Assembly. It tended to be far more contentious, which led to the facilitators often using the language of mediation and reiterating the joint nature of the enterprise. The emotional, personal, or informal language created a strange disconnect between the formality of the process and the informality and open emotionality of the facilitators. Often, the conversation and discussion fell apart because of disagreements about process.[27]

II. LEGALISM AND THE PUBLIC SPHERE

The concept of legalism derives from Judith Shklar's 1964 book of the same name.[28] In *Legalism*, Shklar argued that there is an ideology within the legal community that relates rule-following to morality.[29] Legalism, she claimed, is "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[30] Legalism exists within the legal community, but also to a greater and lesser degree in other institutions. Shklar, who was very critical of this legalism, saw it as an obscuring force that separated legal institutions from the

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25. *Id.*

26. *Id.*

27. *See* Archive for Spokes Council Minutes, #OCCUPYWALLSTREET N.Y.C. GEN. ASSEMBLY BETA, http://www.nycga.net/category/assemblies/minutes-sc/ (last visited Oct. 26, 2012).

28. SHKLAR, *supra* note 3.

29. *Id.* at 1.

30. *Id.*

context in which they arose.[31] Legalism provides a cohering culture but also separates rules from politics.[32] A cultural fixation on rules obscures and transforms fundamental moral questions and replaces them with technical questions.

In a legalistic culture, the overlay of rule-following and morality leads to a cultural tendency to think and talk about rules (instead of morality), to judge on the basis of rule-following (instead of morality), and to self-judge on the basis of rule-following (instead of goodness or virtue).[33] The process of rule-following tends to become as important as the particular substantive harms that the rules protect. In short, the culture becomes one of "process over substance." Legalistic cultures transform substantive debates into procedural debates. In a culture dominated by legalism, the rules themselves and the relationships between the rules and individuals and institutions dominate the conversations, becoming the topic of ultimate concern and the set of ideas around which debates are framed.

As Shklar described it:

> The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definitions. This procedure has served to isolate law completely from the social context within which it exists. Law is endowed with its own discrete, integral history, its own "science," and its own values, which are all treated as a single "block" sealed off from general social history, from general social theory, from politics, and from morality. The habits of mind appropriate, within narrow limits, to the procedures of law courts in the most stable legal systems have been expanded to provide legal theory and ideology with an entire system of thought and values.[34]

In a legalistic culture, once the rules exist they quickly grow to take on a separate power of their own, so that this formalism takes over, and leads to what Shklar perceives to be a disturbing reverence for the laws. This is because, as Robin West explained: "if one has a moral duty to obey rules, it must be the case that the rules are there— and accordingly, legalism commits lawyers to the formalist claim . . . that existing law fully determines all questions posed by conflicting

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 2.

rights and duties."[35]   Another feature of legalism is the (related) tendency to conservatism, because all rules that are right-creating must necessarily come before the current moment or debate.[36]   If actions are judged in terms of their conformity to rules and process—without regard to their substance—how can one then change the rules or introduce new ones?   Legalism enshrines—and values—laws because they are there and have been there before, and thereby creates a culture.

But how is one to tell the difference between a legalistic culture and a non-legalistic culture?   All cultures have rules and different degrees of rule-breaking, but it is the attention to those rules—and the moral judgment that accompanies the following or breaking of rules—that defines legalism.   One can have a non-legalistic culture with many rules, or a legalistic culture with few rules; it is the relationship to the rules of the individuals as they interact with each other inside the institution that matters.   Take, for instance, jay-walking, a town "rule" against walking across a street in an area other than the designated crosswalk.   The fact that the rule exists tells you nothing about whether the town culture is legalistic or not.   In fact, a rule on the books tells you very little: it merely tells you that there is a rule, not whether anyone takes it seriously.   Nor does merely watching whether people violate the rule: rule-following and legalism *may* tend to be, but are not necessarily, correlated.   Person A might follow the rule and not jaywalk, but not because she has a particularly moral, character-based relationship to rules in general.   Instead, she might be afraid of getting caught.   Person B might have a strong habit of only walking on crosswalks and will obey that habit without much thought.   Person C might choose to obey the rule because of concerns about safety.   Person D might obey the rule, however, because he believes that rules should be followed because they are rules, and he gains a greater and more positive sense of identity when he follows rules; person D when privately or publicly mentioning those who jaywalk will use language that indicates that law-breakers are somehow violating the cultural norms, and are "wrong" simply for failing to follow the rules.   Person D therefore represents the "legalistic" approach to rule following.

