

Remarks for the “New Governance Workshop”
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I very much appreciate Kerry’s invitation to participate in this workshop, and look forward to learning a great deal.

I haven’t myself been a participant in what is apparently a wide academic discussion about “new governance”– indeed, in reading the materials for the workshop I felt as I often do when everyone I know is suddenly talking about a TV show I haven’t seen, and I then discover it’s been on for years without my noticing.

The phrase “new governance” reminds me of the “New International Economic Order,” perhaps because I am in the middle of writing and teaching about the history of “law and development.” What was the NIEO, actually – it was a new institutional project at the UN, a particular set of policy initiatives. It was also, and perhaps more importantly, a *literature* – a set of manifestos, proposals, a new description of what had already become the dominant economic order, and, of course, a fashionable topic for the chattering classes of the “international community” for a few years. Whatever else it was, it wasn’t a *New International Economic Order*.

The parallel phrase in the literature we have for consideration this weekend – “the new governance” – suggests that how we are governed – globally governed – has changed.

Taken as I usually am by cyclical metaphors of repetition and rotation, of the “turn” to institutions or interpretation or whatever, even I must admit that sometimes things do change. Institutions, practices – but also ideas, consciousness, OK, even “paradigms” if you like.

Things like “governance” do change. In Foucault’s terms, there was the gallows and then there was the prison timetable.

Or, if you prefer, for a long time an “economy” is an input-output cycle to be managed, harnessed for national growth or development, and then suddenly an “economy” is a market of individuals responding to price signals, allocating resources to their Pareto-Optimal destinations through exchange.

A market to be protected, served, stabilized and worshiped, but not distorted. You might think there are lots of market failures and much need for stabilization and correction – or you might not – but either way you are governing in a new economic world.

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In rough terms, on a global level, we might think of two past moments of new governance: new ways to govern, but also new meanings for “politics,” new identities for subjects and rulers, for law, for the state, and for things like “culture.”

Sometime between 1789 and 1900 – and as late as 1960 for much of the colonial world – governance was consolidated on a global basis around the national sovereign state. People were organized into territorial states, granted citizenship, and government was defined as what national public authorities did. Building a national public politics across the planet had a strong emancipatory dimension – slaves, women, workers, peasants, colonial dominions obtained citizenship in relationship to the new institutional machinery of a national politics. New governance – called “*government*,” centered on Parliament, and offered new identities for sovereigns and subjects, status dissolved into nation and contract.

Or, take the twentieth century. National politics was remade. Some key words: administration, management, the rise of policy and a policy class, technocracy, expertise. Private ordering, public/private partnerships, social partners, Keynesianism, countercyclical macroeconomic management. Corporatism, in all its varied forms. The new international law --- transnational law, international economic law, human rights --- constitutionalism, for the nation and the world.

Law infiltrating the political, a net of law thrown across national sovereigns, sovereignty itself disaggregated into a bundle of legal rights.

Federalism, power sharing, subsidiarity, devolution. Interdependence, social solidarity, policy management. Functionalism, realism, pragmatism, problem solving. Procedure and substance intermingled, distinguished, balanced, blended.

In this sense, the twentieth century did bring “new governance.” The legalization of politics, the replacement of *governments* by *governance*.

For me, the new governance challenge for the 21st century resembles that of the 18th and 19th more than the 20th. New governance now will mean new opportunities for *politics* – not shifts in the machinery of 20th century regulation and management.

How will people again become political citizens -- transnationally? Where – transnationally -- will we contest decision affecting the distribution of wealth and status? What could a transnational public capacity mean?

My Cambridge friend Philip Allott – who styles himself a Bolshevick Tory – likes to say we are living in “pre-revolutionary times.” I don’t know about that, but let’s call it a revolution in slow motion – governance *is* changing.

The West does seem to be up against some pretty daunting challenges. There is an internal demographic challenge, particularly in Europe and the ex-Soviet Union, which will force a reckoning with immigration or security or both.

And there are twin challenges from the rest of humanity. The challenge posed by economic success in the third world – by the hundreds of millions of Chinese and Indian individuals who have emerged from poverty into our industrial present. Speaking loosely, and to put it in the starkest terms, with economic globalization and the continued loss of public capacity, large swaths of the world will, in twenty years, have whatever social security system, whatever environmental regime, whatever labor law, whatever wage rate prevails in China.

