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Volume 2: Lifeworld and System: A Critique of Functionalist Reason

Translator's Preface

In preparing this translation, I was greatly reassured by the author's willingness to read through a first draft and suggest whatever changes he thought appropriate. The reader should be advised that, while these changes were introduced to capture more precisely his meaning or to make the translation more readable, they often resulted in minor departures from the original text. At such points, then, the correspondence between the German and English versions is not exactly that of translation.

I am indebted to Victor Lidz and Jeffrey Alexander for reading and commenting upon the translation of Chapter VII, and to Robert Burns and Carol Rose for helping with the legal terminology in Chapter VIII. I am particularly grateful to Sydney Lenit, Marina Rosiene, and Claudia Mesch for undertaking the hardly inconsiderable task of typing and retyping the manuscript.

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ary consciousness, it would have to examine the conditions for recoupling a rationalized culture with an everyday communication dependent on vital traditions.

C.—Tendencies toward Juridification.—I have explained the symptoms of reification appearing in developed capitalist societies by the fact that the media-controlled subsystems of the economy and the state intervene with monetary and bureaucratic means in the symbolic reproduction of the lifeworld. According to our hypothesis, a "colonialization of the lifeworld" can come about only

- when traditional forms of life are so far dismantled that the structural components of the lifeworld (culture, society, and personality) have been differentiated to a great extent;
- when exchange relations between the subsystems and the lifeworld are regulated through differentiated roles (for employment at organized work places, for the consumer demand of private households, for the relation of clients to government bureaucracies, and for formal participation in the legitimation process);
- when the real abstractions that make available the labor power of the employed and make possible the mobilization of the vote of the electorate are tolerated by those affected as a trade-off against social rewards (in terms of time and money);
- where these compensations are financed according to the welfare-state pattern from the gains of capitalist growth and are canalized into those roles in which, withdrawn from the world of work and the public sphere, privatized hopes for self-actualization and self-determination are primarily located, namely, in the roles of consumer and client.

Statements about an internal colonialization of the lifeworld are at a relatively high level of generalization. This is not so unusual for social-theoretical reflection, as can be seen in the example of systems functionalism as well. But such a theory is always exposed to the danger of overgeneralization and so must be able to specify at least *the type* of empirical research that is appropriate to it. I shall therefore provide an example of the evidence by which the thesis of internal colonialization can be tested: the juridification of communicatively structured areas of action. I choose this example because it offers no particularly serious problems in method or content. The development of law belongs to the undisputed and, since Durkheim and Weber, classical research areas of sociology.

If it is true that the symbolic reproduction of the lifeworld cannot be

transposed onto the base of systemic integration without pathological consequences, and if precisely this trend is the unavoidable side effect of a successful welfare-state program, then in the areas of cultural reproduction, social integration, and socialization an assimilation to formally organized domains of action would have to take place under the conditions mentioned above. The social relations we call "formally organized" are those that are first constituted in forms of modern law. Thus it is to be expected that the changeover from social to system integration would take the form of juridification processes. The predicted reification effects would have to be demonstrated at the analytical level and, indeed, as being the symptomatic consequence of *a specific kind* of juridification.

I shall analyze this specific juridification process in connection with German examples from the spheres of family and school law. It is only the late offshoot of a juridification process that has accompanied bourgeois society since its beginnings. The expression 'juridification' [*Verrechtlichung*] refers quite generally to the tendency toward an increase in formal (or positive, written) law that can be observed in modern society. We can distinguish here between the *expansion* of law, that is the legal regulation of new, hitherto informally regulated social matters, from the *increasing density* of law, that is, the specialized breakdown of global statements of the legally relevant facts [*Rechtstatbestände*] into more detailed statements.[22] Otto Kirchheimer introduced the term *Verrechtlichung* into academic discussion during the Weimar Republic. At that time he had in mind primarily the institutionalization of class conflict through collective bargaining law and labor law, and in general the juristic containment of social conflicts and political struggles. This development toward the welfare state, which found expression in the participatory social rights [*soziale Teilhaberechte*] of the Weimar Constitution and received great attention in the constitutional law theories of the time (above all from Heller, Smend, and Carl Schmitt), is but the last link in a chain of juridification thrusts. In rough outline, we can distinguish four epochal juridification processes. The first wave led to *the bourgeois state*, which, in western Europe, developed during the period of Absolutism in the form of the European state system. The second wave led to the *constitutional state* [*Rechtsstaat*], which found an exemplary form in the monarchy of nineteenth-century Germany. The third wave led to the *democratic constitutional state* [*demokratischer Rechtsstaat*], which spread in Europe and in North America in the wake of the French Revolution. The last stage (to date) led finally to the *democratic welfare state* [*soziale und demokratische Rechtsstaat*], which was achieved through the struggles of the European workers' movement in the course of the twentieth century and codified, for example, in Article 21 of the Constitution of the Federal Republic of Germany. I will characterize

these *four global waves of juridification* from the viewpoint of the uncoupling of system and lifeworld and the conflict of the lifeworld with the inner dynamics of autonomous subsystems.