When it comes to institutions, there are greater and lesser degrees of legalism, and individuals who are not legalistic in other parts of

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35. Robin West, *Reconsidering Legalism,* 88 MINN. L. REV. 119, 120 (2003).

36. *Id.*

their lives may take on a legalistic attitude when in a legalistic institution. A non-legalistic institutional culture will not spend most of its time and energy debating the rules of procedure or referring to the rules of procedure. If a procedural rule is violated in a non-legalistic institution, the violation is likely to go unnoticed; most participants may not even know the rules. For example, in my experience, some boards of small non-profits may not follow those rules that govern them and may not even know the rules. They may, for example, recruit a new board member without referencing a rule that new board members may only join every three years. If the rule is brought to the board's attention, they may choose to follow it, but the infraction is not seen as a fundamental—or moral—infraction. Other institutions of governance may be non-legalistic in other ways. For example, one could argue that many representative bodies, while rule-following, are not legalistic, in that they do not attach a separate moral value to rule-following. They follow the rules because if they did not they would be "caught" and punished by those of an opposing party. They do not, however, internalize the rules as essentially good.

For Shklar, and the conversations that have followed, the debate about legalism began in the international justice sphere—Shklar stands for a generous skepticism towards a "rule of law" approach in the context of war crimes, in particular, in wake of World War II.[37] My interest is in applying this critique at the opposite end of the scale—legalism in the context of movements and community organizing, and most particularly legalism in the context of a movement built around civil disobedience. Legalism is particularly interesting for Occupy Wall Street because by its own terms, legalism rejects liberalism, which is often deeply associated with Occupy Wall Street.

Shklar, of course, has many bedfellows in her critique. Lon Fuller was disturbed by what he saw as a "creeping legalism" that changed all rhetorical and communicative spheres to adjudicative discussions.[38] For still others, legalism is the perversion of the rule of law, when rules become fetishized over substance, as opposed to enablers of substantive virtues.[39] One critic discusses how legalism makes a "fetish of rules" and "shuts out moral, political, and social

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37. *See generally* SHKLAR, *supra* note 3.
38. LOU FULLER, *Two Principles of Human Association*, *in* THE PRINCIPLES OF SOCIAL ORDER 81 (Kenneth Winston ed., 2001).
39. *See* West, *supra* note 35, at 119.

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discourse."[40] Legalism "takes on the trappings of a kind of overall regulator in that it assures us of a single authoritative rule for each dispute as well as an internally consistent system of rules."[41]

Legalism is not always used in a negative light. The notion of "legal liberalism" is intertwined with pluralism, and one of the values of legalism is the importance of a shared grammar in a multicultural context. Robert Gordon, for instance, writes about the value of a professional culture with autonomous rules: "The culture of legalism may help to promote political pluralism because it can multiply procedures, rule-following temperaments, and entrenched professional practices that are askew to or somewhat resistant to outside control and manipulation."[42]

The political philosopher Jürgen Habermas clearly identifies with the kind of argument that Shklar makes—he argues against what he sees as a tendency for the rational, juridical mode of argumentation that descends from rationalized feudalism entering into and colonizing family and educational life.[43] His critique is largely one of "instrumental reason" instead of public discourse.[44] Habermas is interested in the relationship of the public-to-public conversation, and the relationship between public conversation and political legitimacy.[45] He is committed to the possibility of a legitimate public discourse that is measured by something other than just rationality; he is opposed to the profusion of hierarchical, end-of-history rules that accompany an overly rational culture.[46] He associates rationality (without public discourse) as an expression of hierarchical power. Instead, he advocates for communicative rationality, whereby perpetual reason-giving directly empowers the public to identify and create legitimate reasons.[47] In his idealized form, the discussions consisted of reasoned and represented individuals speaking to each

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40. James Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 529 (1996).

41. *Id.* at 529–30.

42. Robert Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 458 (2010).

43. *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

44. 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 356–73 (Thomas McCarthy trans., 1989).

