

## THE UNIVERSAL HISTORY OF LEGAL THOUGHT\*

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### Three ideas of law

1. The history of legal thought in all major legal traditions exhibits a surprising constancy. In each of them, three ideas of law recur: the first two explicitly, the third, for the most part only implicitly. In the West, on both the civil-law and the common-law sides, the coexistence of these three ideas of law persists with disconcerting clarity and continuity. It is all the more surprising that it has been so little remarked.

To study it is of much more than historical interest. From that study we can hope to garner a better understanding of the limits of legal doctrine and legal theory today. We can also hope to find clues to overcoming these limits.

The first element in this universal pattern of thinking about law is the idea of law as immanent order: a moral order that is latent in the life of a society and revealed and refined through the work of legal doctrine. The votaries of this idea of law are the professional experts in law. The jurists organize their work around the view of legal doctrine as the expression and the development, in the detailed materials of the law, of an intelligible and justifiable scheme of social life. In the extant law, the legal experts find, beyond the arbitrary doings of power, a halting and flawed but nevertheless cumulative approach to a comprehensive ordering of social life. This ordering is both discovered and developed, over time, through the reasoned elaboration of law. In historical time, the law "works itself pure." At the very least, it is improved; it is rescued from being the expression of a brute contest among powerful interests and brought closer to its role as a defensible vision of social life.

The immanent order may be represented as the institutionalized form of the life of a people, according to a formula dear to Hegel and the German historicists of the nineteenth century. Alternatively, it may be portrayed as the local instance of a universally authoritative direction for humanity. Whether it is national or cosmopolitan in its reach, it represents the product of a collective work, undertaken in historical time. The

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jurists fulfill their responsibility not as mere servants of those who momentarily hold power, much less as isolated and independent thinkers, but as sharers in a community of discourse tied to both a particular society and legal tradition.

The second element in the world-historical repertory of legal thought is the idea of law as the will of the sovereign. The sovereign is the state, or whoever holds governmental power. Thus, law as the will of the sovereign is also the law willed by the state and imposed by the state on society. The adepts of this view are the political theorists and the philosophers of the state as well as the legal thinkers who desire to be free from what they regard as the illusions of the practical jurists.

The account of law as an expression of political will may or may not incorporate a commitment to democracy. Democratic law-making is simply a variant of the more general idea of law as an instrument of political will. Thomas Hobbes and Carl Schmitt, Hans Kelsen and H.L.A. Hart, stand, in this respect, all on the same side.

According to this view, law is whatever the sovereign, whether democratically legitimated or not, wants it to be. The possession of sovereign power is in the first instance a fact, confirmed by the practice of habitual obedience and reinforced by the power to sanction disobedience. Law as the enactment of the will of the sovereign is not supposed to be simply a selective intervention of the prince, adapting to circumstance and political purpose an otherwise stable body of law, legitimated by custom, tradition, or divine authority. It is, on this account, the whole source of law. Whatever in the extant body of law fails to result from the active and explicit choice of the sovereign, depends, for its force, on the sovereign's willingness not to disturb it.

Nothing in this view need be revolutionary or authoritarian. For theorists of constitutional democracy, all law must, without exception, find its source in the decisions of the constitutionally legitimated institutions, if only by their consent to laws received, or inherited, from other sources.

2. These two views of law -- law as latent normative order and law as the will of the sovereign -- account for most ideas about law that have been influential, not only in the West but, with modest qualifications, in world history. What they chiefly leave out are the systems of sacred law, particularly those associated with the Semitic salvation religions -- Judaism, Christianity, and Islam. However, depending on the underlying theological orientation, such sacred law may itself be represented as a variant of one or the two views. In one instance, the immanent order is the one that helps increase our share in the attributes of divinity. In the other instance, the sovereign whose will makes law is God.

Consider two facts about these two views and about their relation to each other. Taken together, these facts already begin to suggest the major riddle presented by the history of legal thought. They also have implications for the task of legal theory today.

The first fact is that although these two views address the same subject matter -- law -- they are incompatible. They contradict each other in their view of what law is and therefore as well of how it can and should be developed. There is no obvious way to reconcile them, although they are made to coexist all the time by a number of devices. Of these devices, by far the most familiar is the expedient of associating each of the two ideas of law with a distinct institutional setting: law as the will of the sovereign with law making, in legislation and politics, and law as the quest for immanent order with the interpretative work of the jurists, especially when that work is undertaken in the setting of adjudication. However, the contradiction does not vanish by such a switch, discarding now one set of presuppositions about law, now another, according to the institutional circumstance and agent.

The second fact about the two views and their relation to each other is that each of them is radically incomplete. Neither can work without the introduction of an additional element. This additional element, however, without which each of the two views fails on its own terms is not the other approach; it is not the idea of law as immanent order for the effort to represent law as the will of the sovereign, and it is not the latter for the project of advancing the former. It is, astonishingly, an entirely different and largely unacknowledged theme. The third element in the universal history of law is the implicit reference to the real structure of society, including its institutional organization as well as its hierarchies of advantage and its divisions of experience.

At any given time, even the most powerful authoritarian or democratic sovereign, under all institutional arrangements established to this day, finds itself reduced to intervening in a social context not of the sovereign's devising: the inherited arrangements and routines of society and culture. The pretense that these routines and arrangements, and the whole distribution of advantage and disadvantage resulting from them, subsist only because the sovereign consents to them is little more than a fiction. The sovereign is in fact powerless to change them except at the margin or when crisis -- usually in the form of war or economic collapse -- broadens the room for change.

The use of legal doctrine to represent law as an imperfect but progressive approximation to a plan of social life suffers from a similar ineradicable incompleteness. Take the principles and categories enunciated in any part of the law, within any legal tradition, including the law of contemporary societies. You could never guess from the discourse of the jurists what their high-flown words really meant in context, or what practical meaning and effect legal doctrine would have once married to the realities of the established order in society. You would, if you did not belong to that society and culture, need independent information about that order. Legal doctrine may seek to redescribe it and even to alter it at the margin. It is nevertheless powerless to remake it from the ground up.

Both the approach to law as immanent order and the view of law as the will of the sovereign depend on a third idea of law: law as the real structure of society. Unlike the

first two ideas, however, the third one remains in the shadows; its enabling relation to the other two ideas, denied or disguised. From the relation of law as the real structure of society to law as immanent order and as will of the sovereign arise the most important problems of legal theory. To reconceive this relation in theory, and then to help change it in practice, is the most pressing task of legal thought now.

3. A daunting obstacle to the execution of this task is that we now lack a reliable way of understanding how the real structure of society gets made and remade in history. Both the idea of law as immanent order and the idea of law as will of the sovereign must rely on a view of the real structure of society. No such view is now available.

The arrangements of society no longer seem to us to be natural, necessary, or sacrosanct. We recognize their contingency and their flaws although we have no proper account of how structural change takes place in history, and suffer, in part for that reason, from an impoverished imagination of institutional alternatives. The unacknowledged and unargued reliance of the two leading approaches to law on a view of the real structure of society is therefore a major objection to them.

The history of social theory over the last two hundred years explains how we came to find ourselves in such a predicament. That history, as it bears on the basic situation of legal thought, can be summarized in a few words.

The tradition of social theory that, beginning with Montesquieu and Vico, found its most radical and ambitious expression in the work of Karl Marx, before being reborn as the comparative historical typologies of Max Weber and Emile Durkheim, developed ways of thinking about the structure of society. It recognized that these structures are our creations. It taught us to distinguish, in each historical circumstance, between the formative institutional arrangements and ideological assumptions -- the structure or regime, which Marx called the mode of production, emphasizing its economic aspect -- and the practical or discursive routines that these assumptions and arrangements shape. It provided intellectual tools with which to explore the discontinuous character of historical change.

These revolutionary insights -- revolutionary as modes of understanding and revolutionary as bases for the reformation of society -- were tainted, nowhere more clearly than in Marx's own writings, by necessitarian illusions. One of these illusions was that there exists in history a small, closed set of such institutional systems (the closed-list illusion). History is supposedly the record of their discovery and enactment.

A second illusion is that each of these systems -- the institutional options of humanity -- amounts to an indivisible type, all the parts of which stand or fall together (the typological illusion). Politics must therefore be concerned either with the management, defense, and improvement of one such indivisible system (reformism) or with its replacement by another one (revolution).

According to third illusion (the historical laws illusion), there are laws of change (e.g., the eventual failure of the relations of production to accommodate the greatest possible development of the forces of production). In the absence of such laws, there are at least directional and irresistible tendencies (e.g., bureaucratization, rationalization, functional specialization, and integration) governing the succession of indivisible institutional systems in history. History diminishes, if it does not altogether abolish, the space for programmatic imagination; it is history that supplies, regardless of our intentions, the program that matters.

These illusions of false necessity have become increasingly hard to share. In rejecting them, however, the positive social sciences that took hold in the course of the twentieth century also discarded the insights with which those illusions had been combined. They have produced a view of society and history that has tended to vindicate the naturalness, the superiority, or even the necessity of the dominant arrangements. They have cut the vital link between insight into the actual and imagination of the adjacent possible.

We have been left, as a result, with no reliable way of thinking about how the structure -- in particular the institutional structure -- of society changes and consequently no developed account of what it is. We are driven between agnosticism and superstition: agnosticism as despair of understanding the nature of society and its transformation, superstition as identification of our professed ideals and our recognized interests with the habitual forms of their enactment in established institutions and practices. An important example of such superstitions is the belief, graced with a hundred lives in the core of practical economics, that a market economy has a single natural or necessary legal-institutional form. A market is a market, a contract is a contract, and property is property.

The solution to the problems presented by the intellectual history that I have just recounted is to rescue and to radicalize the insight of classical social theory into the decisive effects and discontinuous history of formative institutional arrangements and ideological assumptions (the structures), while expunging from this insight the taint of necessitarian superstition. To that end, we need a conception of structure and a way of thinking about structural change and structural alternatives that neither the tradition of classical European social theory nor the practice of contemporary social science offers.

The structure of a society is the set of institutional arrangements and ideological assumptions that shape its practical and discursive routines, especially its recurrent conflicts over the resources of power, capital, and intellectual or spiritual authority by which we make the future in the present. In this essay, I use the terms structure and regime interchangeably.

There is now in the world a very restricted list of live options -- identified and accessible -- for the ordering of different parts of society: the winning and use of governmental power; the legal constitution of the market -- including the provisions of contract, property, and corporate law; the legal status of work and workers and the

relation between labor and capital and of both of them to the state; the forms of associational life standing between the state and the individual and giving shape to civil society outside the market and the state; and the definition of the family and its responsibilities and its powers. This restricted stock of institutions and institutional ideas is the fate of the contemporary societies -- the dictatorship of no alternatives -- that imagination and transformative practice must oppose.

An example of a piece of structure is the way in which in our relations to one another, codified in property law, unites or disassembles the many powers brought together in what remains our dominant idea of property -- a creation of the nineteenth century -- and vests these powers, as that idea of property does, in a single right holder, the owner, or, instead, in many tiers of right holders with distinct claims on the resources in question, as has much more often happened in the world history of law. Another example is the status of labor and the predominant form of free work: whether wage labor, bought and sold, or what were, until close to the end of the nineteenth century, regarded as the higher forms of free labor: self-employment and cooperation. The range of variation in one part of the regime limits the feasible scope of variation in another. To return to the two examples that I just gave: in an advanced economy, requiring the aggregation of capital and labor at large scale, indispensable economies of scale can be reconciled with the predominance of self-employment and cooperation over wage work only if the property regime allows many different tiers of stakeholders to hold concomitant claims on the same productive resources.

The parts of a regime reinforce one another; they are not simply a hodgepodge of loosely connected arrangements and beliefs. The institutional arrangements could not endure if they undermined one another. Nor could they be flourish if not represented and managed under the lens of widely accepted conceptions: images of what the relations among people can and should be like in different parts of social life.

Such a structure, however, is not a system. When it changes, it changes part by part and step by step, as the rejection of the typological illusion implies. If it continues changing in a particular direction, particularly under the influence of a conception, the cumulative outcome can be revolutionary. To such piecemeal structural change we can give the name radical reform. Radical reform is the characteristic instance of structural transformation; the revolutionary substitution of a whole regime by another is the largely fantastical limiting case.

In the history of social thought and politics over the last few centuries, the fantasy of such revolutionary substitution has turned into a pretext for its opposite. If consequential change is unavailable, or if available too dangerous, what is left to do is to humanize a world that we despair of reimagining and remaking. Such is the character of contemporary social liberalism and social democracy.

The sign that the institutional and ideological regime has undergone such a fragmentary change is that the shape and scope practical and discursive conflicts over the

making of the social future within the social present have shifted. For example, the political-business cycle today in the rich North-Atlantic countries has among its presuppositions the untying of macroeconomic policy from the restraints of the gold standard and the sound-money policy dominant the early twentieth century. But it also presupposes the renunciation by government of any direct power over the private investment decision. A series of such limited innovations, expressed in a particular repertoire of policies, institutional compromises, and ideas informing them defines the space of contest over the making of the future within the present.

If we are interested in radical reform, we must be interested in law. For it is in the law that the organization of society appears to us not under the misleading appearance of a recurrent type, such as capitalism or the regulated or social market economy, but in its detailed institutional and ideological reality as the set of mutually reinforcing and contradictory arrangements and assumptions that it is: the institutional form of the life of a people represented under the light of the understandings of group or class interests and collective ideals that make sense of them.

The explanation of structure and structural change is the supreme object of theoretical ambition in social thought. The preservation or transformation of structure is the overriding concern of practical ambition in politics. In the contest over the future, the topic is not simply the arrangements and assumptions that define a regime. It is also the nature of the structure: its relation to our structure-making and structure-defying agency, the extent to which it is entrenched against attack and revision or, on the contrary, facilitates and organizes its own transformation.

Imagine history as a game of musical chairs. The music is practical and visionary strife. When the music stops (although it just dies down rather than stopping completely), we sit down on the chairs. The chairs are the structure. Or, to change the metaphor, the regime is simply frozen fighting: the residue of arrangements and assumptions made possible by the temporary interruption and the relative containment of the struggle over the terms of our access to one another and, in particular, over our future-shaping activities.