(*a*) The European development of law during the phase of Absolutism can be understood basically as an institutionalization of the two media through which the economy and state were differentiated off into subsystems. The *bourgeois state* formed the political order within which early modern, occupationally structured society was transformed into a capitalist market society. On the one hand, relations among individual commodity owners were subjected to legal regulation in a code of civil law tailored to strategically acting legal persons who entered into contracts with one another. As we have seen, this legal order is characterized by positivity, generality, and formality; it is constructed on the basis of the modern concept of statutory law and the concept of the legal person as one who can enter into contracts, acquire, alienate, and bequeath property. The legal order is supposed to guarantee the liberty and property of the private person, the security of the law [*Rechtssicherheit*], the formal equality of all legal subjects before the law, and thereby the calculability of all legally normed action. On the other hand, public law authorizes a sovereign state power with a monopoly on coercive force as the sole source of legal authority. The sovereign is absolved from orientation toward any particular policies or from specific state objectives and becomes defined instrumentally, that is, only in relation to the means for the legal exercise of bureaucratically organized domination. The means of effectively allocating power become the only goal.

With this first wave of juridification, "civil society" was constituted, if we use this expression in the sense of Hegel's philosophy of right. The self-understanding of this phase found its most consistent expression in Hobbes's *Leviathan*. This is of special interest in our context inasmuch as Hobbes constructs the social order exclusively from the system perspective of a state that constitutes civil society; he defines the lifeworld negatively—it encompasses everything excluded from the administrative system and left to private discretion. The lifeworld is that from which civil law and legal authority emancipate the citizen; its essence lies in the corporatively bound, status-dependent conditions of life that had found their particularistic expression in feudal [*ständisch*] laws concerning person, profession, trade, and land. What remains of this in Hobbes's rational state is attributed to the sphere of the private, which indeed can now only be characterized privately—by the minimum of peace that ensures physical survival, and by the unfettering of the empirical needs of isolated subjects who compete for scarce resources according to the laws of the market. The lifeworld is the unspecific reservoir

from which the subsystems of the economy and state extract what they need for their reproduction: performance at work and obedience.[23]

The Hobbesian construction hits exactly at the level of abstraction at which the innovations of the bourgeois state—namely, legal provisions for the institutionalization of money and power—can be characterized. Hobbes, in abstracting from the historical substratum of premodern lifeforms, anticipates in his theory what Marx will later ascribe to reality as "real abstractions." Without this lifeworld substratum, the state in its absolutist form could not have found a basis for its legitimation, nor could it have functioned. Certainly, the bourgeois state accelerated the dissolution of this substratum on which it tacitly fed. However, out of the exhausted traditional life forms, and out of the premodern life-contexts in the process of dissolution, there arose—at first in class-specific forms—the structures of a modern lifeworld, which Hobbes could not see because he exclusively adopted the system perspective of the bourgeois state. From this perspective, everything that is not constituted in the forms of modern law must appear *formless*. But the modern lifeworld is no more devoid of its own structures than are historical forms of life. *Subsequent* juridification thrusts can be understood in these terms: a lifeworld that at first was placed at the disposal of the market and of absolutist rule little by little makes good its claims. After all, media such as power and money need to be anchored in a modern lifeworld. Only in this way can the bourgeois state gain a nonparasitic legitimacy appropriate to the modern level of justification. Today the structurally differentiated lifeworld, upon which modern states are functionally dependent, remains as the only source of legitimation.

(*b*) *The bourgeois constitutional state* found a prototypical form in nineteenth-century German constitutionalism and was conceptualized by theoreticians of the *Vormärz* period (1815–48), such as Karl von Rotteck or Robert von Mohl,[24] and later by F. J. Stahl.[25] Used as an analytical concept, it refers to more general aspects of a wave of juridification that by no means coincides with the specific legal developments in Germany.[26] This second wave means the constitutional regulation of administrative authority which up to then was limited and bound only by the legal form and the bureaucratic means of exercising power. Now, as private individuals, citizens are given actionable civil rights against a sovereign—though they do not yet democratically participate in forming the sovereign's will. Through this kind of constitutionalization of the state [*Verrechtsstaatlichung*], the bourgeois order of private law is coordinated with the apparatus for exercising political rule in such a way that the principle of the legal form of administration can be interpreted in the sense of the "rule of law." In the citizens' sphere of freedom the ad-

ministration may interfere neither *contra* nor *praeter* nor *ultra legem*. The guarantees of the life, liberty, and property of private persons no longer arise only as functional side effects of a commerce institutionalized in civil law. Rather, with the idea of the constitutional state, they achieve the status of morally justified constitutional norms and mark the structure of the political order as a whole.