45. *Id.*

46. *Id.*

47. *Id.*

other on behalf of the public, not on behalf of themselves. When mass media became the dominant form of public and political interaction, however, citizens became consumers instead of public-speaking participants and the public sphere became "refeudalized."[48]

Habermas argues that in order to free the public sphere—that is, to recreate the possibility of legitimate decision-making coming out of the public sphere—there is a need for engaged activist groups to create the culture of the public sphere.[49] Much of Habermas' writing centers around and derives from this history and this ideal discourse situation. Habermas' political ideals are focused on "communicative action" and discourse.[50] When engaged in communicative action, participants come together in order to reach a common view.[51] They use argument and cooperation in an effort to reach consensus and seek collective ends instead of individual ends.[52] In Habermas's view, one must engage in reason-giving from the perspective of the communal society, and the act of reason-giving must both reflect and create intersubjectivity.[53]

For Habermas, process is justice, but juridification is a kind of social and political death: "In the vertigo of this freedom there is no longer any fixed point outside the democratic procedure itself—a procedure whose meaning is already summed up in the system of rights."[54] Habermas' theory is that ideas are legitimated by coming through and being created by the process of open and rational discussions resulting in consensus. At the same time, the open process should not be too formalized. An essential part of this idealized discourse is that when speaking, the speakers speak from the perspective of the civil society itself, not from the perspective of their own interests; arguably, this is the perspective of the public sphere.[55] Therefore, in the idealized discourse, free speakers give reasons for action from a public perspective, and other free speakers counter those reasons.[56] While the idealized form may never exist, the public sphere can exist when there are public discussions that are

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48. *Id.*
49*. Id.*
50*. Id.*
51. *Id.* at 84.
52*. Id.*
53. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 43, at 280.
54. *Id.* at 229.
55*. Id.*
56*. Id.*

not dominated by individual perspective. In this sense, the public sphere is easiest to imagine in direct opposition to a view of the public sphere as a space for negotiating between clashing private interests.[57] According to Habermas, a functioning public sphere leads to a general recognition of overlapping public consensus. The core principles that shaped the process are very similar to the core principles that Habermas considered necessary for a public sphere— open access, open discussion, a starting point of the public as the orientation, a commitment to political equality and (at least within the movement) a free press. Habermas said that communicative action existed when two or more people "seek to reach an understanding about the action situation and their plans of action in order to coordinate their actions by way of agreement. The central concept of interpretation refers in the first instance to negotiating definitions of the situation which admit of consensus."[58]

III. EXPLANATIONS FOR LEGALISM AT OCCUPY WALL STREET

At Occupy Wall Street, the language with which people described their own communicative culture was reminiscent of both Habermas and the Deliberative Democratic theorists.[59] One of the lead organizers called the model of consensus process "the movement's greatest achievement."[60] It was to be a model of "genuine, direct democracy to counterpose the corrupt charade presented to us as 'democracy' by the U.S. Government."[61] The idea that people would come to an understanding and a shared plan of action based on

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57. In other words, this view of the public sphere is in direct contrast to the fundamental underpinnings of social choice theory and much of law and economics scholarship.

58. Jürgen Habermas, *Social Action and Rationality*, *in* JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER 142, 143 (Steven Seidman ed., 1989).

59. One of those theorists, Michael Dorf, concluded that the Occupy Movement was less interested in protest than in process. *See* Michael Dorf, *Occupy Wall Street Is a Democracy Movement*, DORF ON LAW (Oct. 31, 2011), http://www.dorfonlaw.org/ 2011/10/occupy-wall-street-is-democracy.html. Dorf and Sabel did not, unlike the other theorists, encourage or require consensus in their model of democratic experimentalism. *See* Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

60. David Graeber, *David Graeber: On Playing by the Rules—The Strange Success of #OccupyWallStreet*, NAKED CAPITALISM (Oct. 19, 2011), http://www.nakedcapitalism.com/2011/10/david-graeber-on-playing-by-the-rules-%E2%80%93-the-strange-success-of-occupy-wall-street.html.