And there is the parallel challenge posed by economic failure in the third world – by the revolution of rising frustrations among the hundred of millions of individuals who can see in, but for whom there seems no route through the screen except through rebellion and spectacle.

If you put these threats together, we confront an accelerating social and economic dualism. A rumbling fault line between two global architectures, between an insider and an outsider class, between leading and lagging sectors, both *within and between* national economies and political units.

This is not a clash of cultures, of modernity and tradition or secular and religious, still less of Weberian Protestantism and Islamic fundamentalism. It is a clash between different modes of being in relation to the twentieth century culture of economic, political and social management. Two modes of being, both present not just between and within national societies, but also within us.

What would “new governance” mean in such a moment?

To find out, we do first need *better maps* of how we are in fact now governed. This is a sociological project – how are subjects now created and managed? Lots of our received ideas simply no longer add up. Governance is not the sum of public and private, international and national law – it is more disaggregated and disorderly. The world is not ruled by the political, even in the exception, but by expertise, by management, by procedures and institutions, by professions, by modes of knowledge as much as modes of decision.

We do not have a good sociological picture of the mentality and machinery of the global establishment.

The “new governance” literature may well offer a step forward on this score. Better maps. If there are those who continue to think it is all regulation and deregulation, public and private, who think of power as either the right to coerce, repress, punish, or as a commodity in horizontal exchange among private actors, then it is all to the good to

point out the erosions and transformations these distinctions and conceptions have in fact undergone.

Seeing the new governance literature as a sociological mapping exercise, however, does leave me with a couple of worries.

First, “new” seems the wrong word for something that has been, after all, an ongoing project of at least a century. These may be new maps – but it is familiar terrain.

As a result, these maps may be misleading --- particularly when we also know that the *old* governmental forms and images remain fully alive – and when the relationship between the governance machineries of sharp distinctions and of blurred boundaries is not that between two worlds or epochs, but between two rhetorical frames, two social identities, two performances *within* twentieth century governance practices

I am worried, in short, that these maps may be off – perhaps even off in a way we might interpret as motivated – or biased.

In presenting the “new governance” as a map, the literature seems to imagine, if in a subtly altered form, the existence of a benign “public” sovereign, speaking for the universal, for the ethical, for the general will, for the collective interest. It seems, in fact, to yearn for such a power, or person.

This powerful 19th and 20th century imaginary can make it hard to focus on the disaggregated process of mutual *instrumentalization* so characteristic of relations within the world made by the twentieth century professionalization of political and economic life.

Or, to invoke my friend Philip Allott, the authors of this literature often don’t seem to realize what scoundrels rule, how cynical the machinery of state power has become.

I don’t know if I would go that far, but the available rhetorics of benevolent power and right order do have their dark sides. Think bombing for human rights. Or, in the sociology of regulation, think of John Braithwaite’s terrific map of global industries maneuvering for advantage in a networked world of rules and institutionalized policy management.

Better maps would focus on the heterogeneity of modern governance, on dislocations and ruptures between overlapping regimes or among intellectual disciplines, or on the *lack* of fit between our legal and institutional procedures and the unfolding of social life.

They would focus on moments of decolonization *by* the life world, rather than the enhanced capacities and machinery for regulatory management.

Attentiveness to heterogeneity may also serve as an antidote for the rationalizing tendency to interpret everything in functional terms, *as if* it had been designed or could be seen to work as a *response to a problem*.

I worry that the “new governance” literature continues the intellectual practice I call “as if pragmatism” – writing and speaking *as if* things had been designed by a benign spirit responding to general needs and expressing general will.

As if, for example, the word “proportionality” referred, in fact, to a metric for calculating what should be sacrificed for what, or as if the words “subsidiarity” or “federalism” referred to a metric for ascertaining who should have power to decide what by the light of an indisputable common objective.

At the same time, “new governance” is not just a new description of an old – or new – or renewed – order. It is also a wish, and a project.

The New Governance wish – the party platform for the new governance project, if you like – seems to take a position on modes of law making, on the forms law takes, and on the modes of enforcement.

First off, this is all pretty law-o-centric, although it does come wrapped in the promise of a Blair-style Third Way, and of a grand historic compromise between a deregulatory right and a participatory left.

