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Research Note***The Regulatory Span of (Formal) Institutions:
Essay Inspired by Klammer & Scorsone (2022)*****Wilfred Dolfsma**

Abstract: Formal institutions, most prominently laws, impact society and also the economy by changing actors' behavior. How that impact can be conceptualized is in need of more elaboration. Klammer & Scorsone's (2022) recent publication opens avenues on how to understand the ways in which institutions can over-instruct, under-instruct and ambiguously instruct the behavior of actors. Sources of and direction for institutional change can then be better understood.

Keywords: institutions, formal institutions, law, informal institutions, institutional change, institutional entrepreneurship

JEL Classification Codes: B52, D02, H10, K00

Sarah Klammer and Eric Scorsone, both from Michigan State University (MSU), place their plea for institutions to be taken more seriously in economics, and also for institutional economics to take legal scholarship more seriously, squarely in the MSU tradition of "troublesome economists." Legal institutions and formal institutions more generally are prime but not sole among institutions regulating interpersonal behavior in any practice.¹ Informal institutions also regulate individuals behavior, yet this is not acknowledged (much) among legal scholars. Dave Schweikhardt, Warren Samuels, and Allan Schmid, amongst others, are the "troublesome economists." Klammer and Scorsone, however, make the arguments about the need to study institutions more by drawing on the work of Yale University legal scholar Wesley Hohfeld. Hohfeld lived and worked at the start of the twentieth century. His article (Hohfeld 1913) has been as influential among legal scholars since it was published as it has been invisible to institutional economists. One key changed way of conceptualizing that Hohfeld is known for is the idea that property as a concept can be conceived of as a bundle of rights. Hohfeldian concepts central to the treatise of Klammer and Scorsone include: rights, duties, privileges, and immunities. They are argued to be central to understanding such economically relevant outcomes as "distribution of income, wealthy and overall economic performance" (Klammer and Scorsone 2022, 3). The "legal-economic nexus" (as Samuels has put it) develops into a Legal-Economic-Performance (LEP) framework referred to as SSP by Klammer and Scorsone: Situation-Structure-Performance. Klammer and Scorsone acknowledge that inspiration for this framework is from the Structure-Conduct-Performance (SCP) model from the field of Industrial Organization in economics.

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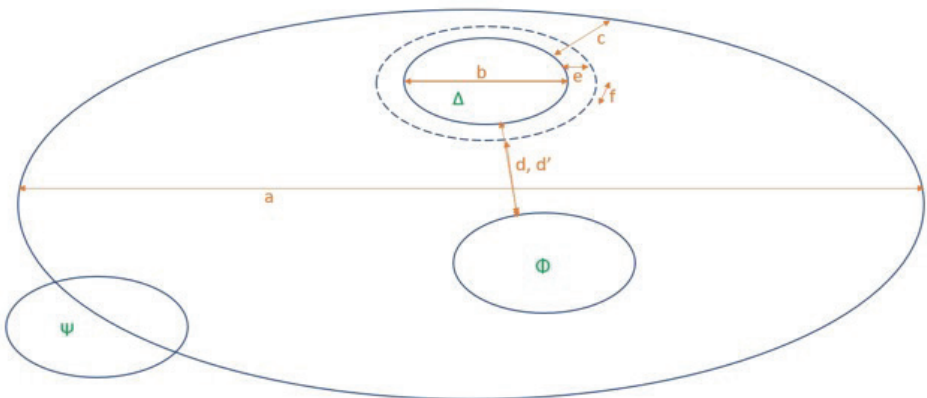
¹ A practice is defined here as "any form of activity specified by a system of rules [(set of) institutions] which defines offices, roles, moves, penalties, defenses, and so on, and which gives activity its structure" (Rawls 1955, 3).

This research note is not a classical book review, but an essay inspired by Klammer and Scorsone's (2022) recent book to explore what new avenues they open up by building on Hohfeld and legal studies generally, suggesting a somewhat different set of data to study (conflicts over institutions settled in court), using a method that institutional economists might not be wont to adopt (content analysis).

Framing the Regulatory Span of Institutions

The SSP framework, notably, does not contain a conceptual element to signify human conduct. Choices that individuals make about whether to behave exactly how formal institutions “instruct” them to are not taken into account. Individuals behave exactly in line with formal institutions, it is assumed. With reference to figure 1, inspired by Klammer and Scorsone, with the large circle with diameter “ a ” signifying a practice regulated by formal as well as informal institutions, and Δ , Φ , and Ψ being areas of explicitly formal institutions (law) that do the regulating of behaviors in a practice. Behaviors in a practice that are not regulated by Δ , Φ , and Ψ are thus regulated by informal institutions. Figure 1 allows one to see how assumptions legal scholars, among others, tend to adopt are relatively strict. The assumptions are best elaborated upon referring to arrows in the figure indicated with letters a through f . The assumptions are, (1) $a = b$, and therefore $c = 0$, [or $d = 0$, in case a number of different partial laws fully cover a practice] as no part of a practice is left unregulated. Behavior is thus not un-instructed by formal institutions. In addition, (2) $e = 0$ as there is no ambiguity in interpreting what the law prescribes or no (known) imperfection in the extent to which a law is enforced [and so $(d-d') = 0^2$]. Behavior is thus not ambiguously instructed. What is more, (3) no areas of (partial) law overlap, thereby creating confusions or tensions between these areas of law, which means that c and d (both) cannot have a negative value. Behavior is thus not over-instructed. If for an individual choice on how to behave is un-instructed, ambiguously instructed, or over-instructed, a case could come to a court, whereupon a judge decides on a verdict seeking to advance a situation in which (1), (2), and (3) hold (again).