61. *Id.*

consensus was not secondary, but primary. For example, Dan Kervick, a member of Occupy Wall Street, wrote:

> It is notable and inspiring that as the Occupy Wall Street movement took shape around the United States and other parts of the world, the participants in the occupations organized themselves as communities of equals, in which every voice is equally prized and harmonious consensus is avidly sought. The hunger for democratic community and self-determination is palpable. This is not the laissez faire form of self-determination, in which each individual strives only to determine the course of one individual life, but a more encompassing phenomenon, in which people strive to build and sustain communities and then work together as equals in order to make well-founded, democratic decisions to determine the direction of the community. It's hard work. But the work is inspiring and ennobling, and people are naturally drawn to it.[62]

The language suggests people coming together. And yet, in my experience with Occupy Wall Street, I discovered a highly legalistic culture, one in which the procedural rules became central to the discussions and debates and, to some degree, overtook substantive discussions. Since I was also a member of a law school faculty, I compared the faculty meetings to the Occupy Wall Street meetings, and found the faculty meetings far less legalistic, if measured in Shklar's terms—there was less debate about whether the meeting itself was following its own convening rules. This does not undermine Kerviks's point, which is well taken, or the aspirations of the Occupiers—I share many of the aspirations mentioned here.

At both the Spokes Council and the General Assembly—though slightly more frequently at the Spokes Council—the process became a central point of discussion, as facilitators increasingly referred to the process and followed the process. I overheard one participant talk about it as the "totemic process." The legalism of the Spokes culture showed itself in the degree to which participants adhered to the process, and the anxiety and focus they exhibited toward the appropriateness of process.

The effort to elevate the process seemed deliberate and essential to the process itself. At the beginning of almost every meeting, there

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62. Dan Kervick, *Public Money for Public Purpose: Toward the End of Plutocracy and the Triumph of Democracy—Part V*, NAKED CAPITALISM (Dec. 29, 2011), http://www.nakedcapitalism.com/2011/12/public-money-for-public-purpose-toward-the-end-of-plutocracy-and-the-triumph-of-democracy-part-v.html (cross posted on NEW ECONOMIC PERSPECTIVES).

would be a call to respect each other and to respect the process.[63] The Facilitation Working Group would refer decisions about the process to the process rules. This highly rigid rule-following in terms of process is especially striking because there is no law that backs up these rules (no one could sue), it is a relatively small decision-making body (fewer than fifty representative "spokes" were present at every meeting), and it is easy to imagine that decisions could have been made outside this process. A minority of participants would sometimes act out and demand that the process be abandoned. A member of the Technology working group claimed, for instance, in a late November meeting: "Let me explain how shit gets done right now. We, the privileged elite. I know someone's phone number. I call them. It gets shit done. It's not transparent. . . . [I have] been with this since August just please we can assume good faith of each other."[64] His frustration was with the idea that process was being used to cause what he saw as friction instead of enabling action: "Ok, we agreed to stay on process but there are some times when the process does not serve the work that needs to be done."[65]

What is much harder to record—and is more impressionistic—is my experience that the language of process then bled into individual, unrecorded conversations, and became much of what was talked about within private discussions and meetings. I also found myself focused on whether or not the process was being followed, and becoming emotionally attached to process-following for its own sake. I think my experience was fairly common. People would question whether a particular working group was conforming to procedure— often because they had some other substantive concern about the working group, but also because the culture lent itself to critiquing the working groups through a critique of process. For example, a classic critique of my own working group was that it was not "open" enough. This critique might be expressed by saying that the group failed to follow the rules about recording minutes of our meetings on the website, as required by working group rules.

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63. *See, e.g.*, Interview by 99GetSmart with Azzah from Occupy Orlando (Nov. 2, 2011), *available at* http://99getsmart.com/?p=702 (discussing the importance of process).

64. *NYC Operational Spokes Council Minutes 11/28/2011*, #OCCUPYWALLSTREET N.Y.C. GEN. ASSEMBLY BETA (Nov. 28, 2011), http://www.nycga.net/2011/11/28/nyc-operational-spokes-council-11282011/.

65. *Id.*

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In the following section, I explore some hypotheses for why Occupy Wall Street might have become so heavily process-focused.

A. Heterogeneity of Occupy Wall Street

The first explanation for Occupy Wall Street's focus on process is the movement's heterogeneity. Because Occupy Wall Street was an organization founded on highly diverse political beliefs, the need for a shared set of beliefs to organize decision-making became incredibly important. Perhaps one of the most important roles of the legalism of the process was that it allowed the participants to create a shared language very quickly that was not substantive (and therefore likely to lead to conflict), not trivial (because it permeated the culture), and unique (therefore allowing for identity creation and a sense of separateness). Much of the Occupy Wall Street humor related to this new grammar, but the grammar that spread the farthest was the legal, process grammar, moving far more quickly than new turns of phrases or new chants. Why was this? The legal process grammar became essential   for   communication   across   different   substantive commitments.