It is in our interest not to allow these collective creations of ours to imprison us as if they were natural, part of the furniture of the universe, rather than artifacts that we made. It is in our interest to narrow rather than to widen the distance between the ordinary moves that we make within a framework of arrangements and assumptions that we take for granted and the extraordinary moves by which from time to time, under the pressure of crisis, we challenge and change parts of the framework. It is in our interest to rob the structure of its delusive semblance of naturalness and necessity and so design it and regard it that we make it allow us to engage it without surrendering to it, resisting and revising even as we participate.

On this view, the focus of struggle then is not just one structure against another. It is also one kind of structure against another a kind: a kind that is less naturalized and

entrenched against a kind that is more. To the extent that we disentrench our regimes, designing to invite their own revision, we turn them into experiments. We represent as our revisable creations rather than as objects of superstition and idolatry. They then cease to hold us in their thrall.

Such change in the character as well as in the content of our formative arrangements and assumptions is itself a species of liberation and empowerment. It is, moreover, casually related to our most powerful material and moral interests: in the development of our powers of production and in our emancipation from the hierarchies of class and caste that have formed and perverted the history of civilization.

Regimes shape their own sequels. However, the extent to which the past creates the future, and the dead govern the living, is not a constant. It is a variable -- one of the most important variables in history. The expression of this variance depends on the details of our political and economic institutions and of our educational practices.

Where do such structures come from in the first place, and how do they change? Different regimes compete in the world with regard to the functional advantages of economic prosperity and military power that they are able to support, as well as with respect to their consequences for the entrenched social hierarchies and divisions that weigh on our relations to one another. But contrary to what the closed-list illusion supposes, they are not selected from any preestablished stock of possible regimes. Nor is there is any one-to-one relation between a certain level of functional advantage -- for example, in what Marx described as the maximum development of the "forces of production" -- and a particular regime that we can take from history's shelf of readymade possible regimes. Historical experience has shown that, at any any particular level of technological and economic development, very different institutional arrangements can have similar functional consequences.

In the worldwide contest over the organization of society, competing states do not choose from a menu of possible regimes. They choose from the imagined and accessible alternatives presented to them in their historical circumstance. The programmatic imagination extends these alternatives into the realm of the adjacent possible: the *theres* that we can get to from *here*. Instead of selecting from a closed list of possible regimes, this competition for functional advantage and spiritual authority selects from the institutional and ideological material at hand: itself the product of many loosely connected sequences of practical and visionary strife. In contradiction to what the historical-laws illusion supposed, this struggle conforms to no script and obeys no laws of historical change.

Whenever there is a set of technological, organizational, and conceptual innovations that promise to enhance our powers to produce or to destroy, the tendency is to adopt them in the form that least disturbs established interests and ruling preconceptions. Such is the path of least resistance. Today's insular knowledge or innovation economy is an example of the path of least resistance: by leaving what is now



the most advanced practice of production confined to fringes that exclude the vast majority of businesses and workers, this instance of the path of least resistance promotes both stagnation and inequality and prevents the knowledge economy from fulfilling its promise.

The path of least resistance is always the most probable outcome. It is never the necessary one. Its friends and beneficiaries have in their favor an existing world and the assumptions it makes about what is feasible, as well as the established understandings of group or class interests, in that world. But the enemies of the path of least have a countervailing advantage: the path of least resistance typically accommodates to the established world at a price: the price of failing to make good on the potential of the innovations. The difference between the insular knowledge economy that we have and the knowledge economy for the many that we do not exemplifies the significance of this shortfall. The former is a machine for slowdown and inequality. The latter would anchor growth in inclusion, tapping the energies and talents of many more people and businesses.

Their countervailing advantage would do the enemies of the path of least resistance no good if there were no way to translate it into the way in which real states, classes, and communities do or can understand their interests. But there always is a way, as I later argue: the way we understand our interests and identities, as members of a particular class, for example, always depends on our assumptions about alternative futures and about who we would be and become in each of those futures.

The search for alternatives to the path of least resistance goes on in the dark unless we develop an approach to alternatives that is free from the mistakes of both classical European (and especially Marxist) social theory and contemporary social science: the latter deficient in structural vision, the former equipped with a way of thinking about structure that was compromised by the illusions of false necessity. Such an imagination of structural change and structural alternatives must not remain under the spell of abstractions like capitalism and socialism or the market economy. It must touch the ground of institutional detail. The best if not the only place to touch that ground is the law.

In the preceding paragraphs I have described how the imperative of structural vision arises outside legal thought, in the history of politics and of social theory but then requires us to deal with the law, in theory and in practice. The problem is that we do not know how. What could be more natural than to turn to legal thought to find out how to deal with law? When we turn to it, however, we have reason to be disappointed. The rest of this essay argues that we cannot respond, in either theory or practice, to the imperative of structural vision until we free ourselves from the equivocations, confusions, and contradictions of the two views of law that have shaped the universal history of legal thought.

## Law as immanent normative order

4. If there is an approach to law that has been predominant among jurists in a broad range of legal traditions across the time and space of history, it is the one evoked by the concept legal doctrine or, in the civilian tradition, legal dogmatics.

Before I enumerate the attributes of doctrine and explore its relation to the idea of law as immanent order, I place it in an elementary historical context the better to reveal the way of thinking that guides it. To us, children of European civilization, its most familiar expressions are classical Roman jurisprudence and the jurisprudence of the English common law.

The Romans regarded their thinking about law as one of the highest expressions of their genius, as a foundation of their power, and as the branch of thought with the strongest claim to be ranked supreme. When, after many centuries of imperial despotism and perversion of their republican ideals, the Digest of Justinian defines jurisprudence as "the science of all things human and divine," it expresses a reverence that was cultivated from the early history of the state.

In the period that the Romans later regarded as the apogee of their practical law craft -- from the end of the Punic Wars to the Civil Wars that ended in the downfall of the Republic, legal doctrine was rendered as neither a theoretical system nor a literal reading of laws adopted by their law-making assemblies. It was informed by general ideas. However, the point of these ideas was never cumulatively to turn the understanding of law into a system of hierarchically organized propositions, with the most general abstractions at the top and concrete decisions at the bottom.

Many laws were voted in the councils of the Republic that were vested with law-making authority. However, such episodes of law-making amounted to localized interventions or adaptations in a body of law on which no assembly had ever deliberated. Roman law and legal doctrine had been developed, over time, slowly and persistently, by the decisions of particular magistrates responsible for clarifying, developing, and applying law in particular cases. Above all, it had been built by the opinions of famous legal experts -- jurisconsults -- enlisted to advise litigants or officeholders.

The law preexisted and outreached the laws, even though the laws modified the law. The enacted laws dealt with fragments of social life, for which some circumstance or crisis required, or some powerful interest demanded, initiative. The law dealt with everything. The everything with which it dealt was the institutionalized form of a life in common: the statement and reorganization of collective life as a series of interlocking obligations and prerogatives, appropriate to each social role, station, or activity, from buying and selling land or labor, to parenting or making war.

The fundamental presupposition of this idea of law was that the arrangements of society, although irreducible to a simple system, susceptible to being rendered as a

pyramid of increasingly general and abstract propositions, were informed by practical moral ideas. These ideas defined a fine texture of reciprocal responsibilities and rights. They amounted to the embodied vision of a form of social life.

If this vision could not be deduced from a small set of axioms, neither could it be described as simply an arbitrary set of compromises or impositions. The laws, on the other hand, might be described as just such impositions or compromises. They were voted, often in tense and conflict-ridden circumstances, under prodding from groups anxious to obtain a definite, localized change of rules. The law, however, was not, according to this view, as factitious and as circumstantial as the laws. Law was history turned into institutions, sustained by a shared vision. It was the outcome of the development of the way of life that made the Romans who they were, translated into a detailed plan for living together in every department of their existence.

The habits of mind deployed in such an elaboration of law were those of analogical reasoning, historical fidelity, and prudential judgment. The guiding conception was that of an ordering of social life that, albeit irreducible of a system of axioms and deductive inferences, lent itself to expression as a set of loosely connected practical ideas. To force law into a conceptual system of hierarchically ordered propositions would have violated its nature and threatened to produce absurd results.

Nourished by experience and corrected by a long conversation, so the jurists believed, such an elaboration of law, in its context of case-by-case application, would help preserve and improve the Roman way. It would bring the practices of the people closer to their beliefs. It would refine their beliefs in the light of their experience. From this dialectic between practice and belief, in the details of the interpreted and applied law, there would emerge the comprehensive articulation of a form of collective existence.

For such a view of law, the theorizing, encyclopedic orientation, and rule mongering of the imperial period, conducted under the two-fold influence of bureaucratic despotism and Greek philosophy, represented a degeneration rather than an enhancement. Jurisprudence (that is to say, legal doctrine) was not a branch of applied philosophy or a gloss placed on the deeds and decisions of power. It was no satellite to some other intellectual or political activity. It lay at the center of a conceptual and practical universe, and spoke in its own, distinctive voice, without apology or disguise.

This self-understanding of the civil law has stayed alive ever since, modified, but not discarded, in the age of democracies and of codes. The single most influential work of modern civil law -- Savigny's "On the Vocation of our Time for Legislation" -- states the view. The heart of the law does not reside in codified law, written down in statute books. It lies in the doctrinal elaboration of a form of social life, irreducible to the abstractions of political philosophy or social theory. It is inseparable from the historical project of a people, now represented in the new vocabulary of nationhood.

The treatment of codes as the primary source of law is, on this view, characteristic of the senility of legal thought and of decadence or defeat in the adventure of nation-

building. The codes, for such a view of law, are something like what the Restatements of law were for the American law of the twentieth century: a set of rules of thumb, to be understood and used as a convenient abstract of preexisting legal doctrine. Particular laws continued to be seen, in the manner of the classical jurisprudence, as localized interventions in an evolving corpus of doctrine, entrusted to the care of the jurists.

It is a view that conflicts with the claims of democracy and, more generally, of political authority, democratic or not. The sovereign may want to make law, as much of it as possible. If the sovereign wears the mantle of democratic legitimacy, the will to make law must be all the more forceful. Among the core meanings of democracy is the subjection of the terms of social life, including the institutional arrangements of society, to collective self-government.

The institutions that have up to now stood for democracy have been inadequate instruments of this commitment: they have continued to inhibit the transformation of society through politics. They have renewed the power of the dead over the living. They have made change await crisis. It is incompatible with democracy that the organization of society be imposed by forces, of interest, preconception, or tradition, without democratic confirmation, if not democratic invention.

Every set of constitutional arrangements that has existed in the history of democracy up to now fails to subject the real structure of society to the processes of deliberation that it established. However, each constitutional regime fails in a different way. The constitutional tradition of the United States, for example, fails by associating, as if they were naturally and necessarily connected, a liberal principle of fragmentation of power (realized through the multiplication and separation of powers) and a conservative principle of the slowing down of politics (achieved through the Madisonian scheme of checks and balances).

The aspiration to subject social order to democratic decision has always outreached its institutional form. In the history of states over the last few centuries, democracy has become the most widely accepted basis for the will to make law. In those civil-law countries, notably France, in which a revolutionary tradition took the strongest hold, the ancient civilian conception was placed on the defensive and made subordinate to a view that recognized legislation, in judicial practice as well as in political theory, as the foremost source of law. Even then and there, the classical idea remained alive in the minds and in the work of the jurists.

They continued to take a leading role in writing the laws, particularly the basic corpus of private law. Those laws that they did not write, the civilians continued to interpret, breaking down, through successive doses of statutory construction, the contrast between statute and doctrine. Even when the jurists failed to draft the laws, they worked to assimilate the legislative material, through persistent statutory construction, into the idea world of doctrine, as if to dissolve and incorporate the alien graft.

Thus, the civilian spirit was perennially rekindled, even when the organization and the principles of politics seemed to contradict its assumptions and methods. To this day, the attempt to represent the law as a comprehensive, intelligible and defensible ordering of social, economic, and political life, remains the self-appointed task of the jurists. The conception of this task survives, despite its troubled and contradictory relation to democracy and notwithstanding its opposition to the epistemological and methodological biases of contemporary thought. The increasing powers assumed by judges, under the disguise of interpretation, in many civil-law jurisdictions, have provided further support for the survival of this ideal, as judges rebel against the role of passive, literal-minded servants of the legislature and return to what for the jurists has always come most naturally.

These remarks about the civil law apply, with remarkably little adjustment or qualification, to the Anglo-American common law. Indeed, a common lawyer, trained to regard the civil law as "code-based law," might mistakenly suppose that it was only to the common law that they applied. Difference in the relative roles of jurists and judges in the civil and common-law traditions obscures the fundamental resemblance of their attitudes to the practice of legal doctrine. Once again, there is the view of a practice of reasoned, case-by-case elaboration of law, through which, in Lord Mansfield's phrase, the law "works itself pure." Once again, statutory law is regarded as a series of largely focused interventions against the background of a body of doctrine that, renovated and revised by case law, continues to define many of the most basic arrangements in every part of social life. Once again, the jurists look down on efforts to reduce this body of doctrine to a compendium of rules (as in the Restatements of Law or the treatises of the academic jurists), regarding such efforts as a minor art and a gross simplification of the content of doctrine. Once again, the claims made on behalf of legal doctrine enter into conflict with prerogatives of democracy, parliamentary sovereignty having played in England a weaker version of the role that revolutionary democracy has played in France. Once again, legal doctrine (even if elaborated through judge-made case law) relinquished its primacy only in public law. In American constitutional law, however, it nevertheless retained that leading role, given that the American constitution has been changed more often by finding new meaning in the unchanged words of the Constitution than by changing them outright.

The American debates about judicial activism and judicial self-restraint simply present these tensions through the prism of controversies about the role of judges, given that it is judges who in Anglo-American law have performed some of the roles that the civil law, over much of its history, assigned to jurists who held no judicial office.

What can be said of the civil and the common law can be said, as well, of most of the major legal traditions in world history. For a body of doctrine, such as Islamic jurisprudence, that claims for itself a source in divine revelation and that seeks, on this basis, to shape the whole of social life, the authority and the independence of doctrine

may be even greater than in a secular legal order like the civil or the common law. God remains further away than is the prince or the legislature; his provision for society therefore becomes more susceptible to be taken for whatever the jurist-theologians say it is.