In terms of social theory, this process can again be seen from two sides: from the perspectives of the system and the lifeworld. The absolutist state had understood itself exclusively as an agent of subsystems that were differentiated out via money and power; it had treated the lifeworld, pushed into the private sphere, as unformed matter. This legal order was now enriched by elements that acknowledged the entitlement to protection of the citizens' modern lifeworld. Viewed from the outside, this can also be understood as a first step by which the modern state acquired a legitimacy in its own right: legitimation *on the basis* of a modern lifeworld.

(*c*) The *democratic constitutional state* took shape during the French Revolution and, since Rousseau and Kant, has occupied political theory to the present day. Again, I am using the term analytically to refer to the wave of juridification in which the idea of freedom already incipient in the concept of law as developed in the natural law tradition was given constitutional force. Constitutionalized state power was democratized; the citizens, as citizens of the state, were provided with rights of political participation. Laws now come into force only when there is a democratically backed presumption that they express a general interest and that all those affected could agree to them. This requirement is to be met by a procedure that binds legislation to parliamentary will-formation and public discussion. The *juridification of the legitimation process* is achieved in the form of general and equal suffrage and the recognition of the freedom to organize political associations and parties. This heightens the problem of the separation of powers, that is, of the relations among the functionally differentiated governmental institutions of the legislature, the executive, and the judiciary. In the constitutional state this problem had existed only for the relationship between the executive and the judiciary.

In terms of social theory, this wave of democratization lies along the same path as the previous constitutionalization. Once again the modern lifeworld asserts itself against the imperatives of a structure of domination that abstracts from all concrete life-relations. At the same time, this brings to a certain close the process of anchoring the medium of power in a lifeworld that is rationalized and differentiated, and no longer only among the bourgeoisie.

The first juridification wave constitutive of bourgeois society was still

dominated by those ambivalences that Marx exposed in connection with "free" wage labor. The irony of this freedom was that the social emancipation of wage laborers, that is, the freedom of movement and freedom of choice upon which the labor contract and membership in organizations were based, had to be paid for with the proletarianization of the wage laborers' mode of life, of which normatively no account was taken at all. The next two waves of juridification were already carried forward by the pathos of bourgeois emancipation movements. Along the way to the constitutionalization and democratization of the bureaucratic authority that at first appeared in absolutist form, we find the unambiguously freedom-guaranteeing character of legal regulations. Wherever bourgeois law visibly underwrites the demands of the lifeworld against bureaucratic domination, it loses the ambivalence of realizing freedom at the cost of destructive side effects.

(*d*) The *welfare state* (which I need not characterize once again) that developed in the framework of the democratic constitutional state continues this line of *freedom-guaranteeing juridification*. Apparently it bridles the economic system in a fashion similar to the way in which the two preceding waves of juridification bridled the administrative system. In any case, the achievements of the welfare state were politically fought for and vouchsafed in the interest of guaranteeing freedoms. The parallels leap to the eye: in the one case the inner dynamics of the bureaucratic exercise of power, in the other the inner dynamics of economic accumulation processes were reconciled with the obstinate structures of a lifeworld that had itself become rationalized.

The development toward a *democratic welfare state* can in fact be understood as the institutionalizing in legal form of a social power relation anchored in class structure. Classic examples would be limitations placed upon working hours, the freedom to organize unions and bargain for wages, protection from layoffs, social security, and so forth. These are instances of juridification processes in a sphere of social labor previously subordinated to the unrestricted power of disposition and organization exercised by private owners of the means of production. Here too we are dealing with power-balancing juridifications within an area of action that is *already constituted by law*.

Norms that contain class conflict and enforce social-welfare measures have, from the perspective of their beneficiaries as well as from that of democratic lawgivers, a freedom-guaranteeing character. However, this does not apply unambiguously to all welfare-state regulations. From the start, the *ambivalence of guaranteeing freedom and taking it away* has attached to the policies of the welfare state.[27] The first wave of juridification constitutive of the relation between capital and wage labor owed its ambivalence to a contradiction between, on the one hand, the socially

emancipatory intent of the norms of bourgeois civil law and, on the other, its socially repressive effects on those who were forced to offer their labor power as a commodity. The net of welfare-state guarantees is meant to cushion the external effects of a production process based on wage labor. Yet the more closely this net is woven, the more clearly ambivalences of *another sort* appear. The negative effects of this—to date, final—wave of juridification do not appear as side effects; they result *from the form of juridification itself.* It is now the very means of guaranteeing freedom that endangers the freedom of the beneficiaries.