Mary Ann Glendon has argued that a more heterogenous society requires more legalism as a social bond, because the rules (and not the substantive commitments) are the only shared commitments.[66]

> This legalization of popular culture is both cause and consequence of our increasing tendency to look to law as an expression of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law. . . .   Legality, to a great extent, has become a touchstone for legitimacy.[67]

Laws that engender loyalty are treated as special and sacred, not merely ugly necessities.. One sees this regularly in the emotional and intimate relationship people have to the Constitution, whether or not they are implicated in Constitutional decisions—the idea that gun ownership is a Second Amendment right is reason in and of itself to support gun ownership for many, whether or not they have any attachments to guns and even if they think gun ownership might be a social bad. The Constitution's emotional role provides a kind of glue, a constitutional nationalism.

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66. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 2 (1991).

67. *Id.*

B. Shared Culture of Occupy Wall Street

Another related explanation for the legalism could be the explicit efforts to create community through creating a shared culture. The facilitator on November 14th, for example, referred to the shared community values in this way:

> We prefer people use "I" statements, phrase it more, "I feel this is going . . ." instead of, "You are a terrible . . . ." Keep it open, address the entire assembly. Keep it from your viewpoint, away from me versus you . . . . Be concise and be civil. Thank you all. We're building a community. This is a practice. I want to review real quick: don't talk over each other, respect each other's voices, mutual respect.[68]

The rules and laws were not so much about the laws themselves, but about the creation of a subculture with shared rules and laws.

In this way, the hand signals served less as a method of decision-making and more as the creation of the kind of allegiance that is often seen in secret societies or other close communities. The use of the hand signals was not, in this view, a highly rigid expression of process. Instead, it marked a choice by those who used the signals to identify with a particular subculture, and in so doing severed their connections to other cultures. The social function of the rules was more about ritual than rule itself.

This rule-as-ritual explanation can help make sense of the high degree of emotional attachment to the rules that existed even among those who were critical of the rules. And the rule-as-signal can explain how the rules would spread to different communities—such as some of the lawyers groups I was working with—as those similar communities would use the hand-signals as a gesture of solidarity or "getting it," or social acceptance. Legalism, as a matter of political culture, and anarchism, are often understood as opposites. In her book *Another Liberalism*, Nancy Rosenblaum writes about the fundamental temperamental opposition between liberal legalism and romantic anarchism.[69] According to Rosenblaum, romantic anarchy opposes not just the civil law, but the "attendant ethos of fairness and impartiality, and the disposition to make and obey rules."[70] She

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68. *NYC Operational Spokes Council Minutes 11/14/2011*, #OCCUPYWALLSTREET N.Y.C. GEN. ASSEMBLY BETA (Nov. 14, 2011), http://www.nycga.net/2011/11/14/nyc-operational-spokes-council-minutes-11142011/.

69. NANCY ROSENBLUM, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT 34 (1987).

70. *Id.*

argues that the sensibility of the anarchist is fundamentally against the sensibility of the state, and that "legalism is anathema in any department of life, not just the juridical state."[71] Anarchists find a political society made up of "claims and counterclaims" intolerable.[72] On the other end, she sees liberalism as a rejection of the "law of the heart," a society which prefers emotional versus rational decision-making.[73] She talks about the virtues of liberalism as including an "active disposition" to respect rights and rules and argues that liberalism "assumes personalities for whom making and following laws feels comfortable, as well as practical and just."[74]

Relatedly, in a recent article, Amy Cohen noted that most contemporary scholars see "new governance" as a "break from liberal law."[75] Cohen notes that new governance has been seen as an "undermining of law," a "move away from law-centered strategies," and "informality, soft law, and extra-legal forms in action."[76] But Cohen very smartly notes that "when read against Hayekian neoliberalism, new governance emerges as a formalizing, reason-seeking, and indeed law-seeking project; that is, as a deliberate (but democratic) effort to try one's absolute best to decide which principles govern and then apply them."[77] Power that is truly decentralized in a radically equal way requires the kind of high formalism and legalism that decentralized, public sphere discourse allegedly rejects.