But of course, we are not just governed by law. Nor can new legal forms halt – often even channel – the movements of ideology, economics or culture that also rule our world. Think of Abe Chayes in the 1970s celebrating “new public law litigation” as a description, and as a program – he presented it as the unstoppable, inevitable outcome of the legal realist judicial inheritance, only to see his analysis almost instantly overwhelmed by an unexpectedly firm ideological turn in the judiciary.

As a project, new governance is also a vulnerable flower – a brief for the significance, vitality and constitutional centrality of a quite specific professional legal culture and sensibility – and for a political rapprochement within the policy class between a center-right attuned to market failures and a center-left that has lost faith in its own nostalgia for what it remembers as the potent regulatory and administrative state of New Deal days. These political tendencies are status quo parties, timid about social conflict, hesitant about distribution, resigned to poverty but insistent about dignity and “representation” and participation.

Altogether missing from the program --- are the revolutionaries now in power on the right. In this, new governance seems the intellectual handmaiden to progressive parties riveted to the status quo. The parties of stability and modest reform – the American Democratic Party today, but also the broader governing class in most of Europe. Preserving social security, providing a little more child care, confronting

corporate power through truth in labeling, consumer sovereignty and the broad NGO diaspora.

In its more technical form, the “new governance” program for law making, legal form and law enforcement begins by contrasting a “hard” and a “soft” approach.

Thus, rule making:

Hard: vertical, disciplinary, repressive public authority

VS.

Soft: horizontal, participatory, dialog, consensus, voluntary

Legal form – norms that are:

Hard: formal, clear, rules

VS

Soft: antiformal, broad standards and principles

Legal enforcement that is:

Hard: benchmarks, penalties, sanctions, managed by the state, by the agency, by the judge.

VS

Soft: incentives, voluntary codes, citizen pressure, information/market based

In each case, to be new is to be soft.

These are puzzling, if also familiar, alternatives.

They repeat, of course, precisely the distinctions *against which* the new governance map rebels, perhaps explaining the persistent suggestion that we see them as on a “continuum,” or as tendencies to be “balanced,” in an uncanny echo of the late realists and legal process jurisprudes of a half century or more ago.

Still, fair enough.

But the literature also seems, at least to my ears, in full retreat from what might be called the “linguistic turn” or the “self-reflective” turn in legal – and other – scholarship. The tradition that would see these alternatives, hard and soft, as claims, postures, justifications, rhetorical performatives by experts in relation to their own governing practices, rather than simply as useful policy alternatives to be selected and deployed as needed.

The tradition that would be interested in the blind spots and biases of mapping – or managing – or legitimating in these terms.

To present “hard” and “soft” as management options is also to imagine and wish for the benign policy manager --- as the triangulated subjectivity from which hard and soft *would* appear as a choice. Well, if only our rulers -- or their constituents -- *were* preoccupied with solving problems, fine-tuning solutions to society’s functional demands.

Lost is the historical and cultural randomness of the regulatory system, and its porousness to instrumentalization from without. Where is private ordering? Customary law? The informal sector? Or, for that matter, the irrationality of the business cycle, or the spectacle, the psychosocial, in politics. Where in the “new” legal process, are the parties, the one-shotters and repeat players – what happened to law as the dependent, rather than independent variable of political life?

Where are the *stakes* --- not constitutionally, but actually --- for this round, this conflict, this rule, this standard? Who, for example, benefits from policy failure, from governmental gridlock – from governance deficits, democracy deficits, from old governance, or for that matter, from “new” governance?

The “soft” alternatives for rule making, for rule form, and for rule enforcement, are often proposed not only as “new,” but as *progress* over the hard.

It is true, I think, that the soft ideas were, in fact, in history, largely developed in reaction to the hard ideas, in the break of twentieth century thinking about governance from nineteenth century thinking.

But that doesn’t mean it was *progress* – if for no other reason than that the soft ideas remain firmly premised on the continued existence of the hard alternative, and continue to be subject to defeasement in our imagination, to disenchantment by confrontation with the hard. Over the last century, the soft choices have been “continuumized” into a relationship of complementarity, struggle – to use a Derridean word, “supplementarity” – to the hard alternatives.

At the same time, the “soft” choices are also often proposed as more constitutionally, generally, rule-of-thumb “appropriate” for situations that can be characterized as manifesting interdependence” or “social” needs for “solidarity.” For our global village perhaps.

