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Taking Interdependence And Production More Seriously: Toward Mutual Rationality And A More Useful Law And Economics

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Taking Interdependence and Production More Seriously: Toward Mutual Rationality and a More Useful Law and Economics

KENNETH M. CASEBEER* & CHARLES J. WHALEN**

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Neoclassical economics—the standard supply-and-demand analysis taught in countless university economics courses—overwhelmingly dominates the economics profession in teaching and scholarship.¹ It has long been the virtually unchallenged choice of practitioners in the intersection of law and economics.² As Michael Howard and John King write, the success of neoclassical economics “has been phenomenal: mainstream economics is technically rigorous, its procedures have been widely emulated, and the subject commands great prestige.”³

Things are now different, however, as the global economy struggles to recover from what is widely referred to as the Great Recession. The aura around neoclassical economics—like the bubbles generated (but not anticipated) by those enamored with its logic—has burst. Today there is increasing recognition that neoclassical economics does not accurately predict, or even explain, human behavior.

* Professor of Law, University of Miami School of Law. The core of these remarks were first offered at Class Crits III: Rethinking Economics and Law After the Great Recession, Baldy Center for Law and Social Policy, University of Buffalo School of Law, May 17–18, 2010. The author wishes to express appreciation to all the participants, and particularly to Randy Albelda and Charles Whalen for taking them initially with puzzled plausibility.

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1. See generally Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191 (2007) (reviewing LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002)).

2. For an article collecting sources of criticism of neoclassical law and economics, see Thomas S. Ulen, *Rational Choice and the Economic Analysis of Law*, 19 LAW & SOC. INQUIRY 487 (1994). For an early analysis of the bias in the adoption of neoclassical economic method as law and economics, see C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975). For an alternative to market efficiency, see Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

3. M. C. Howard & J. E. King, *Where Marx Was Right: Towards a More Secure Foundation for Heterodox Economics*, 25 CAMBRIDGE J. ECON. 785, 803 (2001).

Of course, this is not news to heterodox economists.⁴ In fact, in the view of many such economists—including institutionalists, feminists, and post-Keynesians—neoclassical economics “is a farce. The conceptualization of economics agents is incoherent, modern market systems are portrayed as a bazaar capable of being re-engineered according to tastes rather than as relatively inflexible disciplinary structures, and the coordination of rational human action always runs along the grooves of voluntary agreements.”⁵

Heterodox economists have catalogued an extensive list of neoclassical shortcomings.⁶ It is ahistorical and purely formal, requiring assumptions that never obtain in the real world.⁷ It depends on modeling a choosing subject as a completely autonomous individual,⁸ which is at least unlikely as a description of human nature as that nature is actually experienced.⁹ And it depends on rationality—calculated by individual maximizers of personal utility—independent of the distribution of resources available to different individuals.¹⁰

Despite such shortcomings, neoclassical economics and its intellectual forerunners have, for generations, been deployed to justify a process of increasingly concentrated accumulation.¹¹ Notice the progression of

4. 4 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 2–6 (2d ed. 2008).

5. Howard & King, *supra* note 3.

6. See MARC LAVOIE, INTRODUCTION TO POST-KEYNESIAN ECONOMICS 1–15 (2006).

7. See generally BRUNA INGRAO & GIORGIO ISRAEL, THE INVISIBLE HAND: ECONOMIC EQUILIBRIUM IN THE HISTORY OF SCIENCE (Ian McGilvray trans., The Mass. Inst. Tech. Press 1990) (1987); Bruce E. Kaufman, *The Original Industrial Relations Paradigm: Foundation for Revitalizing the Field*, in NEW DIRECTIONS IN THE STUDY OF WORK AND EMPLOYMENT: REVITALIZING INDUSTRIAL RELATIONS AS AN ACADEMIC ENTERPRISE 31 (Charles J. Whalen ed., 2008); HYMAN P. MINSKY, STABILIZING AN UNSTABLE ECONOMY (1986).

8. Howard & King, *supra* note 3, at 787.

Since the seventeenth century, liberal theorists have portrayed individuals as essentially rational, and as approaching each other with their central characteristics already given prior to any interaction. Social relationships thus appear as a means and a constraint in satisfying purely private goals, and, although complex, involve nothing more than the activities of individuals: there are no properties of social relationships that cannot be derived from the characteristics of individuals.

See also William M. Dugger, *Redefining Economics: From Market Allocation to Social Provisioning*, in POLITICAL ECONOMY FOR THE 21ST CENTURY: CONTEMPORARY VIEWS ON THE TREND OF ECONOMICS 31 (Charles J. Whalen ed., 1996).

9. “[Amartya] Sen objects that the traditional approach reduces people to ‘rational fools’ and that an economic theory based only on revealed preferences is unable to deal with what he calls ‘commitment.’” Josh Whitford, *Pragmatism and the Untenable Dualism of Means and Ends: Why Rational Choice Theory Does Not Deserve Pragmatic Privilege*, 31 THEORY & SOC’Y 325, 334 (2002). See also NANCY FOLBRE, THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES (2001).

10. ROBERT H. HAVEMAN, THE ECONOMICS OF THE PUBLIC SECTOR 28–29, 43 (2d ed. 1976); A. ALLAN SCHMID, CONFLICT AND COOPERATION: INSTITUTIONAL AND BEHAVIORAL ECONOMICS 14–15, 82–83 (2004).