Consider the practical difficulties that attend giving each person an equal power to speak. For a three-hour meeting, if each person in a group of sixty is to have equal time to speak, they will each get to speak for three minutes total—even for the most fluent person, it is difficult to explore complex ideas within three minutes. Even if only one in three actually wants to speak (and one might wonder the reasons for their shyness), a three-hour meeting would enable a total of nine minutes each, on all the different topics that arise. Nine minutes might fairly be enough for any one person to explore and express their thoughts on any single issue. Therefore, there would be time for twenty people to speak their minds about one single topic

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71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 35.
75. Cohen, *supra* note 8, at 381.
76. *Id.*
77. *Id.*

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within three hours, if real political equality is to be achieved, that is, if each person's voice actually is to be heard.

Now consider that Occupy Wall Street in Zuccotti Park was far more than sixty people—there were closer to six thousand. The number of Working Groups exceeded sixty, moreover, so even within the representative structure that was set up, there was never time within a three hour meeting to enable actual equal speech on any single topic. Yet the aspiration of doing so requires an intensely rigid process, where the number of minutes alloted per person is limited, and the scope of topics likewise is limited. Natural speech patterns and thought patterns do not mimic these constraints, so that constant reminders of these rules were necessary. And those who disagreed or were tired or annoyed would pick up on the habit of the facilitators to recite these patterns, and use technical tools to try to stop certain kinds of speech.

C. Rejection of Representative Decision-Making in Occupy Wall Street

An additional explanation for the legalism that exists within Occupy Wall Street might be that the rejection of one model (representative decision-making) created a void, meaning that another decision-model needed to replace it. The intuitive response of those involved is to mimic a known form, even if the mimicry is not actively desired—so when rejecting the form of representative decision-making, the community collectively gravitated towards the form of decision-making most widely dispersed in our culture, via television shows and activists' own interactions with law, legal rules that govern adversarial decision-making.

Most members of Occupy Wall Street are very interested in proving something new, and in creating a new form of self-governance. Many occupiers, when asked what they "wanted," would say something along the lines of wanting to demonstrate that it was possible to run a community in a different way than other communities did.[78] They wanted to show that representative government might not be necessary by *showing* that representative government was not necessary.[79] They were deeply suspicious of

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78. *See, e.g.*, William Greider, *The Democratic Promise of Occupy Wall Street*, THE NATION (Nov. 22, 2011), http://www.thenation.com/article/164767/democratic-promise-occupy-wall-street#.

79. Julia Shaw, *Occupy Wall Street Is No Tea Party*, THE FOUNDRY (Oct. 26, 2011, 3:26 PM), http://blog.heritage.org/2011/10/26/occupy-wall-street-is-no-tea-party/

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leaders and people with power, and anyone holding persistent power, as happens in a representative democracy. Words like "vote," and "represent" were seen as negative. Sometimes the reaction was more mixed, as when I raised the idea at a structure meeting to look at different constitutions: several of the people at the meeting were keenly interested in looking at different constitutional structures, while others were highly resistant to the comparison to any existing governance structure. Rejection of a norm requires replacement, and the court is a very present model for decision-making in American culture. The court, and court system more broadly, are familiar to many because of their prevalence in American entertainment culture.[80]   Moreover, the legalistic culture, which started in law schools, has spread to the society at large, so that the public rhetoric of the mass media as well as individuals often looks to process. This norm is so deeply entrenched in modern culture that part of the reason for the legalism could be a kind of "trickle-down" legalism. As Justice Rosalie Silberman Abella of the Ontario Court of Appeals argued, "We have moved from being a society governed by the *rule of law* to being a society governed by the *law of rules*. We have become so completely seduced by the notion, borrowed from criminal law, that process insures justice, that we have come to believe that process *is* justice."[81]   Given this experiment, the question becomes whether this is more generalizable, and whether legalism might be a likely—if not necessary—side effect of a culture that is committed to political equality and consensus.

At the beginning of this Essay I mentioned that many critics have used the language of "bottom up" to describe Occupy Wall Street, and associated "bottom up" with "disorganized." Scholars on both the Left and Right, as well as the popular press, associate devolution of law with rejection of law, and oppose devolution and legalism.

("'Since we can no longer trust our elected representatives to represent us rather than their large donors,' the Zuccotti Park occupiers explain, 'we are creating a microcosm of what democracy really looks like.' Zuccotti Park is meant to be a model of the governmental structure that should replace America's constitutional system.")