In the area of *public welfare policy* this situation has attracted wide attention under the title "juridification and bureaucratization as limits to welfare policy."[28] In connection with social-welfare law, it has been shown repeatedly that although legal entitlements to monetary income in case of illness, old age, and the like definitely signify historical progress when compared with the traditional care of the poor,[29] this juridification of life-risks exacts a noteworthy price in the form of *restructuring interventions in the lifeworlds* of those who are so entitled. These costs ensue from the bureaucratic implementation and monetary redemption of welfare entitlements. The structure of bourgeois law dictates the formulation of welfare-state guarantees as *individual* legal entitlements under precisely *specified* general legal conditions.

In social-welfare law, *individualization*—that is, the attribution of entitlements to strategically acting legal subjects pursuing their private interests—may be more appropriate to the life situations requiring regulation than is the case, for instance, in family law. Nevertheless, the individualizing definition of, say, geriatric care has burdensome consequences for the self-image of the person concerned, and for his relations with spouse, friends, neighbors, and others; it also has consequences for the readiness of solidaric communities to provide subsidiary assistance. A considerable compulsion toward the redefinition of everyday situations comes above all from the *specification of legal conditions*—in this case, the conditions under which social security will provide compensation: "An insured case is normally understood as a 'typical example of the particular contingency against which social security is supposed to provide protection'. Compensation is made in the event of a valid claim to benefit. The juridification of social situation-definitions means introducing into matters of economic and social distribution an if-then structure of conditional law that is 'foreign' to social relations, to social causes, dependencies and needs. This structure does not, however, allow for appropriate, and especially not for preventive, reactions to the causes of the situations requiring compensation."[30]

In the end, the *generality* of legal situation-definitions is tailored to *bureaucratic implementation,* that is, to the administration that deals

with the social problem as presented by the legal entitlement. The situation to be regulated is embedded in the context of a life history and of a concrete form of life; it has to be subjected to violent abstraction, not merely because it has to be subsumed under the law, but so that it can be dealt with administratively. The implementing bureaucracies have to proceed very selectively and *choose* from among the legally defined conditions of compensation those social exigencies that can at all be dealt with by means of bureaucratic power exercised according to law. Moreover, this suits the needs of a centralized and computerized handling of social exigencies by large, distant organizations. These organizations add a spatial and temporal element to the social and psychological distance of the client from the welfare bureaucracy.

Furthermore, the indemnification of the life-risks in question usually takes the *form of monetary compensation.* However, in such cases as reaching retirement or losing a job, the typical changes in life situation and the attendant problems cannot as a rule be subjected to consumerist redefinition. To balance the inadequacy of these system-conforming compensations, *social services* have been set up to lend *therapeutic assistance.*

With this, however, the contradictions of welfare-state intervention are only reproduced at a higher level. The form of the administratively prescribed treatment by an expert is for the most part in contradiction with the aim of the therapy, namely, that of promoting the client's independence and self-reliance. "The process of providing social services takes on a reality of its own, nurtured above all by the professional competence of public officials, the framework of administrative action, biographical and current 'findings', the readiness and ability to cooperate of the person seeking the service or being subjected to it. In these areas too there remain problems connected with a class-specific utilization of such services, with the assignments made by the courts, the prison system and other offices, and with the appropriate location and arrangement of the services within the network of bureaucratic organizations of the welfare state; but beyond this, such forms of physical, psycho-social and emancipatory aid really require modes of operation, rationality criteria and organizational forms that are foreign to bureaucratically structured administration."[31]

The ambivalence of the last juridification wave, that of the welfare state, can be seen with particular clarity in the paradoxical consequences of the social services offered by the therapeutocracy—from the prison system through medical treatment of the mentally ill, addicts and the behaviorally disturbed, from the classical forms of social work through the newer psychotherapeutic and group-dynamic forms of support, pastoral care and the building of religious groups, from youth work,

public education, and the health system through general preventive measures of every type. The more the welfare state goes beyond pacifying the class conflict lodged in the sphere of production and spreads a net of client relationships over private spheres of life, the stronger are the anticipated pathological side effects of a juridification that entails both a bureaucratization and a monetarization of core areas of the lifeworld. The *dilemmatic structure of this type of juridification* consists in the fact that, while the welfare-state guarantees are intended to serve the goal of social integration, they nevertheless promote the disintegration of life-relations when these are separated, through legalized social intervention, from the consensual mechanisms that coordinate action and are transferred over to media such as power and money. In this sense, R. Pitschas speaks of the crisis of public-welfare policy as a crisis of social integration.[32]