11. Drawing on the work of Hyman Minsky, one can identify five stages of capitalism: merchant capitalism (1607–1813), industrial capitalism (1813–1890), banker capitalism

abstraction regarding what became central to economic practices through the legalized definitions of capital and associated property rights in succeeding stages of capitalism:¹²

- In merchant capitalism, based on exchange of goods and services, capital was largely tangible (e.g., land, buildings, resources, inventory) and was provided and controlled by individuals or families.¹³
- During industrial capitalism, based on production of scale and specificity, capital also included stock ownership and bond issuance, intangible but still traceable to specific assets, although managed increasingly by enterprise employees.¹⁴
- Under banker or finance capitalism, based on access to secured future performance, capital expanded to include debt instruments, more intangible because securities might not have value upon being due, managed in part by monitoring of enterprise success by banking managers external to the capital-utilizing enterprise.¹⁵
- In managerial capitalism, based increasingly on enterprise response to uncertainties of geographical dispersion and both internal and external risks expressed in monetized costs, capital included insurance and other risk-pooling devices, as well as the ability to export such risks beyond the firm, where—even when charged to the producing enterprise—they were managed by financial intermediaries largely independent of specific firms.¹⁶
- Finally, with money-manager capitalism, based on derivative financial instruments (resting on aggregated assumptions and depending on forecast economic expansion—or, in fact, bubbles) capital becomes financial flows: pure abstractions and legalized fictions in which the same underlying social relations are repeatedly bought and sold as *derivatives*.¹⁷ This form of capital adds little or nothing to usable production.¹⁸ Indeed, the consequences of exchanging such capital makes it impossible to enforce liabilities following a breakdown in economic performance, leaving third parties (often taxpayers) holding the bag. Further, even their existence is mythical without

(1890–1933), managerial capitalism (1933–1982), and money-manager capitalism (1982–present). See Hyman P. Minsky, *Uncertainty and the Institutional Structure of Capitalist Economies*, 30 J. ECON. ISSUES 357, 362 (1996); Charles J. Whalen, INTEGRATING SCHUMPETER AND KEYNES: HYMAN MINSKY'S THEORY OF CAPITALIST DEVELOPMENT, 35 J. ECON. ISSUES 805, 810 (2001).

12. The key here is centrality to economic or market actions, not the precise date of their invention. For example, loans were certainly used from times preceding capitalism.

13. See Whalen, *supra* note 11, at 810.

14. See *id.* at 810, 812.

15. See *id.* at 812.

16. See *id.* at 813.

17. See *id.* at 814.

18. Fernando Toboso, *On Institutional Individualism as a Middle-Way Mode of Explanation for Approaching Organizational Issues*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT 203, 214 (Sandra S. Batie & Nicholas Mercuro eds., 2008).

legal enablement, indeed legal invention. “Capital” itself becomes an instrument of distribution.

The problem is that at the same time neoclassical economics is used to justify an increasing concentration of accumulated “wealth,” it fails as *social science*. It is ultimately and purely tautological reduction in which there is no human choice correctly understood, only human calculation.¹⁹ Most brutally, when employed as a methodology for making policy (especially with respect to financial markets and labor markets), it has caused untold human misery and justified intolerable injustice for masses of people.

Neoclassical economics cannot be used well in actual decision-making because it is not contextual.²⁰ It separates the agent of choice from the structures within which choice inevitably must be undertaken.²¹ It thus inaccurately describes the actual possibilities of, and artificially circumscribes the idea of, human freedom. Finally, neoclassical economics has no account for power in analyzing social decisions. It is thus bankrupt—despite long and widely held perceptions to the contrary—as an acceptable guide for legal and policy decisions.²²

Heterodox economics takes history, context, power, and structure seriously, and, by combining those research premises, it more accurately describes human behavior than neoclassical economics. Nevertheless, challenges remain in the effort to supplant neoclassical theory with a more useful approach to law and economics. One involves the need to base such an economics on the reality of human *interdependence*.

19. Daniel W. Bromley, *Institutional Economics as Volitional Pragmatism*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT, *supra* note 18, at 91, 94.

20. This applies as well to rational choice game theory. See Whitford, *supra* note 9, at 331–32.

[I]n “its theoretical method, rational choice theory assumes what is to be explained” because it “inevitably require(s) the ad hoc introduction of extraneous variables” and thus falls to the utilitarian dilemma: “either one adopts rational choice assumptions, in which case the ‘ends’ of action remain ‘random,’ or one lets the ends be determined in some way, in which environment overwhelms rational choice.”

(quoting Frank J. Lechner, *The New Utilitarianism*, in 10 CURRENT PERSPECTIVES IN SOCIAL THEORY 93, 96 (John Wilson ed., 1990)). Some rational choice theorists have tried to expand individual preferences by adding internalized other-regarding behavior as an additional rationality calculus. See Lynn A. Stout, *Social Norms and Other-Regarding Preferences*, in NORMS AND THE LAW 13, 14–17, 34 (John N. Drobak ed., 2006). Even other-regarding preferences, however, are still “revealed preferences” and calculated as individually rational. Lynn Stout’s analysis is nonetheless helpful in citing studies showing that other-regarding choices are most often chosen through communication and cooperation with other other-regarding persons.

21. See, e.g., Bromley, *supra* note 19.

22. See generally William M. Dugger, *The State: Power and Dichotomy*, in FUNDAMENTALS OF THE ECONOMIC ROLE OF GOVERNMENT 49, 49–57 (Warren J. Samuels ed., 1989).

Another can be addressed by giving more attention to *production* as the heterodox alternative to the neoclassical focus upon exchange.