[80]   Another theory that this Essay does not explore is that the legalistic culture could have been a means of entertainment—i.e., the core activity of Occupiers was that they needed to be present, and so the "entertainment" of process kept them engaged in a way that no other activity could.

81. Ben Aisenberg, *Are We Losing Our Way?*, 27 COLO. LAW. 17, 17 (1998) (quoting Justice Rosalie Silberman Abella of the Ontario Court of Appeals at American Bar Association midsummer meeting).

Some would argue that the more decentralized a legal system is, the less law-like it is.[82] There are many theorists of a kind of deliberate exchange of public reasons and the values that such an exchange represents. Yale Law Professor Bruce Ackerman and his co-conspirator James Fishkin, the great modern experimenters in deliberative democracy, do not give the participants in their experiments the kind of ongoing power, and daily contact, that epitomized the deliberative discussions of Occupy Wall Street.[83] They test and imagine situations where "Americans will not be encountering each other as consumers or coreligionists or even as friends—but as citizens searching for common ground."[84]

I have not found evidence of legalism resulting from their experiments, though I suspect that there are a few reasons why. First, they are not testing for it. Second, many of their experiments rely on randomly assigning people to subjects with which they do not initially have a deep association. Third, each person has ample time to speak. And fourth, they have no real power and the groups—even if they meet multiple times—are meeting in the context of making policy decisions that do not directly govern their own lives.[85] This arises as well in the context of a broad, post-Internet, and Internet-related ideology in the culture related to "bottom up" decision-making. While the precise description of what constitutes "bottom up" is often lacking, the general idea is that permeable structures exist that enable anyone with talent, or an idea, or determination, to rise up semi-

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82. *See* Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 97, 98 (Gráinne de Búrca & Joanne Scott eds., 2006) ("The experimentalist governance model on the other hand is more radically bottom-up in seeing social actors/stakeholders as generative of norms, and responsible for the spread and dispersal of these through their ongoing practices and activities.").

83. *See generally* James S. Fishkin & Robert C. Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284 (2005), *available at* http://www.uvm.edu/~dguber/POLS234/articles/fishkin.pdf.

84. Bruce Ackerman & James S. Fishkin, *Deliberation Day*, *in* DEBATING DELIBERATIVE DEMOCRACY 7, 22 (James S. Fishkin & Peter Laslett eds., 2003), *available at* http://wxy.seu.edu.cn/humanities/sociology/htmledit/uploadfile/system/20101014/20101014112741352.pdf.

85. I find many of these experiments unrealistic, not only because when time and power intrude, the dynamic is likely to be very different than a single set of interactions. As a lifelong activist, I have never seen any group work in which the bonds of hatred form more quickly than the bonds of friendship. I find much of the deliberate democratic literature to miss out on the emotional nature of community. In Occupy Wall Street—a highly engaged, deliberate group—participants became highly emotional, highly rational in their argumentation, and almost exclusively referred to and imagined a public good when they made their arguments.

organically and be recognized and heard, and possibly persuade others. The "bottom up" metaphor suggests a kind of proto-soup, where things "bubble up," and "emerge." But the ecosystems that allow for "emergent" memes are not necessarily equal, and in fact are not likely to be equal. There's a romance to the notion of "bottom up" governance, or "emergent" governance—the idea that "the people" in a mass society can self-govern if they are just given the tools or means.[86] "Bottom up" or "decentralized" self-governance has taken off as a meme in both the Right and the Left—the "new governance" mavens of the Right, aligned with the neoliberal tradition, talk about devolving power to companies and trade associations, while the new governance mavens of the Left (and Right) talk about the Internet's capacity for enabling new forms of self-government.

Occupy Wall Street was created in this rhetorical context, where people with different ideas and political beliefs emerge from a structure in which "decentralized" and "bottom up" seem both plausible, highly romantic, and, while politically charged, substantively neutral. It also arose in the highly legalized context of a culture in which entertainment centers around legal dramas and a high level of association between process and fairness. And finally, it arose in the context of a rejection of the behavior of major financial institutions, which appeared to operate outside of process and outside of the rule of law.