There is, of course, the old pulling-an-ought-out-of-an-is problem with this line of analysis, common as it certainly was in the first half of the twentieth century when these ideas were first developed.

Perhaps we shouldn’t read too much into the affirmation of the soft as our next best global future – it may simply reflect resignation in the left/center of our policy class that *only* soft machinery can still be rallied to defense of the social agenda. But even at a tactical level, it seems iffy to conclude much *in general* about “soft” modes as tactics of management – or of politics. We are now far too familiar with all the paradoxes of policy

management -- “soft” modes that turn out to coerce more ruthlessly than hard, soft engagement that co-opts, soft principles that do more to legitimate and excuse than to control, and so forth.

So I come to this workshop as skeptical of the new governance project as of the new governance map. Is new governance new? Is it governance? Does it bear any relation to the political challenges of the coming century?

The focus on dialog and conversation makes one suspect an allergy to conflict, to contest and struggle. I find my potential intellectual allies focused on constitutionalism, on process, on institutional reform and law to solve what seem to me more *political* challenges.

I guess I come to the workshop worried that “new governance” offers a look into the practices of the technical class, into modes of regulation and styles of management, less to unravel or politicize or contest expertise, than to confirm and expand it.

To my mind, by contrast, “new governance” for the 21st century would mean expanding the political contestability of expert rule, and building public capacities up to the challenges posed by the economic and social successes of so many in China or India – or Mexico or Brazil – while offering new paths of political inclusion for those experienced, by us, by themselves, as excluded.

Before someone tells me “you misunderstood, that’s just what we’re about,” let me say a few sentences about the “new governance” literature I *wish* were being written.

Perhaps it *will* turn out that it is already underway – a new paradigm, a new global consensus, a new disciplinary agenda.

The “new global governance” literature of my dreams would focus on building a more effective global politics.

How might the forces affecting people’s lives be rendered more visible and contestable to the world’s citizens? How might the human experience of *decision* – of responsible freedom --- be encouraged throughout the worlds of corporate, private and technical expertise.

The new governance literature of my dreams would start with cartography, mapping the world political situation – heterogeneously, comparatively, stressing the relative force of economic, cultural, military and ethical power.

The global political process looks quite different if look from Europe or from the United States, from Mexico or Monaco, from the automotive or entertainment industries. It looks different if we focus on free trade, on development and poverty, on diplomacy and interstate politics, or on individuals and human rights.

What are the powers of large and small states, of leading and lagging sectors? What is the nature and future of American power in the world system? Is hegemony rising? Falling? Fallen?

Some players do mobilize the international regulatory regime more effectively than others – how might this power and competence be more widely shared? Seen as nodes of regulation, how can national and local governments be coordinated? For whom, to what end, are transnational networks of experts strategically useful? Where global problems require a cocktail of regulation, coordinated at various levels – how might this coordination be facilitated?

Yes, private ordering and private power are significant – the new governance literature of my dreams would map the ways in which corporate decision makers and private investors make decisions with substantial transnational effects – would see corporate governance as global governance

How might the revolutionary force of the democratic promise – of individual rights, of economic self-sufficiency, of citizenship, of local community empowerment, of respect for human rights and of participation in the decisions that affect one's life --- be carried to the sites of global and transnational authority?

For the scholarship I am imagining, the story would not be one of soft or hard – but rather a Tale of Two Architectures. *Within* the nation state -- even within the European Union – we struggle for a rich political life of legal, economic, social and cultural solidarity. We think of international life more harshly – a world of military power and economic competition, in which all we can hope for is stability, ameliorated by modest humanitarian initiatives. We would ask how this might be changed.

In economic affairs, the institutional question would be this – who will inherit the failure of the Washington Consensus? The collapse of state socialism was inherited by the banks, the Americans, the international financial institutions. But after neo-liberalism, who? How, for example, might nation-state – or global cities -- be strengthened as a shield for the weak, as a substantive guarantor of policy diversity, as an arena for democratic political life?

As confidence in the “market shocks” of neo-liberal policy and structural adjustment ebbs, how might the space for diverse national or local strategies and experiments be fostered?

The world is increasingly divided. Not only between rich and poor nations, but also between advancing and declining economic sectors, regions, and social groups. Globalization can sever links – supply chains, social networks, traditional patterns of credit – that might moderate these divisions. How might positive linkages leading and lagging sectors be preserved and new links forged?