There are no guarantees that taking interdependence and production more seriously will be enough to displace neoclassical economics—or, more importantly, that such a strengthened heterodox economics will result in institutions that provide a context for choice experienced as authentic to human nature and that promote human freedom as just. But these changes will certainly move us in the right direction.

I. POWER, AGENCY, AND SOCIAL BEINGS

In the economic modeling of human behavior, agency must be defined and related to the structure of social relations. Structure includes not only material conditions, but also the institutionalized organization of rules, conventions, and relations.²³ Both aspects of structure are dynamic and socially constructed. This suggests that agency—in the case of either the individual or group—and structure are mutually dependent.²⁴ This includes law as a form of social decision-making.

Law as rules and institutional practices—that is, structure—is neither completely autonomous from economic conditions and non-law social institutions nor reducible as epiphenomena of those conditions and practices.²⁵ If law is consciousness—that is, agency—legal practices are subject to a similar mutual constitution within social relations. Alas, however, even institutional economists too often assume legal and political institutions are relatively fixed for economic-choice purposes.²⁶

Begin with ontology. Georg Wilhelm Friedrich Hegel begins, or at least popularizes, the era of the Modern. He observes that human nature is always and necessarily historically situated.²⁷ Nothing in our experience warrants the claim that there is any place outside experience from which to stand and ahistorically critique the practices of the way things are from moment to moment.²⁸ Yet our experience is also that “the way

23. A. Allan Schmid, *Power and the Troublesome Economist: Complementarities Among Recent Institutional Theorists*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT, *supra* note 18, at 1, 23.

24. *Id.*

25. See E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258–69 (1975).

26. See Neil Komesar, *The Essence of Economics: Law, Participation and Institutional Choice (Two Ways)*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT, *supra* note 18, at 165, 167.

27. G. W. F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A. V. Miller trans., Oxford Univ. Press 1977) (1807).

28. This reality is captured by the following popular expressions: “You can’t step into the same river twice” and “The time train has no stations to get off and then back on to resume going somewhere.” See LAVOIE, *supra* note 6, at 7, 14.

things are” is not necessarily the way things ought to be.²⁹ How can we then account for agency in situations of change as anything more than playing out the ideas already inscribed in present practices?³⁰

Hegel argues that we as individuals live out our individual histories in the expenditure of time and energy. But how do we gain meaning for this activity? What we do never takes place in a vacuum.³¹ What we do parts from our control—in Hegel’s terms, becomes “alienated”—but also comes back to us in an inevitable social response.³² Our life’s meaning is thus dialectically constructed from this social interaction.³³

Our human nature, therefore, is as social beings, not just individuals who are embedded in specific social contexts, but beings who, as subjects, are interdependent.³⁴ Agency must be understood as interdependent rather than as a matter of individual subjective rationality, no matter how enlightened or progressive the individual professes it to be. “[A] different methodology that more accurately captures the particular interdependencies present in any specific situation is more appropriate than anything which neoclassical economists have produced.”³⁵

Turn to epistemology. Several conclusions follow. First, all mean-

29. See generally ROBERTO MANGABEIRA UNGER, *KNOWLEDGE & POLITICS* (1975).

30. See Kenneth Casebeer, *Work on a Labor Theory of Meaning*, 10 *CARDOZO L. REV.* 1637, 1654 (1989).

31. The oft-cited dualism between means and ends is not tenable. An end, or effect, soon becomes a means, or cause, for what follows. Human activity is continuous, and “nothing happens which is *final* in the sense that it is not part of an ongoing stream of events.” John Dewey, *Theory of Valuation*, in 2(4) *INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE* 43 (Otto Neurath et al. eds., 1939).

32. HEGEL, *supra* note 27, at 111–12.

33. See Perry Anderson, *Problems of Socialist Strategy*, in *TOWARDS SOCIALISM* 221, 288–89 (Perry Anderson & Robin Blackburn eds., 1966) (“Man and society exist only as *praxis*, outside themselves in the fluctuating interworld their actions compose together.”); Whitford, *supra* note 9, at 335 (“Theorists must recognize that the interests and choices of actors depend fundamentally on their *actual* social relationships; the preference function chosen by the actor may well depend on the situation and the real identities of the other players.”).

34. This remains an unsettled matter even within heterodox economics, which proceeds from an assumption of individuals as social beings, but still often treats them as individual agents embedded in social contexts. See, e.g., RANDY ALBELDA ET AL., *UNLEVEL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION* 121, 126 (2001); Toboso, *supra* note 18, at 206–07. Cf. SCHMID, *supra* note 10, at 2 (institutional economics “starts with the observation that people are interdependent”). A key intellectual inspiration for A. Allan Schmid is, of course, John R. Commons, who saw the *transaction* as “the ultimate unit of activity, which correlates law, economics, and ethics”; according to Commons, this unit contains three vital elements: “*conflict*, *dependence*, and *order*.” JOHN R. COMMONS, *INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY* 58 (1934).