For an empirical analysis of these phenomena, it is important to clarify the criteria on the basis of which the aspects of guaranteeing and taking away freedom can be separated. From the legal standpoint the first thing that presents itself is the classical division of fundamental rights into liberties and participatory rights; one might presume that the structure of bourgeois formal law becomes dilemmatic precisely when these means are no longer used to negatively demarcate areas of private discretion, but are supposed to provide positive guarantees of membership and participation in institutions and benefits. If this presumption proved true, then one would already expect a change from guaranteeing to taking away freedom at the third (democratizing) stage of juridification and not only at the fourth (welfare state) stage. There are indeed indications that the *organization of the exercise of civil liberties* considerably restricts the possibilities for spontaneous opinion formation and discursive will-formation through a segmentation of the voter's role, through the competition of leadership elites, through vertical opinion formation in bureaucratically encrusted party apparatuses, through autonomized parliamentary bodies, through powerful communication networks, and the like. However, such arguments cannot be used to deduce aspects of taking away freedom from the very *form* of participatory rights, but only from the bureaucratic ways and means of their *implementation*. One can scarcely dispute the unambiguously freedom-guaranteeing character of the *principle* of universal suffrage, nor of the *principles* of freedom of assembly, of the press, and of opinion—which, under the conditions of modern mass communication, must also be interpreted as democratic participatory rights.

A different criterion, more sociological in nature and open to social-theoretic interpretation, takes us further: that is, the classification of legal

norms according to whether they can be legitimized only through procedure in the positivist sense, or are amenable to substantive justification. If the legitimacy of a legal norm is brought into question, it is, in many cases, sufficient to refer to the formally correct genesis of the law, judicial decision, or administrative act. Legal positivism has conceptualized this as legitimation through procedure, though, of course, without seeing that this mode of legitimation is insufficient in itself and merely points to the need for justification of the legitimizing public authorities.[33] In the face of the changing and steadily increasing volume of positive law, modern legal subjects content themselves in actual practice with legitimation through procedure, for in many cases substantive justification is not only not possible, but is also, from the viewpoint of the lifeworld, meaningless. This is true of cases where the *law* serves *as a means for organizing media-controlled subsystems* that have, in any case, become autonomous in relation to the normative contexts of action oriented by mutual understanding. Most areas of economic, commercial, business, and administrative law fit here:[34] the law is combined with the media of power and money in such a way that it takes on the role of a steering medium itself. Law as a medium, however, remains bound up with *law as an institution*. By legal *institutions* I mean legal norms that cannot be sufficiently legitimized through a positivistic reference to procedure. Typical of these are the bases of constitutional law, the principles of criminal law and penal procedure, and all regulation of punishable offenses close to morality (e.g., murder, abortion, rape, etc.). As soon as the validity of *these* norms is questioned in everyday practice, the reference to their legality no longer suffices. They need substantive justification, because they belong to the legitimate orders of the lifeworld itself and, together with informal norms of conduct, form the background of communicative action.

We have characterized modern law through a combination of principles of enactment and justification. This structure simultaneously makes possible a positivistic prolongation of the paths of justificatory reasoning and a moralizing intensification of the justification problematic, which is thereby shifted into the foundations of the legal system. We can now see how the uncoupling of system and lifeworld fits in with this legal structure. Law used as a steering medium is relieved of the problem of justification; it is connected with the body of law whose substance requires legitimation only through formally correct procedure. By contrast, legal institutions belong to the societal components of the lifeworld. Like other norms of conduct not covered by the sanctioning authority of the state, they can become moralized under appropriate circumstances. Admittedly, changes in the basis of legitimation do not

directly affect the stock of legal norms, but they may provide the impetus for a legal (or, in the limiting case, a revolutionary) change in existing law.

As long as the law functions as a complex medium bound up with money and power, it extends to formally organized domains of action that, as such, are directly constituted in the forms of bourgeois formal law. By contrast, legal institutions have no *constitutive* power, but only a *regulative* function. They are embedded in a broader political, cultural, and social context; they stand in a continuum with moral norms and are superimposed on communicatively structured areas of action. They give to these informally constituted domains of action a binding form backed by state sanction. From this standpoint we can distinguish processes of juridification according to whether they are linked to antecedent institutions of the lifeworld and juridically superimposed on socially integrated areas of action, or whether they merely increase the density of legal relationships that are constitutive of systemically integrated areas of action. Here, the question of the appropriate mode of legitimation may serve as a first test. The technicized and de-moralized areas of law that grow along with the complexity of the economic and administrative systems have to be evaluated with respect to functional imperatives and in accordance with higher-order norms. Looked at historically, the continuous growth in positive law largely falls into this category and merely indicates an increased recourse to the medium of law. The epochal juridification waves are, on the other hand, characterized by *new legal institutions*, which are also reflected in the legal consciousness of everyday practice. Only with respect to this second category of juridification do questions of normative evaluation arise.