The persistence of a similar view of the nature and work of legal doctrine in so many different legal traditions and across such a broad range of historical time and space only makes the riddle of its subject matter more significant and more striking. What is legal doctrine about if it is neither the context-bound interpretation of the edicts of a sovereign (even a sovereign legislature, legislating under constitutional restraint) nor the application to social life of a political or moral philosophy? When a civilian explores the sources of obligation or the typology of contracts, as civilians have for many centuries, and has the sense, in so doing of helping to give justified sense and shape to a particular form of social life, what is he doing other than surrendering to a deluded and dangerous legal Platonism? What are the topic and the work of this universal practice?

The work is the representation and reconstruction of law, tested against particular case and circumstance, as an ordering of social life that the participants in a particular society can understand and embrace, in the light of the interests that they recognize and of the ideals that they profess. The alchemy to be performed by legal doctrine is therefore the revelation or the transmutation of what would otherwise be the brute fact of the way things are into an order that can be the subject and the outcome of a discourse. The discourse concerns the forms that human association can and should take in different domains of social life.

It is not a conversation that needs to begin from scratch. It has always already begun. At the center of this work lies the relation between ideals or interests and institutions or practices. The characteristic ambition of legal doctrine is to recognize and support their marriage in the detailed materials of the received law, and to make it, little by little, a more perfect union.

The methods by which doctrine seeks to execute this task vary according to the conceptual as well as the political commitments that may prevail in each place and period. The common element of these methods is the service that legal doctrine renders to the rational reconstruction of extant law as an intelligible and defensible plan of life in society. Such a plan must be capable of being grasped by any participant in a particular, historically located social world, not just by an academic jurist.

The subject matter is therefore the immanent order that is to be both revealed and developed through the work of doctrine. The doctrinal categories are simply the formulaic residues or expressions of the practical, enacted vision.

The trouble is that no real society is the product of such a vision. No body of legal doctrine can work without accommodating to a real structure that doctrine did not invent and cannot, by dint of its alchemy, remake. Before exploring the nature and implications of this trouble, I discuss some of the assumptions on which the work of legal doctrine

relies. These assumptions bring this work into conflict with ways of thought that have become orthodox. They turn legal doctrine into an anomaly and an enigma.

5. The true character of legal doctrine remains elusive, despite the persistence and recurrence of doctrinal thinking in law across a broad range of times and traditions. It does not conform to methodological and epistemological assumptions that have long been dominant in the high cultures of the Western societies. Our prevailing preconceptions about inquiry and authority are so foreign to the spirit of doctrine that a practice, entrenched for hundreds and even thousands of years, at the pinnacle of the high cultures of world civilization, threatens to become an all but impenetrable mystery. Yet the practice of legal doctrine was once not only understood but revered as exemplary of the highest responsibilities of language and thought. It was the place at which the realities of power were believed to meet the aspirations of spirit: if only the part of those aspirations bearing the seal of orthodoxy.

That is not to say that legal doctrine is unchanging or eternal, only that it has enjoyed much greater staying power and much more universal influence than we have been willing to recognize. To our eyes, impressed by the discursive orthodoxies of the last few centuries, the doctrinal endeavor may seem so hopelessly archaic and so dependent on claims against which our established beliefs rebel, that its survival may seem disconcerting. We are tempted to translate it into forms that make it more acceptable to our pieties of method. In so doing, however, we risk misunderstanding its character and its consequences as well as its relation to the opposing approach to law, as the will of the sovereign.

The best way to understand what legal doctrine has been over the long sweep of history, is to place it alongside two other different but similar instances of doctrine: theology and grammar. Of these two instances, however, the first has a far closer connection and resemblance to legal doctrine than the second. Legal doctrine, theology, and grammar stand in contrast to the social and cultural study of law, the social and cultural study of religion, and linguistics (as the science of language).

These disciplines of doctrine share certain connected attributes. First, their discourse is constitutive of their subject matter; it is not discourse about so much as discourse within. That is not to say that the subject matter is created solely by the discourse, for it has many sources. It is to register that the discourse helps make the subject matter. Unlike the sociology of law, the sociology of religion, and linguistics, legal doctrine, theology, and grammar help shape law, religion, and language. They do so not as an unintended effect but as one of their explicit and organizing goals.

One of the corollaries of this feature of doctrine is to defy, in this relation to its own subject matter, the contrast between description and prescription. Doctrine seeks to put the best possible face on the materials it interprets and elaborates. No wonder: it is their co-author. The effort to offer the best possible account -- the one that remains

faithful to the undertaking, or undertakings, embodied in the materials -- has, as its reverse side, the struggle against mistake, heresy, and perversion.

Another corollary of the same trait is that the makers of doctrine are engaged, as interested partisans, in struggle over the future of the discursive or symbolic tradition in which they participate. The posture of the disinterested scientist or observer conflicts with the nature of doctrine.

A second attribute of doctrine is that although no clear line separates it from its subject, the subject matter itself is internally divided or bi-dimensional; it is a field of symbolic or intentional human activity. The textual or verbal materials must be interpreted in the light of a project (in legal doctrine), a message (in theology) or a view of canonical usage (in grammar). In this sense, as well, doctrine refuses cleanly to distinguish analysis from normative judgment; the two come together in the engaged elaboration to which doctrine is devoted.

These first two attributes of doctrinal practice are complementary: each implies and reinforces the other. Together, they distance doctrine from the study of natural phenomena. However, they also make methodological moves and epistemological claims that lack a secure or familiar basis in now prevailing views of argument and knowledge. From the standpoint of positive social science, they may seem old-fashioned and suspect, deploying superstition and confusion in the service of consensus and authority. From their perspective, however, it is positive social science that is disoriented, oscillating as it does between the treatment of social facts as if they were states of nature (as recommended by Durkheim and practiced in much hardcore, empirical social science) and an account of social and cultural life focused on the interplay between intentional, or accepted meaning, and brute causal constraint (as recommended, but not always practiced, by Max Weber, as well as by the main line of modern anthropology).

These two features of doctrine help explain a third: every doctrinal argument implies a claim to exercise power. For legal doctrine, it is the power of the state, involved in the enforcement of law. For theology, it is the power of the religious community, acting, through whatever ecclesiastical organization it has established, in the name of divine authority. For grammar, it is the power of the speech community, or of those within that community who claim to discern, to guard, or to exemplify the canon of proper usage.

The power to which legal doctrine and theology lay claim is immensely greater than any power to which grammar can aspire, even more so when legal doctrine and theology combine, as they so often have, at the commanding heights of so many of the major cultures and states of the past. They have done so most often in the agrarian-bureaucratic empires that were, until relatively recently, the chief political entities in world history.

The claim to influence the exercise of power imparts to the work of legal and religious doctrine its sober and fateful character. Its work must be done in a climate of



hope and apprehension: every misapplication of power may lend force to a downward cycle of injustice or sin.

Such is the world of ideas on which the practice of doctrine depends. In the absence of a discursive, theorized practice with these traits, the idea of law as immanent order would make no sense. The deployment of this practice, however, readily suggests to the jurists the reasonableness and the practicality of this idea of law. The repeated practice of the method will, over time, do more than identify the otherwise fragmentary and contradictory elements of an intelligible and defensible plan of social life in the materials of the law. It will slowly help recast those materials until they seem more fully to embody such a plan. Then the idea of a normative order immanent in social life will retrospectively vindicate the assumptions and claims of doctrinal practice. The two together -- the method and the idea -- have made legal thought what it has been for much of its history.

Doctrine undergoes many historical variations. At the present time, the most important such difference in doctrinal method is the difference between the formalism or conceptualism that we associate with the nineteenth century and the avowedly post-formalist, purposive style of legal analysis, represented in the vocabulary of policy and principle, that came, increasingly, to prevail in the course of the twentieth century. The continuities between these styles of doctrinal practice, as well as between their political assumptions and aims, wholly overshadow their differences. The post-formalist style exemplifies every one of the attributes of doctrine just as much as its formalist predecessor did.

6. The enduring, central aim of legal doctrine has been to represent and reconstruct law as immanent order. It is to the analysis of the idea of immanent order, presupposed in the work of legal doctrine, that I now turn.

Society exists in the mind as well as in the outward, observable routines of conduct and interaction. No social practice or institution can work without being brought under a conception in which many minds can share. There are no social practices that can be reduced to the compulsive routines that the old animal ethology used to call instinctive: that is to say, behavior regulated by genetically determined guides requiring no conceptual representation of the field of action

Indeed, the conventional distinction between the concepts of practice and of institution builds on this requirement. An institution is a set of rules and beliefs shaping a cluster of practices that is informed by a conception of how people, in a certain domain of social life, can and should deal with one another. The shaped practices are already mediated by representations; they are never unmediated by ideas. In speaking of institutions, we draw attention to the relation between representations and rules in imparting particular order to a form of social life; the clusters of practices that are the

institutions give every form of social life its structured and discontinuous character. The institutions amount to focal points of both order and meaning.

Call this mediation of legally expressed institutions and practices by ideas and ideals of human association the fact of representation. Its significance and effects can be understood only by taking account of its relation to two other facts about society and about law, which I shall call the facts of legitimation and of incompleteness.

No order of society can be stable if it fails to be represented in ways that make it compelling to those who participate in it. The representations that breathe life and meaning into practices and institutions must make them seem a tolerable solution to the problems of social life. It is not enough that they make it possible to understand these practices as the expression of a vision of society. They must also do so on terms that command assent and allegiance.

There is both a minimalist requirement and an exacting task. The minimalist requirement is that society not be viewed as a nightmare of brute force, in which the triumphant enslave those who have surrendered, and the fear of death, or the abandonment of hope, become the commanding motive to conform. An approach to the explanation of established practices and institutions that accounts for them simply as the effect of causes unrelated to the concerns of the living human agents who must inhabit the order, and make the best of it, fails to satisfy this minimalist requirement.

Take, for example, the idea that a class hierarchy depends on the stability of arrangements and assumptions that are relatively insulated against challenge and change. According to this view, such a hierarchy in turn makes possible the coercive extraction of an economic surplus, required, in turn, for the development of the productive powers of humanity. This development may have value for the species. The vast majority of individuals, however, find themselves consigned by such a story to the role of a hapless and involuntary bit players in a narrative of collective empowerment and personal enslavement. A causal genealogy of the institutional order of social life is not enough to change these facts if it casts the individual as agent of collective, long-term interests, incapable of translation into the unyielding dimension of biographical time.

Marx's view of ideology as the representation of class interests as universal interests is not enough to meet even this minimalist test if the universal interests can be achieved only in the historical time of the species rather than also in the biographical time of the individual. We live not as representatives of the species but as mortal organisms, within the bounds of a lifetime.

The exacting task is to have the conception live less as a theoretical system than as a discourse informing a view of people's relations to one another in different areas of social life. Such a conception may be loosely organized. It may be capable of expression and development in different variations. Among these variations, there may be varying shades of emphasis and even outright contradictions. What people owe one another by virtue of occupying certain roles vis-à-vis their fellows must be grasped against the

background of a more comprehensive understanding of social life: an understanding that is at once normative and descriptive.

The idea of society is indeterminate even when it is idealized. No particular ordering of social life is natural or necessary. None enjoys uncontested authority. Each must win its authority. One way in which it may do so is by appearing to be natural and necessary: the translation of the indeterminate possibilities of social life into the needs of the day, the outcome of a long co-evolution, or even the vindication of divine providence in the profane realities of the historical world.

The abstract idea of society must be translated into a connected series of schemes of human association: a practical, context-specific view of what relations among people can and should like in each part of social life. In each such field, the model or models of human association will be at once descriptive and prescriptive. They will connect downwards to a discourse about what people owe one another, especially what they owe one another by virtue of occupying certain roles. They will connect upwards to a plan of social life that can be held, at least implicitly in the mind, and serve as a basis for inferring our obligations to one another.

Such a plan will amount to a repertory of forms of human association. No single statement will give it definitive and exclusive content. It will be what twentieth-century cultural theory called a mentality or a form of consciousness, with a characteristic thematic content and a limited elasticity. It will allow for some ways of conceiving the possible and proper forms of human association in particular realms of social life, and exclude others.

Consider, for example, a way of conceiving our dealings with one another in the setting of economic activity. The abstract idea of a market economy may be identified with a particular set of institutional arrangements for the organization of the market, manifest in particular regimes of contract and property. Similarly, in each domain of social life, a view may be established on the basis of a double reference: to inchoate aspirations, values, and meanings and to particular arrangements.

It forms part of the historical practice of such views of human association to pretend that the aspirations and the arrangements are indissolubly bound. They are not. The abandonment of the pretense always helps begin a new turn in the history of society.

Now take a step back. The arrangements of a society and of a culture, I have argued, amount to frozen politics. They take shape as a result of the interruption of our practical or visionary strife over the terms of social life. As the conflict is suspended or contained, the arrangements gain an independent life. To the extent that they insulate themselves against challenge and change, they may appear to us as if they were natural phenomena rather than the human constructions that they are. All our most fundamental interests oppose such a naturalization of the orders of society and culture: our material interest in the development of our practical powers (on the basis of the broadest feasible range of recombination and experiment); our moral interest in the lifting of the grid of

social division and hierarchy that burdens our relations to one another; and our spiritual interest in being able to participate in a social and cultural world without surrendering to it.

However, we also have an interest that runs in the opposite direction. Exhausted by past fighting and fearful of new struggle, intimidated by the force of the established order, and impressed by its pieties, which ceaselessly present to us our anxieties and yearnings in the language of its doctrines and compromises, we determine to make the best of the situation. We form the idea of putting the best face on the situation in the hope of improving it. We begin to see it as a flawed and fragmentary approximation to an intelligible and defensible plan of social life, manifest in a loose series of descriptive-prescriptive models of what relations among people can and should be like in different areas of social life. We mobilize all the resources of high culture, including those of legal thought, in this effort. Call the persistence of this move across history the fact of legitimation.