35. Howard & King, *supra* note 3, at 790. See also COMMONS, *supra* note 34, at 85 (the individual rationality of neoclassical economics applies only in cases such as “the isolated farmer to the extent that he produces for his own use.”).

ing is socially constructed, constituted by contexts of experience.³⁶ There is no place else to construct content. All claims of knowledge are learned through received experience—discourse practices—and even if the experience is sensually direct, then it has meaning to us in our practices through learned symbols.³⁷

Second, knowledge is therefore provisional. Knowledge claims can only be “verified” by their social workability.³⁸ This is not a matter of instrumental utility,³⁹ but rather of pragmatism.⁴⁰ Knowledge is produced under conditions no different in principle from the production of goods, services, technologies, or institutions. As buildings either stand or fall down over time,⁴¹ so do claims of knowledge, paradigms, discourses, and therefore, social relations.⁴² All of these either continue to work in a rough manner or they do not.⁴³ There can be no claim of a necessary connection between *how* we know and any “true” underlying *reality* as demanded by realist or empirical epistemologies.⁴⁴

36. See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

37. See Albrecht Wellmer, *What is a Pragmatic Theory of Meaning? Variations on the Proposition “We Understand a Speech Act When We Know What Makes It Acceptable.”*, in *PHILOSOPHICAL INTERVENTIONS IN THE UNFINISHED PROJECT OF ENLIGHTENMENT* 171, 174 (Axel Honneth et al. eds., William Rehg trans., 1992) (“[W]e mistake the concepts of sentence meaning, intended meaning, and understanding from the start if we do not make the intersubjectivity of a common language the *point of departure* for the analysis.”).

38. See Casebeer, *supra* note 30.

39. See Lawrence A. Boland, *A Critique of Friedman’s Critics*, 17 *J. ECON. LITERATURE* 503, 506 (1979).

40. See Whitford, *supra* note 9, at 342 (“Pragmatism rejects the maximizing assumption as dependent on a knowledge of ends that have yet to be discovered, and posits in its place an actor who hypothesizes solutions to the problem, adjusting with experience.”). See also WENDELL GORDON, *INSTITUTIONAL ECONOMICS: THE CHANGING SYSTEM* 43–44 (1980); William T. Waller, Jr., *Avoiding the Cartesian Vice in Radical Institutionalism: A Reply to Mayhew*, 24 *J. ECON. ISSUES* 897, 899 (1990).

41. See Whitford, *supra* note 9, at 338 (“Hence, we can assess the adequacy of the particular means chosen, asking if it can *in fact* be expected to cause the ends-in-view, just as one can question whether or not the architect’s drawings are adequate to their role in the successful building of the house (to use [John] Dewey’s earlier metaphor).”).

42. See Bromley, *supra* note 19, at 105 (“Individuals . . . work out what seems best by working out what seems possible as they work their way toward what they will come to realize seems best.”). Volitional pragmatism, however, is an inadequate form of pragmatism because it sees all meaning as ideational expressions and therefore all choices as embedded in discourse. It is seemingly post-modern rather than modern. Workability depends on meaning certainly, but that meaning depends on conditions underlying differences in experience, and thus is freighted by power within social relationships.

43. See generally LUDWIG WITTGENSTEIN, *THE BLUE AND THE BROWN BOOKS* (Harper & Row 1958).

44. [D]esires arise in and depend on context. They are inseparable from the conditions that render possible the resolution of the problem, rather than chosen from a portfolio of pre-ordered end-states (even one as reflexive as the tinkerers propose). Through action, subjects learn the results of desires that “are subject to frustration” just as “interests are subject to defeat.”

Yet third, our claims of knowledge, our communicative discourses, all our social interactions, are produced under conditions of inequality and are to that extent distorted by power to subordinate other actors within contextual privilege,⁴⁵ whether such privilege is produced by exploitation (class), domination (gender), exclusion (race), or any other categorization.⁴⁶ The privileged will always seek to preserve their power, which they will falsely see as pragmatic, individual self-interest.⁴⁷ The subordinated, meanwhile, will always experience such distorted interaction as alienated—not of their own.⁴⁸ Under prevailing conditions associated with relations of inequality of power, all individuals inevitably will still behave strategically on the claim of perceived self-interest, but the alienated will choose as best they can or are allowed. Just as inevitably, however, alienated and subordinated persons struggle within unequal contexts by protesting and demanding change.⁴⁹

To work against these conditions of inequality, rationality must be more than procedural.⁵⁰ Making social interactions more transparent or information more widely available will not overcome subordination because the substantive, institutionalized choices will still be distorted in

Whitford, *supra* note 9, at 345. *See contra* LAVOIE, *supra* note 6, at 8. At first blush, this statement about realist epistemology might seem at odds with the view of Marc Lavoie, whose heterodox economics rests on a realist epistemology. *Id.* at 7–8. But one must keep in mind Lavoie is responding to the neoclassical argument that a useful economic theory need not make any attempt to explain how the economy works. Thus, to return to Dewey's architectural metaphor, heterodox economists such as Lavoie suggest merely that we are more likely to succeed at building a residence when we begin with drawings of a house, not a helicopter.

45. Schmid, *supra* note 23, at 15.

46. *See generally* ALBELDA ET AL., *supra* note 34, at 122. *See also* William M. Dugger, *Radical Institutionalism: Basic Concepts*, in *RADICAL INSTITUTIONALISM* 1, 8–9 (William M. Dugger ed., 1989); JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* (1983).

47. "False consciousness" in Marxian terms.

48. Marx provided another reason why people would ultimately abandon oppressive social relations: they are alienating. Marx used the concept of *alienation* to express capitalism's separation of people from the results of their work (which are owned by the capitalist) and from control over their work. Marx also wrote about how capitalism reduced social relationships to money and things, and how this reduction inhibited people from fully developing their human potentialities.

ALBELDA ET AL., *supra* note 34, at 140 (citation omitted). For a redeployment of Karl Marx without distinguishing between economy and culture, *see* HERBERT MARCUSE, *The Foundation of Historical Materialism*, in *STUDIES IN CRITICAL PHILOSOPHY* 3 (Joris De Bres trans., 1972).