The first wave of juridification had a freedom-guaranteeing character to the extent that bourgeois civil law and a bureaucratic domination exercised by legal means at least meant emancipation from premodern relations of power and dependence. The three subsequent juridification waves guaranteed an increase in freedom insofar as they were able to restrain, in the interests of citizens and of private legal subjects, the political and economic dynamics that had been released by the legal institutionalization of the media of money and power. The step-by-step development toward the democratic welfare state is directed against those modern relations of power and dependence that arose with the capitalist enterprise, the bureaucratic apparatus of domination, and, more generally, the formally organized domains of action of the economy and the state. The inner dynamics of these action systems also unfold within the organizational forms of law, but in such a way that law here takes on the role of a steering medium rather than supplementing institutional components of the lifeworld.

In its role as a medium, existing law can be more or less functional, but outside of the horizon of the lifeworld it is meaningless to question the freedom-guaranteeing or freedom-reducing character of these norms. The ambivalence of guaranteeing/taking away freedom cannot be reduced to a dialectic between law as an institution and law as a medium, because the alternative between guaranteeing or taking away freedom is posed only from the viewpoint of the lifeworld, that is, only in relation to legal institutions.

So far we have proceeded on the assumption that law is used as a medium only within formally organized domains of action, and that as a steering medium it remains indifferent in relation to the lifeworld and to the questions of substantive justification that arise within its horizons. Welfare-state interventionism has since rendered this assumption invalid. Public welfare policy has to use the law precisely as a medium to regulate those exigencies that arise in communicatively structured areas of action. To be sure, the principle of social participation and social compensation is, like freedom of association, a constitutionally anchored institution that can connect up easily with the legitimate orders of the modern lifeworld. But social-welfare law, through which social compensation is implemented, differs from, for instance, the laws governing collective bargaining, through which freedom of association becomes effective, in one important respect: measures of social-welfare law (as a rule, compensatory payments) do not, like collective wage and salary agreements, intervene in an area that is *already* formally organized. Rather, they regulate exigencies that, as lifeworld situations, belong to a communicatively structured area of action. Thus, I should like to explain the type of reification effect exhibited in the case of public welfare policy by the fact that the *legal institutions* that guarantee social compensation become effective only through *social-welfare law used as a medium*. From the standpoint of action theory the paradox of this legal structure can be explained as follows. As a medium, social-welfare law is tailored to domains of action that are first constituted in legal forms of organization and that can be held together only by systemic mechanisms. At the same time, however, social-welfare law applies to situations embedded in informal lifeworld contexts.

In our context, government welfare policy serves only as an illustration. The thesis of internal colonization states that the subsystems of the economy and state become more and more complex as a consequence of capitalist growth, and penetrate ever deeper into the symbolic reproduction of the lifeworld. It should be possible to test this thesis sociologically wherever the traditionalist padding of capitalist modernization has worn through and central areas of cultural reproduction, social integration, and socialization have been openly drawn into the vortex of eco-

nomic growth and therefore of juridification. This applies not only to such issues as protection of the environment, nuclear reactor security, data protection, and the like, which have been successfully dramatized in the public sphere. The trend toward juridification of informally regulated spheres of the lifeworld is gaining ground along a broad front—the more leisure, culture, recreation, and tourism recognizably come into the grip of the laws of the commodity economy and the definitions of mass consumption, the more the structures of the bourgeois family manifestly become adapted to the imperatives of the employment system, the more the school palpably takes over the functions of assigning job and life prospects, and so forth.

The structure of juridification in school and family law is marked by ambivalences similar to those in the area of welfare law. In the Federal Republic of Germany these problems, which dominate discussions of legal policy, have been worked out for particular aspects of the development of school[35] and family law.[36] In both cases juridification means, in the first place, the establishment of basic legal principles: recognition of the child's fundamental rights against his parents, of the wife's against her husband, of the pupil's against the school, and of the parents', teachers', and pupils' against the public school administration. Under the headings of "equal opportunity" and "the welfare of the child" the authoritarian position of the paterfamilias—which is still anchored in, among other things, matrimonial-property law in the German Civil Code—is being dismantled in favor of a more equal distribution of the competencies and entitlements of other family members. To the juridification of this traditional, economically grounded, patriarchal power relation in the family, there corresponds, in the case of the schools, a legal regulation of the special power relation (which persisted into the 1950s) between government bureaucracy and the schools. While the core areas of family law (governing marriage, support, matrimonial property, divorce, parental care, guardianship) have been reformed via adjudication (i.e., court decisions) and via legislation, bringing schools under the rule of law—that is, the legal regulation of areas outside the law as specified in the official prerogatives of the schools—was initially stimulated by adjudication and then carried forward by the government educational bureaucracy through administrative channels.[37] The bureaucracy had to ensure that instructional procedures and school measures, as far as they were relevant to the pupil's later life and the parents' wishes, were given a form in which they were accessible to judicial review. It is only more recently that the judiciary has called upon the legislature to act so as to guide the overflowing bureaucratic juridification into statutory channels.[38]