The facts of representation and of legitimation form part of the background to the idea of law as immanent order. They fail, however, to form all of that background. The reason is that there is, alongside the facts of representation and of legitimation, a fact of incompleteness. No conception of law as immanent order, no view of what we owe one another by virtue of the roles we perform, no repertory of prescriptive, context-bound images of human association accounts for the reality of how a particular society is organized and of how it feels to live within it. There is a real history of material constraint and insatiable desire, of struggle and surrender, and of cooption and resistance. This real history is full of contradiction and obscurity, of false starts and never completely suppressed alternatives, and therefore as well of alternative futures.

In this real history, the interruption or containment of struggle over the terms of social life, which allows the structures of society and of culture to take definite shape, and even to gain a semblance of naturalness or necessity, is never complete. The contest over those terms is forever renewed by the combination of two factors.

A first source of its renewal is the persistence in any society of arrangements and beliefs that do not reflect the dominant forces and the triumphant ideas. The institutional and ideological settlement that results from the partial suspension or diminishment of practical and visionary strife is always less a system than it is a compromise. To describe it as if it were a plan conceived by a single mind and will is to disregard its nature as the outcome of surprising conflict among many minds and many wills.

A second source of the renewal of the contest in the midst of the peaceful management and reproduction of the settlement is the ambiguous relation of recognized interests and of professed ideals to the established institutional order. There are always ways to define and defend these interests and ideals that take the order for granted and leave it unchallenged. For example, those who speak for the interests of the organized industrial labor force, established in mass-production industry, may today choose to

define and defend them in ways that presuppose the continuance of the present forms of industrial organization, fighting a defensive campaign against the disruptive effects of technological innovation and economic globalization.

Such institutionally conservative ways to define and defend interests is that they identify the groups that are closest in the social and technical division of labor as rivals and adversaries: for example, the subcontracted or temporary workers or the workers in foreign countries who stand to benefit from the outsourcing of national production. Approaches of this kind to the definition and defense of group interests are thus socially exclusive as well as institutionally conservative.

However, there are always also ways to defend and define interests and ideals that take as their premise the reorganization, including the institutional organization, of some part of social life. They abandon, for example, the attempt to prolong the survival of the present form of mass production industry, as the economic basis of the industrial working class. They do so in favor of an effort both to accelerate and to reorient the change that is underway in the practices of industrial production, as well as in the legal arrangements of work, around the world.

The predominant form of the present shift is the path of least resistance: the one that does the least injury to the dominant structure of advantage and opinion. It leaves the advanced, post-Fordist forms of production quarantined in vanguard sectors that fail to include most of the labor force, even the industrial labor force. Moreover, it is accompanied by a change in the legal organization of work. For every worker who labors in large productive units under the aegis of major corporations, there are now an increasing number of workers who at best belong to a network of contractual relations, contributing to some piece of the final product, under another aegis, and in a distant place. The result is to resurrect, in new form, a way of organizing production that was common in Western Europe before the nineteenth century: work organized as a decentralized network of contractual relations, albeit under the command of a "capitalist" or a corporation.

The leaders of the industrial working class may well conclude that their best chance of the interests that they represent lies in embracing rather than in resisting this shift in the forms of industrial production and in the legal organization of work. However, these chances are acceptable only if implemented in ways that open the gateways of economic and educational access to the advanced forms of production. Moreover, they would also need to develop a body of law and of legal ideas that prevent the change from resulting in the generalization of economic insecurity, disguised as economic flexibility

Such a project cannot advance without a combination of institutional innovations and inclusive alliances. Among the innovations, may be arrangements governing the form of strategic coordination between governments and firms. These arrangements may provide for a type of coordination that is decentralized, pluralistic, participatory, and experimental. In so doing they may ensure an alternative to the present choice between

the arm's length regulation of business by government (as in the United States) and the formulation of unitary trade and industrial policy, imposed top down by the state (as in the northeast Asian economies of the late twentieth century). The point would not be to select winning sectors a priori, with all the attendant dangers of favoritism and dogmatism; it would be to broaden access to the practices and resources of the advanced practices of production. Among the alliances would be those with the same groups -- such as temporary and subcontractor workers -- who the conventional, conservative understanding of the interests of workers habitually regard as rivals and threats. Such an approach to the definition and defense of a group interest is institutionally transformative and socially inclusive; its social inclusiveness is just the reverse side of its bias in favor of structural change.

There is thus always a duality of ways to define or to defend an interest or an ideal. Although some of these ways are institutionally conservative and socially exclusive, others are socially inclusive and institutionally transformative. This second family of approaches to the advancement of an interest defies the limits, and encourages the revision, of the established institutional and ideological settlement, and to the distribution of power and advantage that this settlement supports.

The real nature of such a settlement, its origins in a contingent history of innovation and constraint, of conflict and cooperation, its outcome in compromises that defy reduction to rationalizing formulas, and its intimate link to the distribution of power and advantage, all this forms a central part of a reality undreamt of it in the doctrinal work of the jurists and irreducible to their ideas about immanent order in society. Yet it is a reality to which those ideas must adopt, and which they must in practice presuppose, for legal doctrine to do its work.

A simple thought experiment both clarifies and confirms the fact of incompleteness. Suppose that as an outsider to a society, coming from a place far away from it in time and space and uninformed of its history and particulars, you can decipher its language and gain access to all its texts of law and legal doctrine but to none other. You would be unable to infer from these sources the actual organization of the society and the economy.

If, for example, you knew the Roman law of slavery and manumission of the late Republic, in the sense of having before your eyes the narrowly legal and doctrinal sources of this law, and knew, under the same restraints, the law of obligations and the commercial law, you would find yourself at a loss. You would have little idea of what the rules and doctrines really meant: of the way that free and slave labor coexisted, of the lives of slaves and freedmen, and of the ideas informing the law. The words themselves would remain all but impenetrable mysteries to you, with thin and ambiguous meanings, deprived as they would be of the context that would bring them to life and fix their significance.

The understanding and elaboration of doctrine relies on a context about which it regularly remains silent. The illusion bred by the insider's perspective is that the categories of doctrine carry a meaning of their own, independent of the absurdities and accidents of history. They do not.

Legal doctrine conveys meaning to the participants in a social and cultural world and becomes a guide to their practical application of the law because they can decipher the doctrinal categories against their assumed, undescribed social and cultural background. Otherwise, doctrine would appear to the jurists as it must to an outsider ignorant of its historical context. With the recognition of this fact, however, there emerges the central contradiction underlying the practice of legal doctrine: it must express an intelligible and defensible conception of social life whether or not reduced to a system of rules and propositions, and it must adapt to a real structure of society, forged in the realities of history rather than in the minds of jurists. How can doctrine be both the embodiment of such a conception and an adaptation to such a structure? How can legal reason (if by legal reason the ancient and universal practice of doctrine) make peace with legal history? The doctrinal conception of an intelligible and defensible plan of social life, embodied, although in flawed and fragmentary form, in the law, differs so starkly from the rough conflicts and compromises of historical experience that no such spontaneous convergence between legal reason and legal history could ever be expected to exist.

The ideas, the categories, the very words of legal doctrine must be understood in a way that adapts the conception of immanent order to the real structure of society, as that structure emerged from the most recent institutional and ideological settlement. To this end, the conception must always be formulated in ways that are sufficiently ambiguous and elastic to render such an accommodation possible. There is no easy synthesis between idealized belief and recalcitrant circumstance: their marriage must be forced, literally at gunpoint.

What makes this forced marriage feasible, as a matter of both method and conviction, is the incompleteness of the conception, confirmed by the thought experiment that I earlier described. Law deals with the details of social life; it defines, in fine texture, the institutional form of the life of a people. The ideas of doctrine may be rendered evermore more concrete by a process like the one that Thomistic scholasticism labeled determination (by contrast to deduction): the progressive refinement of an abstract conception. But such determination is so susceptible to taking alternative directions that it would be blind and unlikely to reach its destination -- a point close to a regime of social life already in place -- if the jurist failed to see that point of arrival. He must continuously adjust the process of determination to be sure that he reaches it. He does not need a third eye to see it. All he needs is his tacit knowledge of the real structure.

Moreover, doctrine would be unable to perform the role assigned in my remarks about the fact of representation, and it would fail to carry conviction even for its own

practitioners, if it had unlimited elasticity: it could be used to re-describe any social practice. Doctrine must be seen to be in tension with discrete elements of the real structure of society. The more the practice of doctrine succumbs to the temptation of abstraction and system building, in conflict with the methods that both civilians and common lawyers revere as classical, the greater the risk that the tension between conception and practice will increase. If the tension becomes too great, doctrine ceases to be doctrine; it turns into the political criticism of society, undertaken in the name of a philosophical or political program.

In the legal and political thought of contemporary democracies, the most important expression of the forced marriage between legal doctrine and the real structure of society is the coexistence of two distinct and contradictory vocabularies about law, both of them conventional and unthreatening

The first is the vocabulary of interest group politics. It represents law as the outcome of regulated conflict and compromise, carried out according to the ground rules established by the constitutional arrangements. Its core setting is legislation: the making of law in party politics. Each group represents its interests (as it sees them) in the language of the public interest. However, these public discourses of right, whether couched or not in systems of policy and principle, are in as much competition with one another as the material interests that they are used to promote.

To take seriously the assumptions of this first vocabulary is to expect law to be the repository not of system, even an incipient and developing one (the law "working itself pure"), but of a series of compromises irreducible to formulas and specific to the historical circumstances in which they were struck. This way of talking about law does not map the real structure of society. It nevertheless reveals with little disguise the simmering, low-level contests that accompany the day-to-day reproduction of any institutional and ideological settlement.

If the first vocabulary is prospective, the second is retrospective: it is deployed to represent law after it has been made in legislative politics. Its core setting is adjudication. Only when law is judge-made will this second vocabulary share the space of conventional discourse with the vocabulary of regulated conflict and compromise instead of monopolizing this space. In the post-formalist legal culture of today, it represents law as a repository of connected policies and principles, fragments of a compelling scheme for life in society. In the legal culture of the nineteenth century, it expounded law as the progressive revelation of the predetermined content of a type of political, economic, and social organization. Other legal cultures, in different moments and traditions, exemplified further variations on the same theme.

The peaceful coexistence of these two vocabularies in the legal and political cultures of the contemporary democracies is as mysterious and disconcerting as the relation of the doctrinal quest for immanent moral order to the real structure of society. Indeed, the former mystery is a lesser and derivative expression of the latter one. The



solution to both the fundamental and the derivative enigma lies in the incompleteness of the conception of immanent order that legal doctrine, in all its many versions, has always embraced, and in the unexplained and unargued accommodation of doctrine to the real structure of society.

7. The ineradicable incompleteness of legal doctrine enables it to adapt not only to the real structure of society but also to the law that is made by the sovereign. These two types of accommodation, however, are of an entirely different order. Reliance on the real structure of society is largely unacknowledged, and practiced without any effort to justify it, in the history of law and legal thought. Until the emergence of law-based and especially democratic states in the last few centuries, the limited transformation of law by the will of the sovereign has been explicit. It has also been openly justified: the sovereign makes limited changes in the law in order to deal with problems that the established law, represented in doctrine, fails to address. He responds to one practical emergency after another. He does not reshape the law as a whole.

A particular view of the relation between law as the as immanent moral order and law as the will of the sovereign has prevailed, in many different variations, across a broad range of legal traditions and historical periods. According to this view, the jurists, or the jurist-theologians (in systems of sacred law), rather than the princes (so to designate the holders of the chief power in the state) are the principal custodians of the law. Law, in this same view, is a body of rules, standards, and ideas, founded on custom, on social and legal tradition, on the practical needs of social life confirmed by experience, and occasionally on divine revelation. However, it exists in states, and the rulers of these states also make law. The law that these powerholders make takes the form of sporadic and focused interventions rather than of a comprehensive ordering of social life.

This focused and sporadic character of law-making by the sovereign is more than a theory; it is a summary of what, for most of legal history, has been the fact. The prince intervenes to require some actions and to prohibit others, or to take from some people and to give to others, but he otherwise leaves the established body of "common law" alone. (I here take the common law as a term to describe both the Anglo-American common law and the *ius communis* that was long the chief object and product of doctrine for civilians.) It is the common law, modified only at the margins by the edicts of the prince, and seen as the imperfect and corrigible embodiment of the immanent moral order, that legal doctrine is committed both to reveal and to develop.

A characteristic of the state-building projects that have become dominant in the world in the last few centuries is to arouse an ambition the novelty and revolutionary character of which we often fail to recognize. The slogan of the "rule of law" connotes both sides of this ambition. One of its sides is the commitment to bring all social life under the governance of made law. The second side is to submit the whole activity of the state to the discipline of law, and to express this activity as law.

The implication of the two-sided ambition is that the law becomes what the sovereign, acting within the bounds of law, especially within the bounds of law about law-making, says it is. Common law, guarded by the jurists (whether or not judges) may continue to regulate much of social life. However, according to the pretenses of this rule-of-law idea, this law continues to hold good only so long as the sovereign consents to its perpetuation, renewing its validity by his will.

The commitment to the rule of law in this twofold sense amounts to a revolution in the organization of political life that is second only to the creation of states in the earliest history of civilization. The revolution was so radical that even the agrarian-bureaucratic empires achieved it only in phases of their history and wavered in upholding it. For much of the history of those states, it remained an only partly implemented program of the most ambitious rulers and the best-established regimes: the ones that had come to terms with the weakness of an autocracy unsteadied by law. It came into its own and became the nearly universal doctrine of governments only in the recent history of mankind, under the pressure of the imperative to compete, economically and militarily, with states that had already embraced it.

A consequence of the rule of law idea is to create both a threat and a task for the project of legal doctrine and for its conception of immanent moral order. The threat is that the rule-of-law sovereign, even the rule-of-law democratic sovereign, will not be content to intervene episodically, in the conventional fashion of princes before the ascendancy of the rule of law ideal. He (or it) may insist on exercising their prerogative to remake all or much of the law. The task, for those who would salvage the idea of doctrine, is to find a way to submit to the will of the sovereign without abandoning the doctrinal pursuit or its guiding commitment to the representation of law as an ordering of social life that conforms to a conception, or to a series of connected and evolving conceptions.