49. [A]ll descriptions as well as all evaluations are legitimately contestable on grounds other than those of logic and empirical evidence. It follows that genuine neutrality is impossible, irrespective of whether it pertains to theoretical pronouncements, policies, laws or institutions, and the "interests" of specific agents become of central relevance for understanding their substance.

Howard & King, *supra* note 3, at 789.

50. *See contra* LAVOIE, *supra* note 6, at 7, 9.

content or recognized as alienated.⁵¹

While unequal power distributions will inevitably distort individualistic calculations of “rational” preferences, the alternative is not, as institutionalists have at times seemed to believe, socially holistic “rationality” defined by social structure and operation independent of individuals.⁵² Put in these dichotomous and exclusive terms, a different understanding of “rationality” has been hidden. The masked rationality cannot be a mere reform in the shape of either an “enlightened” individual or a “contingent” or fluid, holistic totality.⁵³ The new rationality must be a *mutual rationality* of interdependent individuals. Agency—to be authentic to the ontology and epistemology of human beings within history—must posit an *interdependent* subject, even though individuals will articulate decisions.

At the micro level, a *de-alienated* context of social interaction will depend on recognition—and action based on mutual recognition—of the actors’ interdependence. Action—including communication—recognized as interdependent, will still be strategic as a matter of self-interest, but now the motivation of self-defense, or choice, will be that of mutual rationality, not individual rationality.⁵⁴ Further, such mutual rationality will depend on conditions of access to the contextual interaction that are roughly equal. This equality cannot be abstract, but must be consistent with solely historical experience, and as such will be known in the overcoming of the alienation produced by inequality.⁵⁵

51. This is why systems of communicative rationality, such as most prominently that of Jürgen Habermas, cannot be purged of distorted meaning. Still, such communication requires overcoming certain inequalities, which is certainly a big start.

52. Toboso, *supra* note 18.

53. This is the otherwise insightful analysis of Fernando Toboso, *supra* note 13, at 208–13. See also LAVOIE, *supra* note 6, at 9–10.

54. Pragmatic cooperation is apparently similar to the game-theoretic variety—“trust” results from interaction between the parties—but it is not nearly so fragile and does not depend on the fortuitous coincidence of mutually compatible interests, since these do not exist in a well-defined state prior to interaction. . . . [Game Theory does not] “contemplate the specific possibility that the inner workings of cooperation might transform the actors’ understandings of one another in relation to the commonly defined world in which their interests are rooted.” [Charles] Sabel argues that an adequate conceptualization of the Japanese model of production must understand cooperation to be rooted in an institutional structure that encourages sufficient interaction between the parties in such a way that they are able mutually to reshape their interests to solve emergent problems (“learning by monitoring”).

Whitford, *supra* note 9, at 350–51 (citation omitted).

55. Capital consumes social relations as individuals are forced into a daily struggle of securing shares of value, leisure time is reduced, and social institutions are shaped to serve capital, all of which limit access to food, medical care, education (and so on) based on ability to pay. Capital transforms “ordinary consciousness” into individualistic consumptive units that mistake capitalism’s competitive social relations for human nature, where people treat each other as “things”.

At the macro level, *de-alienated* experience will depend on producing conditions of equal access to social decisions constituting power (power is understood as authorization of activity). Such social action is carried out through democratic institutions of decision-making practices.⁵⁶ And such democracy cannot be only a form of democracy, but must be experienced as authentic democracy by all participants.⁵⁷ In this way, the economic sovereignty of individuals and the citizen sovereignty of individuals are inextricably linked although described separately. The new economics is *political economics*.

Just as there is ontologically no place to stand external to historical experience and from which to critique social practices, there also is epistemologically no privileged knowledge on which to stand internal to historical experience and from which to critique social practices.⁵⁸ There is no justice! There is only the overcoming of injustice. Such is the Modern condition. Such is history.⁵⁹

II. ECONOMICS AND THE SOCIOLEGAL PROCESS

What, then, does history commit us to in economics? Neoclassical economics, proceeding from an ahistorical and purely posited individualistic calculus of rational behavior, is pure and simple fantasy—anti-truth.⁶⁰ In contrast, the institutionalists and other political-economists making up heterodox economics begin with a commitment to history

Paul Paolucci, *The Labor-Value Relation and its Transformations: Revisiting Marx's Value Theory*, in 27 CURRENT PERSPECTIVES IN SOCIAL THEORY, THEORIZING THE DYNAMICS OF SOCIAL PROCESSES 163, 197 (Harry F. Dahms & Lawrence Hazelrigg eds., 2010).

56. Within enterprises, the notion of worker sovereignty involves opportunities for significant work and the development of one's capacities. Within the economy overall, the notion of citizen sovereignty involves aggregating preferences in a way that gives individuals a meaningful voice. See CHARLES K. WILBER & KENNETH P. JAMESON, AN INQUIRY INTO THE POVERTY OF ECONOMICS 7, 201 (1983). John R. Commons also attempted to address power and interdependence at both the workplace and overall economy. See Bruce E. Kaufman, *John R. Commons and the Wisconsin School of Industrial Relations Strategy and Policy*, 57 INDUS. & LAB. REL. REV. 3, 25–27 (2003). See generally Yngve Ramstad, *From Desideratum to Historical Achievement: John R. Commons's Reasonable Value and the "Negotiated Economy" of Denmark*, 25 J. ECON. ISSUES 431 (1991).