The expansion of legal protection and the enforcement of basic rights in the family and the schools require a high degree of differentiation of

specific conditions, exceptions, and legal consequences. In this way, these domains of action are opened up to bureaucratic intervention and judicial control. In no way are family and school formally organized spheres of action. If they were, *to begin with,* already constituted in legal form, the increasing density of legal norms could lead to a redistribution of money and power without altering the basis of social relations. In fact, however, in these spheres of the lifeworld, we find, *prior to* any juridification, norms and contexts of action that by functional necessity are based on mutual understanding as a mechanism for coordinating action. Juridification of these spheres means, therefore, not increasing the density of an already existing network of formal regulations, but, rather, legally supplementing a communicative context of action through the superimposition of legal norms—not through legal institutions but through law as a medium.

The formalization of relationships in family and school means, for those concerned, an objectivization and *removal from the lifeworld* of (now) formally regulated social interaction in family and school. As legal subjects they encounter one another in an objectivizing, success-oriented attitude. S. Simitis describes the complementary role played by the law in socially integrated areas of action: "Family law *supplements* a morally secured system of social rules of conduct, and to that extent is strictly complementary."[39] The same is true of the schools. Just as the socialization process in the family *exists prior to and conditions* legal norms, so too does the pedagogical process of teaching. These formative processes in family and school, which take place via communicative action, must be able to function independent of legal regulation. If, however, the structure of juridification requires administrative and judicial controls that do not merely *supplement* socially integrated contexts with legal institutions, but *convert* them over to the medium of law, then functional disturbances arise. This is the action-theoretic explanation for the negative effects of juridification stressed in juristic and sociological discussions.

Simitis and his collaborators have carried out empirical research on the dilemmatic structure of the juridification of the family in connection with child custody laws.[40] The group has concentrated on the decision-making practices of wardship courts. The protection of the welfare of the child as a basic right can be implemented only by giving the state possibilities to intervene in parental privileges, once regarded as untouchable. It was the dialectic of this juridification that inspired Simitis to undertake his study: "However indispensable state services may be, they not only bring advantages for individual family members, but simultaneously bring about increasing dependence. Emancipation within the family is achieved at the cost of a new bond. In order to constitute himself as a

person, the individual family member sees himself compelled to make claims on the assistance of the state. What therefore, at first sight, is sometimes presented as an instrument for breaking up domination structures within the family, proves on closer examination to be also a vehicle for another form of dependence."[41] The study shows that the wardship judges surveyed based their judgments on insufficient information and oriented themselves predominantly to the child's "physical" rather than "spiritual" well-being. The psychological shortcomings of judicial decision-making practice result, however, not so much from an inadequate professional training of jurists for such tasks, as from juristic formalization of matters that require a *different type* of treatment: "Initiatives to ascertain the facts or to suggest better ways of resolving conflicts are scarcely to be found. There are perhaps reasons for this on the side of the parents themselves; but it is also a result of their position in respect to the legal process (and in reality), which tends to turn them into 'objects' of negotiation between the judge and the youth-welfare office and thus to make them 'subordinated subjects of the proceedings' rather than 'participants' in them."[42] In almost all cases one can see "how little the judge is able to accomplish with his specifically juridical means, whether it is a question of communication with the child that is essential for the proceedings, or of understanding the factors important for the child's development."[43] It is the medium of the law itself that violates the communicative structures of the sphere that has been juridified.

From this viewpoint, one can understand the policy recommendation to the effect that legislators keep to a minimum the state interventions necessary to protect children's rights. "Among the various possible solutions, the one to be preferred is that which leaves the judge the least amount of discretion in making decisions. Legislative regulation, therefore, ought not to favor far-reaching judicial intervention, as has hitherto increasingly been the case. On the contrary, it must, first and foremost, do everything possible to de-judicialize the conflict."[44]

Of course, replacing the judge with the therapist is no panacea; the social worker is only another expert, and does not free the client of the welfare-state bureaucracy from his or her position as an object. Remodeling wardship law in a therapeutic direction would merely accelerate the assimilation of family law to child welfare law: "In this para-law of the family, it is a governmental authority, the Division of Child Welfare, which sets the tone. Here child-rearing takes place under state supervision, and parents are held accountable for it. The language, particularly of many older commentaries, shows better than any regulation what the goal is. State intervention compensates for disrupted normality."[45]