For the practice of doctrine, as traditionally understood, to survive, whatever the sovereign wills as law must be rationally reconstructed in one of the many vocabularies by which the jurists have worked out such conceptions: for example, the nineteenth-century vocabulary of the legal concepts and the systems of rules and rights that represent the built-in content of a type of political, social, and economic organization, or the twentieth-century vocabulary of impersonal policies and principles that supposedly underlie, inform, and justify the laws.

The most commonplace setting in which the jurists must accomplish this task is their relation to legislation, at the moment at which the statutes are drafted and, more importantly, at the moment at which, once enacted, they must be interpreted and applied, case by case, problem by problem.

Napoleon, the post-revolutionary autocrat, as committed to the rule of law as he was intolerant of any restraint on his power, decides to give France a code. To draft the code, he calls the leading civilians. He and his henchmen, soldiers and schemers, are too

busy and too ignorant to do the work themselves. The beneficiaries of his delegation of power adapt the preexisting body of civilian doctrine to the moral and political ideas of the day, in one fell swoop rather than little by little, as they used to do before the revolution. To the whole world of non-jurists, pre-codified civil law has now been replaced by the law of the code. The jurists know that the law of the code amounts to a restatement, with marginal adjustments, of the law before the code.

Then the civil code must be expounded in the law books, taught in the schools, and applied in the courts. The civilian culture goes to work assimilating the new statute to the civilian system, in the manner of the defenses of an organism working to isolate, dissolve, and absorb a foreign body lodged within it. This process takes place in the country that of all European societies is the one in which the idea of law as the will of the sovereign, reinforced by the revolutionary republican tradition, had taken, and would take, its most assertive form, in conflict with the ancient pretensions of doctrine. The same story has been repeated in countless variations wherever the rule of law ideal has become paramount.

Two factors, however, different and separate from each other, aggravate the conflict between the rule of law and the devotion of legal doctrine to the rational reconstruction of law. One of these factors is a constitutional practice related to a political idea: democracy. The other factor is an idea about law with implications for the organization of law-making: the view of law as the will of the sovereign.

A core meaning of democracy is that the terms of social life, established in law, be chosen according to constitutional procedures guaranteeing the rule of the majority, subject to the rights and privileges of the minorities, and assuring the political minority of its chance to become a political majority. The terms of social life are not to be set by custom or non-democratic authority, unless confirmed by democratic decision. An example of non-democratic authority is the authority of the jurists to expound and develop law, although under the guise of rational reconstruction and in the name of collective wisdom and national tradition.

Those anxious to attenuate the tension between doctrine and democracy may take the failure of the democracy to challenge and change the law that democratic government failed to make as a sign of consent to that law: "*qui tacet consentire videtur.*" However, the repeated appeal to this presumption reduces the democratic claim about law to a sham.

The second factor aggravating the conflict between doctrine and the ideal of the rule of law is the theory of law as the will of the sovereign. This theory has long been the most important rival to the view of law as immanent moral order in society. There will be much to say about the rivalry between these views of law: it is the most important theme in the world history of legal thought.

8. The incompleteness of the conception of immanent moral order, as well as its unacknowledged dependence on the real structure of society, become unmistakable in the course of an effort to grasp how this conception does, can, or should develop. No legal culture has ever imagined this conception to be static. Yet none has ever worked out a view of its development that does justice to the relation between the history of consciousness and the history of institutions. Law, however, is just that: the encounter of institutions and consciousness in a form of social life.

The permanent temptation of the jurists is to imagine that the legal and political ideas in which they express an intelligible and defensible plan of social life has an internal dynamic propelling it forward. At any given time, their evolving plan is full of gaps and inconsistencies, they may readily concede. At any given time, it is likely to be dishonored by many individual transgressions and social practices. However, they believe, it evolves by working to overcome such gaps and inconsistencies. It purifies itself.

In the history of Western philosophy, there is a work that presents as philosophy this secret idea of the jurists: Hegel's *Phenomenology of Spirit*. The guiding conceit of that work is the need of man in society to bring his life under a conception, the contradictions of which, within itself as well as with experience, then become the motor of change. They propel spirit forward until, at last, all contradiction is overcome and spirit comes to be at home in the world. If we put aside the denouement of the final reconciliation, this view contains, raised to the highest level of generality, all the elements of the jurists' understanding of their own activity. It exemplifies each of the facts invoked by their quest for immanent moral order: the fact of representation, the fact of legitimacy, and, up to the last chapter of Hegel's narrative of the ascent of spirit, the fact of incompleteness.

The defect in this self-conception of doctrine and of spirit is the one that motivated Marx's criticism of Hegel's phenomenology as of his entire philosophical system. The real life of society and of humanity cannot adequately be accounted for by an internal history of our dominant conceptions and of their imperfect marriage to the practices and institutions of society.

Man may be spirit, in the sense of overflowing the institutional and conceptual contexts that he builds and inhabits. However, he is embodied and situated spirit, not an incorporeal angel. He is neither shackled helplessly to his historical circumstance nor free to escape by pure thought and will. There is a history of forces, structures, and constraints, and of the hierarchies of advantage that they support, that our ideas only imperfectly penetrate and master. Our beliefs are belied by our experience.

The trouble is that Marx's criticism of the Hegelian narrative requires a theory of the discontinuous making of the institutional and ideological structures that shape people's dealings with one another in any real society. The revolutionary insights of the theory that he offers are disfigured by the necessitarian superstitions that I earlier

enumerated: the view that there is a closed and predetermined list of such structures in human history (for Marx, the "modes of production"), that each of them forms an indivisible system, changing all at once or hardly at all, and that irresistible laws drive their succession in history.

Disbelief in these superstitions, even by Marx's own followers, has not, for the most part, given way to an alternative view of the structures and of their remaking: one that would deepen the core insights by expunging from them the taint of the misguided necessitarianism. It has been followed on the whole, in the positive social sciences, by the denial of those insights and by the consequent naturalization of the established arrangements and ruling assumptions of society. As a result, the self-understanding of the jurists has been left without its rightful corrective.

### Law as the will of the sovereign

9. Law is the will of the sovereign. The sovereign is the one who has the power to make law. This supreme source of law is ordinarily a set of institutions and of institutional roles, defined by the constitutional arrangements

Of all the criteria that raise arrangements to constitutional status, the most important is that they define who makes law. That they be entrenched, and require for their revision qualified majorities and exacting procedures, is a lesser standard of constitutional significance, not universally observed.

The will of the sovereign is also the will of the state: it is the ultimate and effective control of governmental power, manifest in the power to make law, that in the end defines who or what the sovereign is. Thus, the view that law is the will of the sovereign is bound up with the idea that the seat of the law is the state. The rule of law ideal, according to which both the activities of the state and the arrangements of society should be law governed, makes this view explicit.

The idea of law as the will of the sovereign, made by the state, is the major rival, the only major rival in the history of legal thought, to the idea of law as immanent moral order, discovered and refined by the jurists, with the sole exception of the idea of sacred law, representing the will of God.

These two ideas of law conflict. They make assumptions, and produce consequences, that have never been, and cannot be, reconciled within any consistent legal theory. Nevertheless, they coexist in practice. They arose, and they persist, in all the major civilizations and legal traditions that have existed up to now. In many senses, they depend on each other, even as they contradict each other. Their relation to each other and to the real structure of society is the central problem in understanding what law has been and can become.

10. In 1942, the dictator Getúlio Vargas was interviewed by a young journalist in the Presidential Palace of Catete in Rio de Janeiro. The courageous journalist asked him a series of leading questions about why he did not do this or that, a long string of initiatives that the journalist was sure that Vargas, as absolute ruler, could implement instantly if he wanted to. Vargas, who believed in little, referred to himself shamelessly as the dictator, and prided himself on disillusionment, shrugged off the questions, and flashed his chilling sardonic smile.

Then he said to his interviewer: "You're young. You think a dictator can do anything. There's not much a dictator can do."

Take this conversation as an allusion to the central paradox in the idea of law as the will of the sovereign. The most radical champions of this idea have been intolerant of any limitation of the sovereign to make law, other than the limitations that result from the constitutional arrangements. These arrangements may give the head of government or of state near absolute powers, as the Brazilian constitution of 1937, under which Vargas then governed, did. Or, at the opposite extreme, they may establish a form of majority rule, restrained by the rights of minorities, especially the political minority aspiring to power. The sovereign will then be the people, but only in the fashion, and under the restraints, of the constitutional order.

The sovereign, constitutionally restrained and organized, remains the sovereign, and the overriding marker of his sovereignty is that he -- or it -- makes law. The force of constitutional democracies is weakened or hollowed out if the actual arrangements of social life fail to be made an object of collective deliberation and choice, and are merely left undisturbed, until another day.

The radical proponents of the idea of law as the will of the sovereign (Thomas Hobbes and Carl Schmitt first among them) rebelled against all such limitations, in the name not just of survival but of vitality, collective as well as individual. The individual enhances life by participating in a distinct way of life, one that needs to be placed under the guard of an armed political organization to prosper in the world, in the face of its external and internal enemies. Its external rivals are the other states, which may make war against it, and rob it of the means which to defend and develop a distinct form of life. Its internal rivals are the intermediate or indirect powers that seek influence without responsibility.

In the agrarian-bureaucratic empires, these internal rivals used to be mainly the landowning magnates. Now they are the "special interests," organized as common-interest groups, trade unions, political parties, or any other number of organizations of civil society. If they had their way, they would pillage the state, feasting on the flesh of the Leviathan.

For law to be in fact as well as in theory the will of the sovereign, the state must contain these internal and external enemies. It must do so in the service of the higher aim

of fostering the development of a distinct way of life. In them, the individual, in a groundless world, can find a ground.

The radical form of the idea exposes yet more dramatically than does the moderate form the paradox of the relatively impotent law-making sovereign. The sovereign may wage war against the intermediate powers as well as against other sovereign states. The experience of history, however, demonstrates that he is likely to remain relatively powerless to impose his will, not on particular individuals (whom he may put to death) or on particular situations (in which he may aggressively meddle) but in the actual organization of social life, for the defense and development of which sovereignty was asserted in the first place.

Social life cannot be made the object of the will by being either frozen into a particular structure, as the moderate version of the idea of the will of the law of the sovereign favors, or emptied out of any discriminate structure, until the sovereign stands face to face with his subjects, as the radical version of the idea requires. The law made by the state does not, and cannot, accomplish what, according to the view of law as the will of the sovereign, represents its overriding task.

11. The moderate variant of the idea of law as the will of the sovereign has found support, in the history of theories of law, in many different jurisprudential conceptions. One of them, however, has surpassed all others in the rigor and clarity of its formulation as well as in the range of its intellectual influence. Call it the analytical theory of law.

The radical variant of the idea of law as the will of the sovereign has, on the contrary, only ever had a single major theoretical expression, remarkably constant in its central claims for several centuries. Call it the fighting theory of law.

The idea of law as latent moral order has always been a construction of the jurists. It has rarely been articulated as theory. The idea of law as the will of the sovereign has been the dominant account of law in much of the history of legal theory, and it has been regularly embraced by the jurists only in the vague and qualified form that conceals and attenuates its incompatibility with the view of law as an intelligible and defensible plan of social life. The difference in the mode of expression of the two conceptions -- one as largely implicit belief, widely shared by practical jurists; the other, as theory, put forward by individual thinkers, albeit in the name of widely professed ideals as well as of hard-headed realism -- helps explain how the most important and universal divergence of view in the world history of legal thought could have been so little understood and discussed.

The most important instance of the analytical theory of law -- the analytical version of the view of law as the will of the sovereign -- is the Pure Theory of Law formulated by Hans Kelsen, the most influential legal theorist of the twentieth century. Herbert Hart's jurisprudence was its counterpart in the English-speaking countries. The purpose here is not to interpret the distinctive doctrines of these and other theorists of law; it is to grasp what is at stake in the idea of law as the will of the sovereign by considering the defense

and development of this idea in legal theory. That is reason enough to treat these and other views as species of the same basic approach. I interpret and criticize the analytical theory of law, as I will later the fighting theory of law, by first stating its essential idea and then addressing in turn its methodological and political program.

The analytical theory of law proposes a way of thinking about law that clearly distinguishes the legal from the moral or political. Law is best represented as a system of norms, the enforcement of which is backed by the power of the state. The legal question is not whether a norm is right or wrong but whether it is extant law. It is extant law if it was made according to the procedures defined by other, higher-level norms in force. Such a system presupposes, as an analytical construct, a fundamental norm or a rule of recognition that closes it, ensuring the existence of a boundary between the legal and the non-legal.

The systematic relations of validity, however, are not enough. There is an additional, crucial attribute: the law so organized must on the whole in fact be obeyed. The fact of habitual obedience, secured by whatever combination of coercion and consent may be required, shows that law is law, rather than the attempt of a failed sovereign to impose its will upon society. Once the threshold of habitual obedience has been reached with respect to the body of law as a whole, only formal relations of validity among parts of law matter to the questions: what is law, and how should law be represented?

The fundamental norm or the rule of recognition serve, in the analytical theory of law, as impersonal proxies for the contentious idea of sovereignty. The sovereign becomes a system. In this way, the analytical theory seeks to dissociate its concerns from the social and psychological realities of command and obedience, which remained paramount in an early version of this approach to law, such as the jurisprudence of John Austin.

The system of norms nevertheless gives law-making power to those who hold certain offices in the state. Such a view is therefore not an alternative to the idea of law as the will of that sovereign. It is this idea, adapted to the restraints of constitutional government and of the rule of law, in the twofold sense earlier described, and inspired by methodological and political ambitions that I now discuss.

The methodological aim of the analytical theory of law is to disengage the technical representation of what the law is from all sociological issues about the causes and consequences of the laws as well as from all political and moral considerations about the justice of the laws. In this way, the analytical jurist hopes to establish, once and for all, a discourse about law that is immune, in its purity and rigor, to disputes about causation (what causes the laws to be what they are and what consequences follow to society from the laws being what they). More ambitiously, such a discourse should also be proof against quarrels about the rightness and wrongness of laws (their conformity to independently defined conceptions of justice).