57. For authenticity in this social sense, see CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 47–53 (1992). See also ALBELDA ET AL., *supra* note 34, at 141; Dugger, *supra* note 46, at 125–28.

58. Institutionalists Glen W. Atkinson and Ted Oleson recognize both of these points and still suggest a way forward for economic research. See generally Glen W. Atkinson & Ted Oleson, *Institutional Inquiry: The Search for Similarities and Differences*, 30 J. ECON. ISSUES 701 (1996).

59. See generally AMARTYA SEN, THE IDEA OF JUSTICE (2009). See also John R. Commons, *Marx To-day: Capitalism and Socialism*, THE ATLANTIC MONTHLY, Nov. 1925, at 682.

60. "[D]emocratisation poses a threat to capitalist dynamics, which require that politics remain contained in institutions that sustain liberal rights, and state bureaucracies not entertain any social engineering which threatens these rights, no matter how much people might value this. . . ." Howard & King, *supra* note 3, at 795. For recognition by two Nobel laureates of the inapplicability of neoclassical economics to the real world, see Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994) and Paul Krugman, *How Did*

and context,⁶¹ and with an idea of economic justice free of exploitation, domination, and exclusion.⁶² Their economics also has room for a solid grounding in the reality of human interdependence.

A heterodox counter-narrative, providing an alternative to the neo-classical explanation of economic behavior, is good for questioning public policy offered by conventional economists and lawyers allied with them, but it is not sufficient. What heterodox economics lacks is the same sort of widely recognizable tools and methods of analysis that characterize the neoclassical school. To be sure, many careers have been devoted to development and application of such techniques; indeed, it could be argued that heterodox economics suffers not from the absence of a method, but rather from an overabundance of methods.⁶³ “Let a thousand flowers bloom” might make for a vibrant academic community, yet it can also leave policymakers and other practitioners bewildered when looking for sound advice.

It might not be possible for heterodox economics to unite around a single toolkit that could be offered in place of the one used by neoclassical economists. Still, it is certainly an aim worthy of discussion and exploration. And a logical starting point for the endeavor is the definition of economics that has become widely accepted among heterodox scholars: economics is the science of social provisioning.⁶⁴

Working from that definition, Hyman Minsky and Charles Whalen

Economists Get It So Wrong?, N.Y. TIMES, Sept. 6, 2009, <http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html?pagewanted=all>.

61. LAVOIE, *supra* note 6, at 14.

62. In 1977, Wallace C. Peterson sought to identify common ground among the institutionalists and political-economists inspired by John Maynard Keynes. The elements he outlined continue to unite many heterodox economists: a) economic activity is an ongoing process toward an uncertain future linked to culture and history; b) reason and rationality do not always prevail in economic life—much behavior is chosen via accepted conventions; c) economic life is full of conflict—competition does not imply social harmony; d) the state can be used for good or ill, but excessive concentrations of power can only be redressed through the state; e) considerations of equity and justice are integral to the study of income distribution; and f) money is the key institution of contemporary capitalism. See generally Wallace C. Peterson, *Institutionalism, Keynes, and the Real World*, 11 J. ECON. ISSUES 201 (1977). For a complementary elaboration of the institutionalist approaches to power and justice, see Dugger, *supra* note 8, at 49–57.

63. For example, in institutionalism alone, one finds a “social fabric matrix,” the notion of a “higher efficiency,” and various approaches to “instrumental value theory.” See F. Gregory Hayden, *Social Fabric Matrix: From Perspective to Analytical Tool*, 16 J. ECON. ISSUES 637, 646–55 (1982); Steven R. Hickerson, *Instrumental Valuation: The Normative Compass of Institutional Economics*, 21 J. ECON. ISSUES 1117, 1117–18 (1987); Philip A. Klein, *Institutional Reflections on the Role of the Public Sector*, 18 J. ECON. ISSUES 45, 60–63 (1984).

64. See, e.g., William M. Dugger, *Redefining Economics: From Market Allocation to Social Provisioning*, in POLITICAL ECONOMY FOR THE 21ST CENTURY: CONTEMPORARY VIEWS ON THE TREND OF ECONOMICS, *supra* note 8, at 31, 35, 41–42; Marilyn Power, *Social Provisioning as a Starting Point for Feminist Economics*, FEMINIST ECON., Nov. 2004, at 5–8.

suggest that economic success requires “that every citizen have the opportunity to develop and utilize his or her talents and capacities, and that workers are rewarded with rising standards of living and the prospect of an even better life for their children.”⁶⁵ In light of this, beginning norms of social behavior might be posited lexically.

First, social actions must workably overcome existing conditions of inequality of access to social relations producing historical experience.⁶⁶ Freedom is an authentically unalienated experience and depends on an agency of interdependence: the interdependent subject. Economic success, therefore, depends on pursuit—one might even suggest maximization—of mutual rationality.

Second, if necessary social actions (for example, the production of survival necessities at a given historical moment) depend on reproducing a power of inequality, then the resulting distribution of conditions must maximize the gains of those on the bottom while minimizing the gains of those at the top, again on the basis of the workability of proceeding (this is similar to John Rawls’ “maximin” principle⁶⁷).

These norms—and the notion of economic success from which they derive—do not immediately yield a new and unified heterodox alternative to the methods of neoclassical economists, but they do spotlight an alternative research focus. They draw attention to the processes of production and reproduction, not market-based exchange and mass consumption. And at least some attention to these processes already exists across heterodox camps, providing an opportunity for development of common tools and analyses.⁶⁸

Focusing economics on production (and reproduction) can also have important implications for our assessment of the sociological process as it relates to the intersection of law and economics.