All of these factors—along with the causes mentioned above—may have led to a tendency towards legalism. The experience of Occupy Wall Street points to one of the central tensions between

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86. There are *at least* two discrete "bottom up" ideals that often get conflated in the rhetoric of Internet communities. One is the ideal represented perhaps best by Jonathan Zittrain, who characterizes the Internet as a generative place, a platform that enables creativity. *See generally* Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006). In this model, the Internet isn't democratic and its job isn't to be democratic—its job is to not hinder creativity, collaboration, and interesting ideas and creations. The other ideal, exemplified by David Post, among others, is that the Internet is actually democratic, that it leads to a better expression of the popular will in a fundamental way, even as it encourages democratic virtues of citizenship, personal political expression, and organizing. *See generally* David G. Post, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE (2009). In crude form, Zittrain is bottom-up innovation; Post is bottom-up democracy. A highly innovative society can be very non-self-governing, and a highly self-governing society can be terribly uncreative—so while it might seem that they write about the same thing, Zittrain and Post try to solve—and forestall—two very different kinds of problems. Yet in popular culture, and in some academic thinking, the two ideas can be fused.

decentralization of power, and democratization of power, and a culture with an ends-focus instead of a means-focus. The most central commitments of Habermas are quite similar to the central commitments of Occupy Wall Street. The rigorous focus on political equality at the level of process turned the discussions into those of process. While people had formal equality to speak, they tended to speak on behalf of sets of beliefs about the public as a whole, and the community as a whole, not as individuals—yet the process quickly showed itself to be cripplingly uninspired and focused on process.

CONCLUSION

Occupy Wall Street is an extremely important social movement to understand. It sparked—at least for a little while—a change in the structure of American political thought. It created an imaginative opening in the political and economic possibilities for the country by giving a name to a set of ideological and political commitments, and a particular set of grievances, that did not previously have a name or a label. It transformed a loose set of ideological commitments into an ideological set that now has become part of the public grammar. The set of ideological challenges to orthodox political and economic thinking that are loosely represented by "Occupy Wall Street" pre-dated Occupy Wall Street but had less power before they were recognized as a cluster and called a "movement."[87] Therefore, it is

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87. The public acceptance of an imagined set of ideas as a "real movement" can give actual power to the ideas associated with that movement. The acceptance of this set of ideas in the public imagination has a power beyond the power of polling numbers. There is a substantial difference—in terms of power—between the statement "60% of Americans believe that abortion is wrong" and a repeated reference to the "pro-life movement supported by 60% of Americans." This is in part attributable to the actual power that accompanies some groupings, including organizational and financial power to directly impact elections.

However, it is also attributable to the fact that politicians and political actors have an unstated map of the shape of American political life in their head, and they are more likely to be afraid of, excited by, and generally responsive to a set of ideas that are attached to a general description. The set of ideological commitments that are loosely represented by "the Tea Party" pre-existed the Tea Party's rallies and local meetings, but gained enormous power once they were clustered under the heading of "the Tea Party." To think of it another way, there is an imagined American political culture and an actual American political culture that relates to the imagined culture and helps shape it but is not identical to it. There are different ways of describing the culture and categories of belief, allegiance, and partisanship associated with loosely imagined groups within that culture. The imagined map of a political culture as experienced by the media, citizens, and politicians itself shapes that culture and that map moves in a way that is slightly different than direct polling. Occupy Wall Street changed that map.

also important to understand some of the things that seemed to work poorly at Occupy Wall Street for sustaining ongoing action.

To my mind, the consensus process may have worked extremely well for a few months, because it brought people together, created a shared language, provided entertainment for protesters whose primary job was to be present, hour after hour, day after day, in the center of Wall Street, and provided some means of making decisions. However, over time, the consensus process not only stopped decisions, but also led to a kind of fetishizing of "the process," and led away from action towards legalism. The experiment may show some of the limits of formal political equality. I wonder whether, at some point, formal legal equality must give way to a more organic discussion (which will necessarily be more hierarchical) in order to avoid the pitfalls of legalism. When people in a real setting "regard one another as formally and substantively equal," it can easily become an exercise in rulemaking to ensure that each person gets the political equality that is demanded. And in those situations where the rules exist, and the norm is very high, it is very easy to make a jump from substantive to procedural debate. Once inside procedural debates, those procedural debates may have a tendency to dominate. If the idea of radical political equality is taken seriously, it may be that "bottom up" and legalism are more joined than "bottom up" and anarchism. The implicit narratives and metaphors of "bubbling up" (bubbling up sounding disorganized), or "grassroots" (grass sounding disorganized), or "movement" (sounding like flow more than order), may consistently reinforce a misleading narrative about the nature of certain kinds of political organizing.