A working assumption of the analytical jurist is that so long as we succumb to the temptation to confuse our representation of law with our causal and normative ideas, we cannot hope to establish a view of law that is anything more than the continuation of ideological disputes, or of our clashing agenda of social-scientific inquiry, by other means. Such a confusion jeopardizes, he believes, some of the highest interests of a free society. These interests supposedly demand an understanding of law, and of the meaning of particular pieces of law, that refuses to echo and to reinforce the sectarian views of the day. Here the methodological endeavor of the analytical theory intersects its political project.

In making this claim, however, the analytical jurist must deny a defining assumption of the doctrinal quest and of its idea of law as immanent order: the view that doctrine, by the very nature of its work and task, can never wholly dissociate the question of what the law, at any given moment, is from the question of what the law should be. He must also disregard the most significant attributes of law: those that make it central to society.

Law is in fact the institutionalized form of the life of a people. It is the site above all others at which we define and develop our institutions and practices by the light of the ideals and interests with which we make sense of them. We cannot understand it or develop it from within without taking a stand in the struggle over how this marriage of institutions and practices to our recognized interests and professed ideals is best to be sustained.

At the core of the analytical theory lies the hope of invulnerability to explanatory and normative controversy. The only other major example of such an intellectual strategy in the history of modern thought is the far more influential one of marginalist and post-marginalist economics. For it was the centerpiece of the marginalist revolution in economics to propose a way of analyzing economic phenomena that would rescue economics from causal and normative controversies: a pure apparatus of analysis that would work with the material, of causal conjecture or prescriptive commitment, supplied to it from the outside.

The reverse side of analytic purity, in the analytic theory of law, as in the economics that began in the marginalist revolution, is intellectual emptiness. It pays for its desired invulnerability to causal and normative controversy with explanatory impotence as well as prescriptive agnosticism. This is the method of Pontius Pilate; its campaigns begin and end in hand washing. Such a would-be science pays for its relative invulnerability to causal and normative controversy by interrupting, or weakening, the vital dialectic between theoretical analysis and empirical discovery, as well as between insight into the actual and imagination of the possible.

The post-marginalist economics that led to the general equilibrium theories of the twentieth century, and to its diminished and routinized practice as the microeconomics of subsequent decades, achieves explanatory and programmatic effect only by relaxing its

vaunted rigor. It may invite in, through the back door of implicit theory, the simple, individualist acquisitive psychology that it had expelled from the front one. Alternatively, it may overcome its explanatory and prescriptive impotence by equating allocative efficiency with the abstract idea of a market and by then going on to identify this idea with a particular, historically specific and contingent set of arrangements, including particular regimes of property and contract. Such a style of economic analysis must choose, at every turn, between sterile purity and compromised power. At least, it has a choice.

Where, however, is the analytical theory of law to find comparable relief from the burden of its emptiness? Its residual content is the implicit referent of the basic norm or the rule of recognition: the will of the sovereign. In this theory, however, political power, manifest in the power to make law, remains hidden behind the screen of a deliberately hollow analytical system. This evasion of controversial commitment has a political as well as a methodological purpose.

Its political purpose is to inform a public discourse about law capable of reaching above or beyond all factional interests and sectarian programs. This relative impersonality and neutrality is necessary, so the analytical jurists believe, to support the work of law as an impersonal framework of civil coexistence to which the votaries of different interests and visions can remain loyal. Here, however, the analytical jurist confronts yet another intractable problem.

There have been two main proposals in the history of legal thought over the last two hundred years for the achievement of such neutrality and impersonality. Neither of them, however, is acceptable to the analytical jurists, given their methodological commitments. The first proposal was that of nineteenth-century formalism and conceptualism. Its heart lies in the idea that there are types of social and economic, each with its inherent, preset legal content. The second proposal was that of the purpose-driven, idealizing and systematizing legal discourse of the late twentieth century and the early twenty-first century: the view of law as a repository of connected ideals, described in the language of impersonal policy and principle.

Both proposals harken back to the idea of law as immanent moral order, to which they seek to give new life and new meaning, rather than to the idea of law as the will of the sovereign. Both also contradict the methodological ambitions of the analytical theory: its attempt to free itself from controversial empirical and normative claims and to view law without illusion. For these reasons, neither is acceptable to the analytical theory.

Its solution to the problem of using law to ground a public discourse compatible with civic peace and with the rule of law comes in two parts. The first is a view of law making; the second, an account the application or elaboration of law in context. Both are untenable. The significance of their failure is to reveal the contradiction between the methodological and the political commitments of the analytical theory of law.

The hallmark of the view of law-making is its radical proceduralism. The law organizes a system of collective decision, designating the powers, and providing for the composition, of each agent in the process of making law. The legal validity of a decision means that it was made according to these procedural strictures. So long as they are followed, civil war gives way to civic peace, and radical differences of view can coexist.

This proceduralist approach suffers from two fatal defects. Its first flaw is to fail to deal with the implications of the bias of any procedural framework. In this respect, it shares the mistake of the classical-liberal distinction between the right and the good, according to which the law should be neutral among conflicting visions of the good. Every set of political arrangements for law-making encourages some forms of experience and discourages others; it is more hospitable to some visions of the good than to others. The illusory aim of neutrality gets in the way of a realistic goal that it superficially resembles: to ensure that the arrangements for law-making both embody and advance a more general virtue of the institutional arrangements of society: not only that they be open to a wide range of experience (without, however, seeking or feigning neutrality) but also that they facilitate their own revision in the light of such experience. Corrigibility, rather than neutrality, becomes the decisive concern.

The arrangements for law-making are not to be compared to green or red traffic signals; they deal with fateful political institutions rather than with arbitrary or equivalent conventions of coordination. It is not the case, with respect to them, that their particular content matters less than their clarity. Like the rest of the law, they represent the contingent outcome of struggles among interests and visions, as the fighting theory of law recognizes). This content matters because its effects on the course of political life are likely to be far-reaching. The proceduralist approach to law evades the significance of these facts.

The second crucial defect of this proceduralism is its lack of political realism in the vision of the role that law performs in the cohesion of a society. No social order could survive unless the conflict of visions or values were counterbalanced by the predominance of thickly defined shared commitments (sometimes characterized in contemporary Anglo-American political philosophy as an "overlapping consensus") or by the ascendancy in national consciousness of some views of human association over others.

The characteristic nineteenth-century notion of the in-built legal content of each type of social, political, and economic organization and its twentieth-century sequel in the view of law as a repository of connected ideas of policy and principle misrepresent these social and legal realities. They do so in the service of their attempt to justify the rational reconstruction of law as system and to uphold, in new form, the doctrinal pursuit of immanent order. The half-truth that they express is nevertheless the half-truth denied by the proceduralism of the analytical theory.

As a result, the political theory of analytical jurisprudence can make no contribution to either the understanding or the development of a dialectic between consensus and dissent. The deepening of democracy depends on such a dialectic.

A view of the application of law complements this approach to law-making and shares its deficiencies. The analytical jurists cannot accept the conceptualism and formalism of the canonical nineteenth-century practice of legal doctrine. It is not only that they are unable to escape the influence of twentieth-century skepticism about the fixed meanings of words and their correspondence to things. It is also that their causal and normative agnosticism prevents them from subscribing to the conception that served the nineteenth-century version of legal doctrine as its guiding spirit: the idea of a short list of possible types of social, political, and economic organization, often represented as following one another in a preordained sequence, and possessed, each of them with a predetermined legal content, which it is the mission of legal science to reveal.

Neither, however, does the agnosticism of the analytical jurists allow them to embrace the view of legal interpretation that has served as the most influential successor to that idea: that law must be interpreted purposively, by reference to the purposes we ascribe to pieces of law; that ascription of purpose depends on engagement in a context, of a shared life and experience, or of a national project, as well as of a professional community of discourse; and that such interpretation-guiding purpose is to be elaborated in the language of policies responsive to the public interest or of impersonal principles of right.

The appeal to such policies and principles is motivated by the project of rational reconstruction of law: the law is both represented, and corrected or refined, as an approximation to an intelligible and defensible plan of social life. Although this plan may be defective, it is susceptible to continuous improvement. One of the chief ways to improve it is to present law in the best light. The discourse of policy and principle is supposed to supply that light.

Of the three parts of this view of the interpretation of law, the first -- the reliance on purpose or interest -- presents no difficulty for the analytical jurist. The second part -- the dependence of purpose-driven interpretation on engagement in a shared context is acceptable, provided that it be purged of any view of that shared context as the cumulative discovery of moral or political truth, confirmed by progressive convergence to the same beliefs. The third part -- the commitment to the rationalizing reconstruction of law as the embodiment of a normative scheme of human association -- is, however, anathema to the analytical jurist; it conflicts with the disillusioned and realistic view of law as the will of the sovereign rather than as the quest for immanent order.

What then is the analytical jurist to offer as a theory of legal interpretation if he cannot appeal to any of the views of interpretation that are tainted by their association with the doctrinal quest for immanent order? He must do what he in fact has done: to distinguish in the work of interpretation an easy part and a hard part. The easy part is

reliance on plain and uncontested meanings, fixed not because they fail to depend upon the ascription of purpose but because the ascription of purpose remains uncontested. The hard part is the work of interpretation in the area in which the ascription of purpose is contested because the problems at issue are those in which there exists an unresolved conflict of visions or of interests.

Thus, for one analytical jurist, Hart, there is a distinction to draw between those interpretative disputes that deal with a core of accepted meanings and a penumbra of contested meanings. For another, Kelsen, the contrast to make is between the rationally justified choice of the relevant rule or frame of decision, and the discretionary political choice of one or another way of understanding and applying that rule to the matter at hand.

It is clear that this view of interpretation fails. The distinction between the easy and the hard parts, between the core and the penumbra, between the frame and its content, is not only movable; it is also specious. No clear distinction exists between interpreting a rule and defining its scope of application. Plain meanings are plain only to the extent that content and purpose can be taken for granted.

Moreover, the invocation of an area of unguided discretion and dispute represents an invitation to turn the interpretation of law into the continuation of politics by other means: a contest of interests and of visions about which analytical jurisprudence, given its self-denying assumptions of method, can have nothing to say. The hope of confining this open-ended contest to a limited area (the penumbra of unclear meanings and hard cases, the construction of a particular rule after it has been selected as applicable to a particular circumstance) is doomed to be dashed if the distinctions on which it relies are relative and insecure.

The failures of the analytical theory of law making and of law application show that analytical jurisprudence is unable to give effect to its political goals. The root of these failures is the conflict between the methodological and the political aims of analytical jurisprudence. It cannot advance its agenda without sacrificing the latter to the former or the former to the latter.

Without its political complement, the methodological program of analytical jurisprudence turns into an empty box, without even the advantage that the purest and most impotent versions of post-marginalist economics achieved through their marriage to mathematics. The practical jurist must put back into the box some of the content -- of interests, of ideals, of prescriptive images of human association -- that the analytical theorist took out of it, when he reduced law to a set of quasi-logical relations of validity among legal norms. Deprived of its methodological setting, the political program of analytical legal theory loses any clear motive or direction. The poverty of its view of law, society, and politics becomes patent.

Analytical jurisprudence attracts by its simplicity, clarity, and restraint, but repels by its hollowness and contradictions. It has proved unable to provide an adequate account

of the idea of law as the will of sovereign: the chief rival, in the worldwide history of legal thought, to the view of law as immanent moral order.

12. In another theoretical tradition the idea of law as the will of the sovereign appears undisguised and undiminished. By calling it the fighting theory of law, I mean to emphasize its view of law and its attitude to the task of legal thought. It sees law as struggle: a struggle brought to a never more than temporary end by the consolidation of power in a will. Law results from the cessation or containment of fighting over the organization of society and over the terms of our relations to one another. The sovereign is the power that makes the fight stop, although only for a while and up to a point. Society is then recast, momentarily and fitfully, from field of battle, literal and metaphorical, to scheme of life.

The fighting theory of law casts aside all subterfuge and sentimentality in its vision of law and politics. The good that it regards as paramount, and that it hopes to serve by its disenchanting view of power, is vitality. Survival and security are its necessary but far from sufficient conditions.

Vitality may be an attribute of both the individual and the nation. National vitality enjoys causal primacy over individual vitality. A coercive peace, in which struggle gives way to law, enables society to take a definite form: to develop the powers and possibilities of humanity in a particular direction. As a result of the peace, a power is established that can shield a particular form of life against its internal and external enemies. We call this power the sovereign or the state.

Only as a participant in such a world, can the individual flourish. He can satisfy his basic needs for security and sustenance. He can conduct his life against the background of a dense context that gives cues to his desires even as it produces the means with which to satisfy them.

The enemies of the order established, for the sake of vitality, by the will of the sovereign are not simply those who would openly undermine the order from within or attack it from the outside. They are also the intermediate or indirect powers -- the organizations between the state and the individual.

The two defining figures of this version of the idea of law as the will of the sovereign are Thomas Hobbes and Carl Schmitt. Theirs are, however, simply the clearest, most intransigent statements of a view that has had many similar albeit more qualified or eclectic expressions in the history of legal and political thought in the West (e.g., Rudolph von Jhering, Oliver Wendell Holmes, the German "jurisprudence of interests" in the 1920s and its counterparts in other countries). Outside the West, however, we find major traditions, such as that of the Fa Chia school in China or the tradition of arthashastra in ancient India, that are as comprehensive and uncompromising in their claims as the teachings of Hobbes and Schmitt.

The fighting theory of law is a theory without legal theorists who have done justice to its significance. It is the most coherent version of the sole major alternative in the universal history of legal thought to the doctrinal pursuit of immanent order. It has, however, never been formulated in a way that would enable it to live up to the role in which that history has cast it. It did attract the sympathy of some of the most influential legal thinkers of the modern period, including Jhering and Holmes. None of these jurists, however, ever gave the view the comprehensive, developed form that would have allowed it to live as both a theory of law and a practice of legal analysis and thus to preempt the retrospective rationalization of law in the idealizing vocabulary of policy and principle. It is to Hobbes and Schmitt, rather than to Jhering and Holmes, that we must look for the deepest and most radical expressions of the fighting theory of law.