First, if one is committed to the aim of unalienated experience, then coordination and development of the division of labor should be a primary consideration regarding the production process. Whenever workable, the connection between worker and job would be based on incentives of cooperation, rather than competition, within each enter-

65. Hyman P. Minsky & Charles J. Whalen, *Economic Insecurity and the Institutional Prerequisites for Successful Capitalism*, 19 J. POST KEYNESIAN ECON. 155, 161 (1997).

66. This is consistent with Sen’s idea of capability egalitarianism. SEN, *supra* note 59, at 231–38.

67. JOHN RAWLS, A THEORY OF JUSTICE 152–53 (1971).

68. See, e.g., ALBELDA ET AL., *supra* note 34, at 127; LAVOIE, *supra* note 6, at 10; Dugger, *supra* note 8, at 47; Power, *supra* note 64. See generally Steve Pressman, *Alternative Views of the State*, in ALTERNATIVE THEORIES OF THE STATE 1, 1 (Steven Pressman ed., 2006); James Ronald Stanfield & Michael C. Cartoll, *The Social Economics of Neoliberal Globalization*, 38 F. FOR SOC. ECON. 1 (2009). Indeed, a focus on production would have even interested Adam Smith. See ADAM SMITH, THE WEALTH OF NATIONS (Edwin Cannan ed., 1904) (1776).

prise.⁶⁹ Institutionally, the best current practice would be worker ownership, or at least worker management, of enterprises.⁷⁰ Ownership and management of enterprises would additionally be democratic; forms of worker ownership that remove management from worker control, as is the case with many employment stock option plans, do not contribute to production on the basis of mutualism.

Note that worker control does not mean a division of labor unspecialized as to job or aggregated such that all enterprise decisions require daily debate and vote. Operations can be managed by an employee of the employees or by interlocking committees chosen by them. Discipline and productivity assurance can be delegated. There would, however, be a guiding question: do the arrangements enable workers to feel they are mutually acting to produce?⁷¹

The notion could even be extended. Enterprises could be coordinated by regional works councils, which would represent workers, consumers, and the public-goods sector.⁷² And if an enterprise fails as measured by low production or unjustifiable input costs, then the resulting dislocated workers—available for production in some other capacity—would be supported by a social wage.⁷³ Government would not guarantee the right to a job, but the right to productive activity (there is no need to reinscribe the paid/unpaid work distinction).⁷⁴

Second, it follows that deployment of surplus resources would be democratically accountable. Again this does not mean a national referendum on every resource use. There would, however, be a public decision on tradeoffs between the provision of public goods, like infrastructure or mutual consumption in the form of green space, and enterprise development and expansion.⁷⁵

69. See Schmid, *supra* note 23, at 7–9, 20–21; Michael J. Piore, *The Social Embeddedness of Labor Markets and Cognitive Processes*, 7 *LABOUR* 3, 5–6 (1993).

70. Worker management functions as a strategy to improve economic performance, promote greater worker autonomy, foster workplace democracy, and increase worker dignity. See WILBER & JAMESON, *supra* note 56.

71. For a classic study of worker cooperatives, see generally WILLIAM FOOTE WHYTE & KATHLEEN KING WHYTE, *MAKING MONDRAGON: THE GROWTH AND DYNAMICS OF THE WORKER COOPERATIVE COMPLEX* (2d ed. 1991).

72. *Id.*

73. On the Workers' Unemployment and Social Insurance Bill introduced in Congress in the 1930s, see Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 *B.C. L. REV.* 259, 261–63 (1994).

74. Elements of this approach exist in proposals for a basic income guarantee, and the paid parental leave policies of many advanced economies. See Pavlina R. Tcherneva, *Job or Income Guarantee?* (Univ. of Mo.-Kansas City, Working Paper No. 29, 2003); REBECCA RAY ET AL., *CTR. FOR ECON. & POLICY RESEARCH, PARENTAL LEAVE POLICIES IN 21 COUNTRIES: ASSESSING GENEROSITY AND GENDER EQUALITY* (2009).

75. Nari Rhee & Julie Anna Sadler, *Building an Inclusive City: Labor-Community Coalitions and the Struggle for Urban Power in San Jose*, in *LABOR IN THE NEW URBAN BATTLEFIELDS*:

Following Amartya Sen,⁷⁶ this tradeoff would aim at more than mere survival of all, which would seem to require substantial growth of “product” (not accumulation—or even maximization—of money or wealth as currently understood).⁷⁷ Further, overcoming inequality of conditions would be accomplished through adjusting the provisioning process to create more product to address human wants, rather than by a leveling of differences via political redistribution of that which has been produced.⁷⁸ Legally, these pursuits would be underwritten by entitlements to conditions of meaningful choice and mutual interactions, as opposed to property rights as a bundle of disposal uses that merely set initial bargaining positions subject to exchange.⁷⁹ The aim is an economics of interdependent agency enabling human freedom, not a new form of subordination.⁸⁰

Third, this approach to social provisioning would reconnect use value to production.⁸¹ Rights associated with resource use, supplemented by rights that address incompatible uses (in cases of excludabil-

LOCAL SOLIDARITY IN A GLOBAL ECONOMY 178, 186–88 (Lowell Turner & Daniel B. Cornfield eds., 2007).

76. SEN, *supra* note 59.

77. Whatever is produced, call it “product,” rather than a “commodity,” to distinguish it from false categories along a continuum from things to goods to services to technologies to knowledge to abstractions.