Nevertheless, the intuition that lies behind the paradoxical proposal to dejudicialize juridified family conflict is instructive: the juridification

of communicatively structured areas of action should not go beyond the enforcement of principles of the rule of law, beyond the legal institutionalization of the *external* consititution of, say, the family or the school. The place of law as a medium is to be taken by procedures for settling conflicts that are appropriate to the structures of action orientated by mutual understanding—discursive processes of will-formation and consensus-oriented procedures of negotiation and decision making. This demand may seem more or less acceptable for private realms such as the family, and it may well be in line with the educational orientations specific to the middle class. For a public domain such as the schools, the analogous demand for deregulation and debureaucratization meets with resistance.[46] The call for a more strictly pedagogical approach to instruction and for a democratization of decision-making structures is not immediately compatible with the neutralization of the citizen's role;[47] it is even less compatible with the economic system-imperative to uncouple the school system from the fundamental right to education and to close-circuit it with the employment system. From the perspective of social theory, the present controversy concerning the basic orientations of school policy can be understood as a fight for or against the colonization of the lifeworld. However, I shall confine myself to the analytical level of juridification; this manifests itself no less ambivalently in the schools than in the family.

The protection of pupils' and parents' rights against educational measures (such as promotion or nonpromotion, examinations and tests, and so forth), or from acts of the school or the department of education that restrict basic rights (disciplinary penalties), is gained at the cost of a judicialization and bureaucratization that penetrates deep into the teaching and learning process. For one thing, responsibility for problems of educational policy and school law overburdens government agencies, just as responsibility for the child's welfare overburdens the wardship courts. For another, the medium of the law comes into collision with the form of educational activity. Socialization in schools is broken up into a mosaic of legally contestable administrative acts. Subsuming education under the medium of law produces an "abstract grouping together of those involved in the educational process and individualized legal subjects in a system of achievement and competition. The abstractness consists in the fact that the norms of school law apply without consideration of the persons concerned, of their needs and interests, cutting off their experiences and splitting up their life relationships."[48] This has to endanger the pedagogical freedom and initiative of the teacher. The compulsion toward litigation-proof certainty of grades and the over-regulation of the curriculum lead to such phenomena as depersonalization, inhibition of innovation, breakdown of responsibility, immobility, and so

forth.[49] G. Frankenberg has studied the consequences of the juridification of teaching practice from the viewpoint of how teachers, as those to whom the legal norms are addressed, perceive the demands of law and react to them.

There are structural differences between the legal form in which courts and school administrations exercise their powers, on the one hand, and an educational task that can be accomplished only by way of action oriented to mutual understanding, on the other. Frankenberg captures these differences well: "We can take as dominant characteristics of the political-legal dimension of the teaching task: (1) a discrepancy between behavioral prescriptions and concrete action situations; (2) a 'double coverage' for the government's 'educational mandate', through the school administration's responsibility for setting guidelines and through the authority of administrative courts to interpret and specify general norms; (3) an unclear demarcation of the teacher's pedagogic scope of action; and (4) possible threats, whether open or disguised, of sanctions for behavior that conflicts with the norms. To the opacity of the normative complex of school law this adds the incalculability of the normative demands decisive for educational practice."[50] These structural differences leave the teacher insecure and evoke reactions that Frankenberg describes as over- or underutilization of the pedagogical scope of action, that is, as overattention to or concealed disobedience of the law.

The legal regulation of the special power relation of the school removes some relics of absolutist state power. However, the normative remolding of this communicatively structured action area is accomplished in the form of welfare-state interventionist regulations. Controlled by the judiciary and the administration, the school changes imperceptibly into a welfare institution that organizes and distributes schooling as a social benefit. As in the case of the family, the result for legal policy is the call to dejudicialize and above all to debureaucratize the pedagogical process. The framework of a school constitution under the rule of law, which transposes "the private law of the state into a genuinely public law," is to be filled, not by the medium of law, but through consensus-oriented procedures for conflict resolution—through "decision-making procedures that treat those involved in the pedagogical process as having the capacity to represent their own interests and to regulate their affairs themselves."[51]

If one studies the paradoxical structure of juridification in such areas as the family, the schools, social-welfare policy, and the like, the meaning of the demands that regularly result from these analyses is easy to decipher. The point is to protect areas of life that are functionally dependent on social integration through values, norms, and consensus formation, to

preserve them from falling prey to the systemic imperatives of economic and administrative subsystems growing with dynamics of their own, and to defend them from becoming converted over, through the steering medium of the law, to a principle of sociation that is, for them, dysfunctional.