Hobbes had a far broader philosophical program than Schmitt. However, living before the rule of law ideal had become accepted as both a condition and an instrument for the workings of the will of the sovereign, he proposed no detailed account of law. Writing before Montesquieu, Vico, and the modern social theorists, he offered no account of the creation and remaking of the institutional orders that represent the most important creation of the lawmaker.

In Schmitt, the metaphysical project of the enhancement of vitality remained largely implicit in a political argument in favor of a strong sovereign in a strong state. Schmitt emphasized the use of the will of the sovereign to create a space for the assertion and defense of a form of a vigorous form of social life, under the aegis of the nation state. Only in such a space could the individual find grounding in a groundless world and share in the collective vitality. Hobbes, arguing several centuries before Schmitt and facing a wholly different set of problems, had given pride of place to the threshold good of survival and security for the individual, to be underwritten by the law-making sovereign. Both the armed peace of society and the containment of conflict over the ends and the course of life depended, for him, on what would be called in another country, at a later time, the "dictatorship of the law."

What remains constant in this tradition from Hobbes to Schmitt, although more often expressed in the moderate and qualified versions that exercised greatest influence over the course of the past two centuries, is a small number of overlapping themes. These themes include the experience of groundlessness, the threat of disorder and disorientation, the revolutionary assertion of law as the will of the sovereign, and the overriding good of the enhancement of vitality, collective and individual. The practical focus of these themes is the will to use power to make order through law. Such is the ultimate structure and the commanding concern of a view of law that has been almost as universal in its presence as the idea of immanent moral order.

The methodological strength of the fighting theory of law as the will of the sovereign lies in its implicit appreciation of the most important fact about the structures of society: that we made them and that, having made them, we can remake them. They

result from the containment or interruption of our practical and visionary contests over the organization of society. An undeveloped corollary of this presupposition -- undeveloped in all of social thought as well as in the approach to law as the will of the sovereign -- is that social structures, unlike natural phenomena, have a variable degree of existence.

Nature may undergo radical transformations. These transformations may be local, such as those that are described by the physics of phase transitions. Or they may be global, as in the cosmological idea that the very early, dense, and hot universe lacked many of the characteristics of the cooled down universe, including a fixed and discriminate structure of the elementary constituents nature. However, natural phenomena either exist or do not exist; they do not exist more or less.

Social structures, however, do exist more or less. The more they are entrenched against challenge and revision, the more they take on a semblance of natural necessity. They do not assume such an appearance simply by benefiting from the illusions of false necessity. They do so as well by denying to those who reimagine and remake them the institutional and discursive means and occasions with which to change them. It is in our material and moral interest to prevent the arrangements of society, defined in detail by the law, from appearing to us as a non-human reality before which we must bow down.

Those who have taught that law is the will of the sovereign have, however, regularly failed to develop the insight, presupposed and suggested by their own theory, into the constructed character of social arrangements. As a result, they have also failed to pursue this idea into the additional conjecture of the variable relation between agency and structure. What they have supplied in place of such an account is psychological naturalism about power, standing in lieu of a comprehensive view of the making and remaking of institutional orders in history.

This naturalism reduces the circumstance to which the will of the sovereign responds to the brute facts of danger, conflict, and fear, unaided by the light of a more comprehensive view of the interactions between state and society (a view that James Harrington had at the time of Thomas Hobbes, and Max Weber had at the time of Carl Schmitt). Similarly, it reduces the making of law to an exercise of the will when, for the same reasons, everything turns on the transactions between the law-making will and will-limiting structure. The history of law and the history of the state form two sides of the same reality.

13. The fighting theory of law amounts to a proto-social theory: an undeveloped view of the making of law in history. Like every practice of social thought worth considering, it has a conception of the nature of the structures of society: a view that, albeit primitive and bereft of a conception of how such structures change, is true as far it goes (not very far). According to this conception, the institutional and ideological regimes that set the terms of social life result from a contest over interests and as well as over visions. It is a



mistake to fault the fighting theory of law for cynicism about ideals. It views the contest from which law results as regarding moral interests as much as material ones.

The greatest virtue of the fighting theory of law is to recognize, at least implicitly, that such regimes are not simply the outcome of conflict; they *are* frozen conflict. They are the residue of the relative containment or the temporary interruption of a strife that cannot end once and for all. The trouble is that the theorists of this fight never had any general account of the strife: of its practice, shape, meaning, and future.

In their defense, it should be said that at least they never sacrificed (as Marx and many of the classic European social theorists did) the insight into the made and imagined character of the structures of social life to the marriage of functional explanation and necessitarian assumptions. They did not teach that there is a closed list of regimes, or that each of them is an indivisible system (with the result that politics must be either the reformist management of a system or the revolutionary substitution of one such system for another), or that historical laws govern the foreordained succession of these regimes (with the implication that we need no project because history has prepared one for us).

By not having a theory, however, the proponents of the fighting theory of law laid themselves open to an alternation between two inadequate views that served as surrogates for such a considered account. One pole of the alternation is bitter: a remorseless voluntarism, according to which the struggle from which law results has neither rule nor limits, other than the context-specific influences and constraints generated in the course of an accidental history of transitory triumphs and defeats. The other pole is relatively sweet: its theme is a progression to greater freedom and complexity.

The historical jurisprudence of a Fustel de Coulanges, a Henry Sumner Maine, or a Paul Vinogradoff placed the history of law within a large and loose evolutionary narrative professing to show that this history has a direction. It represented this history as suffering the influence of powerful or even irresistible forces, the true nature of which remains largely hidden to the contestants. These narratives, with their formulaic half-truths, such as the eventual separation of family and polis, or the movement from status to contract, stopped short of making the heroic assumptions and stringent claims of classical European social theory. They were ample and elastic enough to coexist with the blind and bitter voluntarism of the other register of the fighting theory of law. Both Holmes and Jhering moved between the bitter and sweet registers: emphasizing the bitter register as legal theorists and the sweeter one as legal historians.

A feature of this intellectual legacy was that it remained deficient in hope -- hope for the development of a higher form of life, expressed in law -- insofar as it recognized our freedom to make law. It offered some measure of hope only to the extent that it presented the making of law in history as lying in the grip of evolutionary forces that the lawmakers were compelled unwittingly to serve. Its hope remained in the lap of its fatalism.

That such a view was incapable of informing a programmatic imagination, determined to create new structures through the revision of existing ones, was the consequence of its failure to turn the idea that law registers the transitory interruption and containment of struggle over the terms of social life into an account of the making and remaking of the institutional and ideological regimes that give shape to society. To have no account of the transformation of such regimes is to have no theory of law.

14. Like the idea of law as immanent moral order, the conception of law as will of the sovereign is radically incomplete. In every real historical circumstance, given the institutional arrangements that have been adopted, the law made by the sovereign, even by the democratic sovereign under a regime of parliamentary sovereignty, has never been more than a series of episodic interventions the arrangements of society. Most of those arrangements have always been left undisturbed. Most have not even come into the sovereign's -- or the nation's -- field of vision. Nevertheless, even in its most ambitious and successful expressions, the view of law as will of the sovereign has been deficient in the imagination of structural constraint and of structural alternatives (if by structure we mean the institutional and ideological regime of a society).

The consequence has been to prejudice the ability of this view of law to contribute to the achievement of its announced or implicit goal. This goal is neither the power of the state nor the cohesion, or the oneness of society; these are means to a greater end rather than an end in itself. The end -- made explicit in the fighting theory of law -- is individual and collective vitality. The collective side is the development of a distinctive and vigorous form of social life under the shield of state power. The individual side is the making, in such worlds, of strongly delineated people, unshaken, unsubdued, unterrified. Security is merely the threshold requirement of vitality, and stands to it as crawling does to walking.

The persistent thesis of the philosophers of the fighting theory of law, from Hobbes to Schmitt and beyond, has been that the chief obstacle to the assertion of law-making power by the sovereign, in the service of the supreme good of individual and collective vitality, lies in the threat posed by the intermediate or indirect powers in society. The more those powers are held in check, the better. This view reveals a failure to grasp the relation of the state, and thus of the law that the state makes, to society and to understand the requirements of collective and individual vitality. The destruction of all intermediate and indirect powers may strengthen the state, or the sovereign, in the short term, but only by reducing its power and prospects in the long-term. It creates a devastation, and calls its peace. It makes for a homogenized society that is unable to flourish, over time, in the face of adversity and changing circumstance because it is ill-suited to permanent and radical innovation.

15. The criticism and reconstruction of the idea of law as the will the sovereign must rely on a view of what the state has been and might become. Even a radically simplified version of such a view may suffice to show how we can distinguish truth from illusion in the long-standing campaign that the theorists of law as the will of the sovereign (in the fighting rather than the analytical tradition) have mounted against the intermediate powers: those that stand between the state and the individual.

Seen from the standpoint of the concerns of those theorists, the history of the state is the history of the political will in the exercise of its ambition to set the terms of social life. Distinguish three idealized moments in that history.

First comes the moment of the creation and consolidation of the state: the political organization of society takes as its focus a central government that projects its will upon a resistant, divided, and hierarchically organized society. What makes an aspect of society political is precisely this disposition to treat the form of social life as subject to a transformative intervention, with no self-evident boundaries. This disposition, and the practices resulting from it, form the ultimate source of the idea of the will of the sovereign that has been so persistent and universal a theme in the history of legal thought.

That the scope of such a will lacks clear-cut limits is not to say that it is unlimited in its power. On the contrary, its reach in this first period in the life of the state was always halting and fitful even in those states that aspired to the greatest control over the economy and the society.

The emergence of the state was invariably associated with the demands of agriculture, herding, defense, and conquest over large territorial expanses (even if only a city-state and its hinterland). Above all, it occurred together with the entrenchment of elaborate, hierarchical social orders, in which class divisions were often sanctified and hardened by a cosmological or theological narrative. The connection of the social division of labor with the formation of such hierarchies created room and need for the action of the state; there was a reciprocal connection between the concentration of political power in the state apparatus and the hierarchical pluralism characteristic of these societies.

The most important terrain for the formation of such a state, and indeed the most important protagonists in world history before the last few centuries, were the agrarian-bureaucratic empires of antiquity. They were thus also, with the qualifications that I next propose, the theater in which the idea of law as the will of the sovereign took its initial form.

In these agrarian-bureaucratic empires, the holders of power in the central government confronted a recurrent dilemma: how to prevent the landholding magnates and potential warlords from concentrating land and power in their own hands, and starving the state of direct access to taxes and soldiers, without inflaming a popular and revolutionary despotism that they would be unable to sustain or control. From the effort to solve or mitigate this dilemma arose the repeated efforts at agrarian reform in these

empires: the attempt to stabilize the circumstance of a class of independent smallholders, beholden to the central power rather than to any landowning and war-making aristocracy. From that effort resulted, as well, the frequent and often successful attempts to organize a bureaucratic cadre at the service of the prince and dependent on him alone.

These efforts, however, conflicted with the interests of the magnates. To make war on them, however, in the name of a direct alliance between the center and the base of society was to risk arousing a turbulence that no prince could be sure of riding without danger to his position. Long before he had advanced in the making of such an alliance, he would be likely to fall victim to the reaction of the intermediate powers. If he nevertheless succeeded in advancing the revolutionary program, he might well find himself among its victims.

There were two major circumstances -- one, within the agrarian-bureaucratic empires and one outside them -- that weakened the force of this dilemma. Nomadic statecraft supplied the inside solution. Many of these agrarian-bureaucratic empires came to be ruled by nomadic conquerors. The secret of their statecraft was to radicalize the struggle against the intermediate powers -- the landowning magnates -- and to enhance the independence of the central government, reinventing themselves in the process.

The outside solution came from city-states, even city-states, such as the Roman Republic or the Athenian democracy, that began to acquire an empire. There the relative absence of land-owning magnates, and their replacement by a commercial plutocracy, much less invested in the control of land and labor, created a circumstance more favorable to a more social pluralism and economic diversification: a pluralism and a diversification that left the state without a single rival. A commercial oligarchy took part of the place of a landowning aristocracy. Less able and anxious to concentrate land and labor in its own hands, it presented less of a threat to central power. State power was readily divided and shared in such a circumstance, no matter how bitter the contests among classes might. So long as the essential social and economic pluralism survived, conflict itself might operate as a device of union, as Machiavelli remarked.

In the agrarian-bureaucratic empires the making and enforcement of society-wide law was tied to the fate of prince in his two-way struggle with the magnates and the populace, each of whom he both needed and feared. Because the power of the prince, or of the imperial government, usually remained both limited and precarious, the law that he made also fell short of imposing a comprehensive project upon society. It was more likely to consist of a series of episodic and localized interventions in a preexisting body of custom, and a stubborn negotiation with the law generated by the states within states that these imperial systems often countenanced.

If the prince failed in his struggle to contain the usurpation of land and of power by the landowning grandees and ceased to enjoy an independent fiscal and military base in a large class of independent smallholders, the government would decline and even disintegrate. It might become a shell. At such moments, the money economy, dependent,

as much as the state, on the preservation of a broad base of independent centers of economic initiative, would shrink. Where it had once thrived, production would be organized by coercion and allegiance, and exchanged reduced, at the limit, to barter.

The law made by the sovereign followed the course of these political and economic cycles. If even at the zenith of the power of the prince, the law enacted by the imperial center amounted to an episodic and localized intervention in social life, at such times it would lose even this limited and fragile authority.

Law as the will of the sovereign came more fully into its own in the two special circumstances to which I earlier referred. The reform of many of these empires by their nomadic conquerors enhanced the independence of the central government from the intermediate powers, breaking the recurrent cycles of political disintegration and economic involution that plagued these imperial states. Such reforms, inspired by the experience and consciousness of the nomadic conquerors, imprinted on the state some of the habits and arrangements of a people that was also an army, and emphasized the permanent ability of the state to mobilize physical, financial, and economic resources without depending on any oligarchy of landlords and warlords. In such a circumstance, the sovereign could go farther, for longer, in imposing his will on society as law.

A similar enhancement of the place of the law took occurred in the history of many of the city-state republics, with their practices of shared and divided power and their combination of social pluralism, economic diversity, and commercial openness. Here too, central power could count on a broad and varied social base, unlikely to fall under the sway of any class of magnates. The division and sharing of power in the state was organized as law. This law-defined sovereign made a society-wide law.