Figure 1. Formal Institutions (Laws) and the Practice Regulated



² Note that d' is the distance between regulated partial area Φ and the dotted line encircling the regulated area Δ . In contrast, d is the distance between the uninterrupted lines encircling areas Φ and Δ .

In addition to what Klammer and Scorsone imply for the study of the law, pointing to how to understand the law and its place in society, they also help the thinking among institutional economists, I would suggest. A special case of condition (3) is (4): the assumption that there is no outside set of (formal) institutions Ψ regulating another practice that *also* pertain to regulate behaviors in the relevant practice (cf. Dolfsma 2013). Especially when one were to take into account the role that informal institutions might play this seems a difficult assumption to maintain (see Olthaar et al. 2017). Relatively coherent sets of institutions regulating a practice clashing or overlapping can also instigate a process of institutional change (see Dolfsma and Verburg 2008).

What is amenable for such a process of institutional change to start is if (sets of) institutions are imperfect in the extent that they regulate because of ambiguity in what they prescribe or because enforcement is imperfectly enforced ($e > 0$), or the regulatory realm of a coherent set of institutions is imperfect in keeping out “impure” elements (see Hodgson 1999; Dolfsma, Finch, and MacMaster 2005). Impurities either exist in a set of institutions from their inception as they grow, or when they enter later this is possible only if, in terms of figure 1, $f > 0$. In the latter case an institutional setting or realm allows elements to permeate its boundaries (cf. Luhmann 1995).

Institutions and Behavior

Hohfeldian terms help explain the hold that an institution or set of institutions has over an individual's behavior (see in particular Klammer and Scorsone, 59). It also allows for additional clarity in discussions in institutional economics and social science generally.

A hold of institutions over behavior can be firm, clearly defining what Hohfeld calls rights and duties as both these are clear about what an individual's undoubted requirements to others they relate to are. A right gives a focal person a claim to do (or not do) something towards another; a duty gives them the obligation to do (not do) to others. These both, in terms of figure 1, refer to uninterrupted lines. Privilege and exposure seem to be opening up holes in a line delineating the span of an institutions or set of institutions. They refer to actions towards others by a focal individual that impact others but that these others cannot prevent (hold the focal individual liable for), or demand remedy for. Privilege and exposure could be seen in the $d-d'$ area of an institutional realm as the relevant behaviors a focal individual could but need not perform. Even if a focal individual does not perform the behavior the other experiences exposure.

The way in which Hohfeld breaks down the concept of power is useful. Power is “the ability of [a focal individual] to change their legal standing vis-a-vis another [individual]” (Klammer and Scorsone, 59). When a focal individual's power is not such that they can affect the (legal) relationship with others, the others are immune and the focal individual presents an inability. This terminology makes the concept of power more precise, as it relates to a realm of (formal) institutions. One might, for instance, ask what it means for a focal individual to gain additional power vis-a-vis another individual who then sees their liability increase: does the institutional realm or setting change, or does the position an individual hold defined in an existing and unchanging institutional realm change?

For a conceptual frame that seems to implicitly assume that formal institutions, and laws in particular, do not change—even when their meaning and span might be made increasingly clear and definite—legal scholars offer an insightful added vocabulary for studying institutional change.

Institutional Entrepreneurship

If, moving from an existing set of institutions pertaining to a practice, institutions are to change, change comes from individuals instigating change. These individuals might be referred to as institutional entrepreneurs (Pacheco, York, and Sarasvathy 2010). Since institutional change necessarily and almost by definition does not emerge from an institutional void (cf. Olthaar et al. 2017), it emerges when either ambiguity or tensions because of over-instruction are perceived by individuals who might use that to change institutions relevant for a practice. With reference to figure 1, different origins for institutional change can be identified.

- a) $c > 0$: space where informal institutions reign. [A similar situation is when d (or d') > 0 .] Informal institutions may be more amenable to change, perhaps locally, so can be brought in line with interests of an institutional entrepreneur (cf. Munir and Phillips 2005).
- b) d (or d') < 0 : due to (formal) institutional sub-realms overlapping. This is where courts are expected to provide clarity in specific cases, when sought to do so, thereby setting a precedent for others to follow. Institutional entrepreneurs can establish themselves when such over-instruction occurs (Maguire, Hardy, and Lawrence 2017), and they can also help create such over-instruction by making sets of institutions overlap (cf. De Graaf and Jans 2015).
- c) $e > 0$: due to institutional ambiguity. This is terrain politically contested, with discussion about extent of clarity and extent of enforcement required needing to be changed, and at what costs. Institutional entrepreneurs with potentially a criminal intent may operate here (e.g., Dante Gutierrez 2021).
- d) $f > 0$: due to institutional permeability. Permeable institutional boundaries increase opportunities for previously or otherwise unimaginable behaviors (e.g., Lizardo 2006).

Conclusions

Klammer and Scorsone (2022) open an avenue for rich conceptual thinking for institutional economists and other social scientists. One reason for this is that by strictly and perhaps a little unquestioningly following a number of implicit assumptions that legal scholars tend to adopt about how formal institutions (laws) relate to individual behavior, Klammer and Scorsone provoke thought about what happens when people do not take cues from formal institutions. Based on Klammer and Scorsone's work one can also be led to conceptualize when individuals might be expected to help (re-)shape institutions.

Disclosure Statement

No potential conflict of interest was reported by the author.

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