How, for example, might the flow of capital and goods be managed alongside the flow of labor. Could we structure a grand bargain linking the free movement of labor,

capital and goods. How can borders be secured without disrupting the productive flow of migrant labor, of remittances, of social bonds, of technological and economic know-how?

In the fields of social justice and humanitarian affairs, we would investigate the limits of the human rights paradigm as a vehicle for promoting social justice – as well as its promise. Rights have been elaborated, goals identified, institutions built and constituencies mobilized. What have we learned about the comparative potentials and limits of various institutional strategies for promoting human rights: “naming and shaming,” individual petitions, economic and political sanctions, NGO engagement, economic and political engagement? All can be ways of avoiding political responsibility and disengaging – but each can be effective.

How can the boom and bust cycle of so much humanitarian assistance be avoided, long term causes and consequences addressed, and the political will for long term international engagement be fostered? Take issues of global health --- a textbook case of the need to coordinate national and international efforts, funding, regulatory initiatives, capacity building, education and more. How can the right cocktail of policies, regulatory initiatives, funding and institutional priorities be negotiated and sustained?

For all the new routines of “new governance” cooperation and dialog, our global governance process focuses too exclusively on crisis, on easily visible political and humanitarian disasters, on short term interventions. How might we strengthen our capacity to address the quotidian, the background worlds of ongoing injustice?

These are all enormous issues – we will need better maps, and they will suggest diverse and conflicting programs.

I should say that even in my dreams, I am not much for constitutional reform, or structural revision. Nevertheless, let me close by offering a couple of utopian heuristics to suggest what a true “new governance” might mean – or at least the scale of the effort required:

Imagine a generalized promise of political, social, economic and cultural inclusion, along the lines of trade regime’s promises of Most Favored Nation or National Treatment. The EU has made an open promise to societies on its borders for a generation, changing regimes in Germany, in Greece, Spain, Portugal, Ireland, the DDR, and now the 10 new states to the East. The World Bank tells us that nothing concentrates the mind or facilitates development as surely as promise of inclusion in a rich man’s club.

What if the EU had responded to the challenge of terrorism as they responded to the fall of the Berlin Wall -- offering to change regimes from Eastern Turkey to Western Pakistan the European way? What would accession negotiations mean to Morocco, Jordan, Tunisia, Israel and Palestine, for Egypt? Does Darfur have a future in the European home? In NAFTA, in the United States – what is the right response to genocide beyond criminal courts and humanitarian aid and transitional justice?

What if every national and regional unit made an open-ended offer of inclusion – statehood in Brazil, in the US, in Mexico. Or if statehood were no longer exclusive – if Massachusetts could do some kind of a deal with Canada, Alberta with Montana, New York with Dubai – or Rye, and so on.

Or imagine that every human was born not only with a national passport, but with a once-in-a-lifetime five year non-renewable residence permit for any country of his or her choice? It could be regulated, managed, limits could be set, but imagine the global recognition of a birthright to mobility. At the very least it would re-scramble debates about ‘rights of return’ for Jews and Palestinians in Palestine and Israel.

Imagine, and here I borrow from Jerry Frug’s utopian heuristic for American cities and suburbs, that each person on the planet were allocated three votes, and could cast them in any election they cared about in the world – again, it could be managed, regulated. But it would be a new politics, without even departing from the democratic preoccupation with voting or the 20th century identification of politics with the institutional sites of public authority.

Perhaps the “new governance” projects of my dreams would expand the grand jury from crime to global policy. It is customary now before war is declared – or before a cruise missile is fired – to ask lawyers to pore over the targets and scrutinize the justification, and to ask foreign policy professionals to debate the implications in fancy journals and on Sunday morning television. We debate the jurisdiction of various public institutions --- the Security Council, NATO, Congress, the Presidency – to decide.

Presumably, in new governance, (or old corporatism) we would invite the soft experts of the military industrial complex, the financial class, the human rights community, to join in.

But imagine empanelling a Grand Jury, a Policy Jury, of citizens, global citizens, not to consult or participate or dialog, but to *decide*. If, behind closed doors, the experts could convince the policy jury by majority vote, let the missiles fly.

Well, I sketch these ideas not because they would work or even be good ideas, but to signal the scale of what would, in my view, be necessary before we could speak of global “new governance,” 21st century style.

I look forward to our discussion.