It is therefore in these two circumstances -- that of the agrarian-bureaucratic empires reformed in the light of nomadic statecraft and that of the city-state republics devoted to a constitutional sharing of power by different classes -- that the idea of law as the will of the sovereign first became most real. They are the closest precursors of the law-bound and law-making states of recent history.

16. A second period in the evolution of the theory and practice of law as the will of the sovereign begins when the rule of law ideal acquires the force that it ordinarily lacked in the agrarian-bureaucratic states of antiquity. This change occurred, initially, in the absolutist-aristocratic states of early modern Europe. It developed further in the flawed and relative democracies that are the only democracies that the world has yet known. The law-making and law-bound state has thus existed in both pre-democratic and democratic (or, more realistically, proto-democratic) form.

What distinguished the rule of law ideal is the combination of a legal commitment with a social and economic fact. The legal commitment is that the law should rule. Even a prince who governs without a constitutional sharing of power must, in conformity to this ideal, govern through rules embracing whole categories of people and acts, rather than

through edicts addressed to individuals or to narrow classes of people. Having made such rules, he will then be bound by them.

Under democracy this commitment to legality gains greater authority and force. Self-government, or collective self-determination, forms part of the core meaning of democracy. If self-government means anything, it must mean that people choose collectively the arrangements of society. It must mean as well that they choose them on the basis of institutions and procedures that prevent the few from ruling the many or the dead from governing the living and that keep the future open to conflict, experiment, imagination, and change. It must accept the risks of this openness, hedging against them by securing the individual in a haven of capability ensuring economic and educational endowments and of safeguards against governmental and social oppressions. But the conception and design of that haven are inevitably and rightly open to challenge and revision and therefore as well to subversion.

For democracy, the idea of the artifactual character of society -- that it is made and imagined -- ceases to be merely a theoretical speculation and becomes a guiding principle. Its realization may be subject to any number of practical constraints. If, however, the cumulative effect of such constraints is drastically to narrow the part of social life that is chosen, democracy becomes, to that extent, a lie.

The aspect of social life that must be the fundamental concern of the exercise of political will is the formative institutional and ideological regime: the arrangements and assumptions shaping the surface conflicts and exchanges of a society. To leave that structure in place, without having chosen it, or even subjected it to challenge, through the organization of the contest for power -- for social and economic power as well for power in the state -- is to empty democracy of its content.

The chief instrument for the making and the remaking of the formative context is law. That the structure of society is chosen must mean that it is shaped by law made by the democratic sovereign. Easier said than done.

The rule of law ideal faces a dilemma that resembles in structure, albeit it exceeds in force, the quandary of the prince in the agrarian-bureaucratic empires of antiquity.

Whether their governments have been absolutist or proto-democratic, the societies in which the rule of law ideal has gained authority have been class societies. Among the many aspects of inequality have been unequal degrees of organization and of influence upon the state. Even when this inequality of influence upon the state has not been sanctified in law (as it was in the European *Ständestaat* or under the property qualification of the suffrage), it has existed in fact.

The law-making and law-bound state in such societies has always been relatively porous and pliant to class and other group interests. It has been a soft state, even or especially when not restrained by democracy. The penetration of the state by such interests limits its ability to make good on the pretensions of the rule of law ideal, undermining the reality of collective self-determination.

In its relation to the interests, the soft state finds itself in a position that is analogous in some respects, but not in others, to the relation of the prince to the land owning magnates in the agrarian-bureaucratic empires. The multiplication of centers of initiative, power, and wealth in society creates an all but insuperable barrier to the shrinkage of the money economy and the fragmentation of central authority that periodically deranged those imperial states. The state need no longer depend on any intermediate power to raise taxes and to form armies. Law becomes the preponderant and even the sole instrument of governmental action.

Nevertheless, the realities of class and of inequality and the radically unequal degree of influence that different parts of society exert on the course of policy and on the composition of the government risk render the state captive. They threaten to discredit its claim to act in the name of the general interests of society. Inequality in economic advantage and collective organization does not, however, suffice to explain the captivity of the state. Its effects are always mediated by constitutional arrangements and prevalent political beliefs.

In one way or another, such arrangements and beliefs associate the liberal principle of the division and sharing of power among different parts of the state with the conservative principle of the slowing down of politics, the deliberate restraint imposed on its transformative reach. The Madisonian plan of checks and balances under the American presidential regime is the most extreme and explicit form of such a connection of the liberal and the conservative principles. A similar consequence, however, may also be achieved, even under a pure parliamentary system of theoretically undivided government, thanks to the cumulative effect of many different practices and institutions, including the organization of the media, the financing of political activity, and the participation of the organized interests in the formulation of policy and the enactment of law. The dictatorship of no alternatives -- the sense that there are no institutional alternatives that would not be dangerous and despotic -- helps form the climate of belief in which this institutional logic exerts its restrictive effect.

In such a circumstance, legislation appears always to be a compromise among interests and visions that are not only one-sided and contestable but also unequally organized and represented. Ad-hoc compromises among conflicting visions, as well as among contrasting interests, struck in a circumstance of overwhelming inequality in social and economic life, is the hallmark of legislation in the soft democratic state. This fact encourages the jurists in their efforts at rational reconstruction of the law under the disguise of interpretation of law: their excuse is to make the law better, that is to say less beholden to the special interests, under the pretext of interpreting the law. The rationalizing and retrospective representation of law as a flawed but perfectible body of rules and doctrines, informed by principles of impersonal right and policies responsive to the public interest, is simply the most recent of the vocabularies in which such rational reconstruction has been conducted.

It is on this basis that, in the weak and relative democracies that are the sole democracies yet to have been created in the world, the jurists seek to reconcile the idea of law as the quest for immanent moral order and law as the will of the sovereign. It is not a reconciliation. It is simply a juxtaposition.

If a movement comes to power under such circumstances, proposing radically to reshape society but lacking any institutional program for the deepening of democracy, it may embrace the revolutionary despotism from which the prince, in the imperial agrarian-bureaucratic states, always stepped back: making war on the intermediate powers and organized interests, or at least on some of them; appealing to the superior interests of a nation or of a class; and liquidating the formal or informal expressions of divided government. The twentieth century saw many leftwing and rightwing versions of such revolutionary despotism.

The states created by such revolutionary despotisms claimed to reshape and to unify society, destroying the intermediate powers or submitting them to its the pleasure of the collective or individual despots in the name of large ideological and national projects. The struggle against the intermediate powers could be sustained, however, only in movement: that is to say, only through perpetual internal and external war. As soon as the external or internal war stopped, the despotic regime had to make peace with the intermediate powers inherited from the *ancien régime* or with those that had arisen under the new dispensation. The preservation of power by those who held it, collectively or individually, overshadowed all other aims. The sovereign ceased to be bound by the law that he made, and any requirement of generality in the making and enforcement of law was compromised or abandoned. At the limit, power was consumed in terror: the attempt by the holders of central power to use violence as a substitute for the collective reshaping of institutions and of consciousness.

Revolutionary despotism, which may at first seem to be the relentless implementation of the idea of law as the will of the sovereign, ends up as the undoing of that idea. A question remains: Is there an alternative to both the rule of law in the soft state and the effort to harden the state through revolutionary despotism?

17. There is an alternative: the deepening of democracy through its institutional reconstruction and ideological reinvention. This alternative, however, advances only by implying a radical change in our understanding of the state, the sovereign, and the law. If society is in fact to be governed by law; if law is not to be simply a series of episodic and localized interventions in a form of social life that is imposed by entrenched interest and tradition; if the structure of society is to be a choice rather than a fate, then everything must change. Everything can change little by little.

The alternative to revolutionary despotism is the radicalization of democracy. Consider first the general content of this alternative for the organization of politics, of the



economy, and of civil society, and then its implications for the ideas of the state, of the sovereign, and of law.

Democracy has to become more than the rule of the political majority qualified by the rights of the political minority: a device for making of structures of social life that can enhance our powers and increase our share in the attributes that we ascribe the divine.

Through democracy, so understood and organized, we discover the new and free ourselves from the dead weight of the past, turning memory into prophecy. To this end, our political institutions must be reshaped to increase the level and to expand the scope of organized popular engagement in political life. Constitutional arrangements must reaffirm the liberal principle of the fragmentation of power while repudiating the conservative principle of the slowing down of politics: impasse between the political branches of government must be broken swiftly and decisively. The opportunity for decisive action from on top in central government must be combined with provisions that enable particular part of a country or of society to opt out of the general rules and to create counter-models of the future. A power must be established in the government equipped, financed, and legitimated to rescue oppressed groups from circumstances of exclusion and disadvantage from which they are unable to escape by the means of collective action that are readily available to them. On the institutions of representative democracy there must be superimposed, without the weakening of safeguards of individual freedom, practices of direct and participatory democracy. As a preliminary to all these initiatives, the link between politics and money must be cut.

Once reimagined and redesigned, democracy creates a circumstance in which the state can cease to be soft and submissive to the powerful interests without taking the fatal shortcut of revolutionary despotism.

### The dictatorship of no alternatives and the vocation of legal thought

18. Three elements are, and for the entire history of civilization have always been, paramount in the history of legal thought.

The first element in the universal history of legal thought is the quest, through the practice of legal doctrine to reveal and refine a moral order latent in social life. Law, according to this conception, is and should be the expression of such an order before it is anything else. Thanks to the work of doctrine, constitutive of law across historical time, what would otherwise be savagery and accident is imagined as a reality in movement toward something higher: an order that can be understood as the flawed and incomplete approach to a justified plan for our life in common.

The second element in the universal history of law is the idea of law as the will of the sovereign or of the state. Under democracy this idea gains greater appeal and higher authority. Whether on the basis of democracy or not, the ordering of social life, expressed

as law, should result from choice, from consent, from deliberation, according to accepted procedures. It should not reflect the dictatorship of the dead over the living, nor result from the force of interests that owe little or nothing to the conscious commitments of those who are alive now.

These two elements in the universal history of law are in manifest contradiction with each other. We cannot dissolve their contradiction by representing them as accounts of different realities; they deal with the same thing -- law. Nevertheless, in every legal tradition and in every period in the history of each tradition, they have coexisted as if they failed to contradict each other. This contradictory coexistence continues down to the present day. Without seeing it for what it is, and grasping its origins and consequences, no one can understand the present situation or the alternative futures of legal thought.

The most recent form of this contradictory coexistence comes in the form of the attempt to reconcile the representation of law, after the fact, in the setting of adjudication or professional interpretation, as informed and directed by impersonal principles of rights and policies responsive to the public interest, with the representation of law before the fact, in the setting of legislation or party politics, as the contingent product of regulated conflict among clashing interests and visions. Such a reconciliation cannot be achieved except by making (only then to qualify) a series of claims that contradict either the assumptions of democracy, or our contemporary understanding of history, or both those assumptions and this understanding.

Shall we allow the jurists (whether or not invested with judicial office) to elaborate the meaning of the laws in the name of conceptions that were never present in the minds of those who actually made the laws, or struggled over their content? Shall we imagine that the contestants in such struggles acted at the behest of developing ideas and ideals, of forces in the evolution of society, of which they were only dimly aware? Or shall we try to split the difference among these and other views, the better to make it seem that law as immanent order, discovered and developed in legal doctrine, can be seamlessly combined with law as will of the sovereign, as if they were same reality, seen from two complementary vantage points?

The two foremost elements in the universal history of legal thought not only contradict each other; they are also, each of them, radically incomplete. Each depends on a third element: a view of the real structure of the society in which the law holds. Such a structure cannot be persuasively understood as a product or an expression of either these two views of law. It is not simply what the sovereign or the state wills. Nor is it a tangible embodiment of the airy abstractions of the jurists. It is what it is: it has a brute, irreducible facticity. Without taking it into account, it is impossible to understand how either of those two ideas of laws has actually been made to operate. Their influence amounts to a modification, most often marginal and superficial, of such structure. Their meaning, even for those who deploy them most single-mindedly, is the meaning that they acquire in such a context.

Yet from the standpoint of the legal cultures in which these two leading conceptions of law have flourished, the real structure of society remains largely unexplained, unjustified, and even unacknowledged. It could be explained and justified, and therefore as well recognized, only if it were their product: the expression of the immanent order, discovered and refined by the jurists, or of the will of the sovereign, theorized by the ideologists of the authoritarian or the democratic state. For the most part, however, the real structure of society is neither of these two things.

The significance of this incompleteness is immense, given the combination of a fact about the history of ideas, a fact about the history of society, and a fact about the nature of law.

The fact about the history of ideas is that we now lack a usable theory of how the formative institutional and ideological contexts of social life -- their structure -- are made and remade in history. To possess such a theory, we need to rescue the central insight of classical social theory -- the idea that we are the makers of these decisive regimes and can therefore remake them -- from the incubus of the necessitarian assumptions that has almost always circumscribed the reach of this insight and eviscerated its meaning. To rescue this insight, we must oppose the dominant tendencies of contemporary social sciences and policy discourses. These tendencies underemphasize, when they do not disregard, the distinction between the structures and the surface of social life, and consequently the importance of structural discontinuity in history. If the view that we need does not exist in social theory, it is no surprise to find that it does not exist in legal theory.

The fact about the history of society is that we live, throughout the world, under a dictatorship of no alternatives. This dictatorship is manifest in the restricted repertoire of institutional arrangements that is now on offer in the world. Unless we overthrow it, we cannot advance in the realization of our most basic interests and ideals. What we describe as freedom will be servitude.

The fact about the nature of law is that law expresses the institutional form of the life of a people, viewed in relation to the interests and ideals that make sense -- to its own participants -- of that form of life. Our interests and ideas always remain nailed to the cross of the practices and institutions that stand for them in fact. Law is the site of this crucifixion.

Any consequential political endeavor must have the preservation, the transformation, or the foundation of a regime as its aim. Any deep understanding of law must teach us to reimagine and remake our institutional arrangements and assumptions, from the bottom up and the inside out. To develop such a teaching and to practice is the task that the universal history of legal thought suggests to us now.