78. To be sure, issues of sustainability, resource depletion, and environmental stewardship must also be considered. See Robert Heilbroner, *Economics in the Twenty-First Century, in POLITICAL ECONOMY FOR THE 21ST CENTURY*, *supra* note 8, at 265, 273.

79. Karl Klare proposes four commitments for a new political economy: property rights should foster the widest possible participation in social actions; property rights should inhibit wealth concentration as much as possible; externalities should be minimized; and the highest possible social wage and benefits should be created. Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U. BRIT. COLUMBIA L. REV. 69 (1991).

80. Freedom arises only with human consciousness and is actualized only in human action. Freedom, therefore, is not something that is absolutely guaranteed—it is not a natural inalienable right. It is, as John Dewey pointed out, that secure release and fulfillment of national potentialities “which take place only in rich and manifold association with others.” Freedom today depends on interdependence, a community of people and nations. If that community is impaired, so is freedom. Freedom is not the natural presupposition of national and international life; it is the result of that life.

Shaun Gallagher, *Interdependence and Freedom in Hegel’s Economics, in HEGEL ON ECONOMICS AND FREEDOM* 159, 181 (William Maker ed., 1987) (citation omitted).

81. See ALBELDA ET AL., *supra* note 34, at 124. Under judicial interpretation of the National Labor Relations Act, Klare observes:

[T]he treatment of workers as sellers of labor power and as consumers of commodities, but not as producers, hindered them from achieving an alternative perspective in which worker self-activity, the process by which workers produce value by embodying their labor power in things, services, and relationships, would be recognized as the basis of all production in, and reproduction of, society.

Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 321 (1978).

ity or consumption rivalry),⁸² would at least be prior to creation of any property rights for exchange.⁸³

Exchange requires some medium in any economy of growing scope and complexity.⁸⁴ Yet while exchanges are necessary for coordination, product in a sociolegal process focused on production and reproduction would be initially valued on the basis of worker contribution in order to avoid reinscribing an inequality of power as mere accumulation.⁸⁵ A level of worker effort or contribution could be agreed upon within the enterprise and then translated according to product use value.⁸⁶ Perhaps this would involve some kind of product-per-time-and-labor, a productivity ratio that could be monetized.⁸⁷ The new economics would still treat incentives seriously both for individuals⁸⁸ and organizations.⁸⁹

III. CONCLUSION

This article has addressed two issues that can help strengthen heterodox economics. First, it explained the need to base such an economics on the reality of human interdependence. Heterodox economics has long recognized the role of power in economic life, but coupling that recognition with a greater appreciation of interdependence opens the door to a better understanding of “what is” as well as to a more constructive discussion of “what ought to be.” Second, it highlighted the utility of focusing that economics upon production, not exchange. These changes provide the foundation for a new economics of mutual rationality and thus can contribute to more fruitful examinations of the sociolegal process in those areas where law and economics intersect.

This new approach would have far-reaching consequences for economic analysis in the fields of law, economics, and beyond. The neo-classical supply-and-demand framework would not be merely renamed or reformed. Rather, its static, two-dimensional framework would be replaced by a dynamic, multidimensional framework involving: product

82. Schmid, *supra* note 23, at 26 n.25.

83. See generally Schmid, *supra* note 23.

84. “In capitalism, this regulation is not effected through the direct and conscious control of society over its labor time . . . but through the movement of commodity prices.” Paolucci, *supra* note 55, at 180.

85. RANDY ALBELDA ET AL., *supra* note 34, at 127.

86. Arild Vatn, *Institutions and Rationality*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT, *supra* note 18, at 132.

87. In Ithaca, New York, labor productivity has been monetized into Ithaca HOURS. See, e.g., Paul Glover, *Ithaca HOURS*, in INVESTED IN THE COMMON GOOD 155, 155 (Susan Meeker-Lowry ed., 1995).

88. Even though attributing results to individuals is causally problematic. See Schmid, *supra* note 23, at 26 n.20.

89. Rather than profit-seeking, enterprises would be focused toward producing surplus product.

efficiency, satisfaction of material needs and wants, meaningful work, freedom and justice, equality of opportunity and access, social and economic stability, technological development, and ecological sustainability.⁹⁰

The needed new economics—an economics modeled on interdependent agency, pursued through mutual rationality, and in service of human flourishing—does not yet seem to exist on other than a counter-narrative basis.⁹¹ In fact, there is evidence that a number of producer movements have recently emerged and that advances in the realm of practice have outstripped those in economic scholarship.⁹² It is time for economics to catch up and contribute to fashioning new productive human behavior.

We need change. We have no alternative. We can do no other. We cannot go back and redo. We can only move on from here. That is history.

90. For a recent, but more modest, effort to move in this direction, see JOHN W. BUDD, *EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE* (2004).

91. [T]his process would correspond to a morally oriented process of action in the area of social labor, which recovers the work content of instrumental acts from the dominant forms of work. The valid normative claim which thus comes to expression results from the moral vulnerability which grows not from the suppression of communicative modes of mutual understanding, but from the expropriation of the workers' own work activity. The moral knowledge which is constructed on the basis of such experiences is embodied in acts of work which maintain their autonomy even in the organizational reality of externally determined work relations.

Axel Honneth, *Work and Instrumental Action*, *NEW GERMAN CRITIQUE*, Spring–Summer 1982, at 31, 54.

92. Hoyt Wheeler, *Producers of the World Unite! A Return of Reformist Unionism?* 29 *LAB. STUD. J.* 81, 84–85 (2004).