

THE CRITICAL LEGAL  
STUDIES MOVEMENT

Another Time, A Greater Task

Roberto Mangabeira Unger



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PART I

*Another Time,  
A Greater Task (2014)*





## ONE

### *The Context, the Movement, and the Book*

#### **The Context**

**T**he *Critical Legal Studies Movement* is a manifesto for a movement of ideas in legal thought. This introduction to a new edition of the original book has two aims. Its first purpose is to place both the movement and the book in context and to reconsider both the book and the movement in the light of subsequent developments. Its second goal is to look to the future, and to consider the vocation of legal thought now.

The critical legal studies movement represented, both by design and in fact, a forceful intervention in the history of legal ideas in the United States and more generally in the world. The meaning as well as the importance of such an intervention depends on what follows it. I address both the movement and the book as a step in the development of an unfinished agenda of ideas about law.

A central claim made explicitly in this introduction and implicitly throughout this book is that the potential of law and legal thought to inform the self-construction of society under democracy remains largely untapped. Surrender to the constraints narrowing our vision of what law is and can become undermines our ability to make use of this potential.

In addressing both the recent past and the present vocation of legal thought, we face a difficulty that the social sciences and humanities confront in far smaller measure: the national character of law. The critical legal studies movement was an episode in American life. Americans were chiefly responsible for launching it. It addressed American circumstances, and embraced attitudes in the categories of a discourse that, if not solely American, was expressed in terms that Americans might readily understand and find appealing.

Nevertheless, the issues at stake in the past and future contexts that the book and this introduction address are not peculiar to the United States; they arise throughout the world. A circumstance analogous to the one in which the critical legal studies movement emerged has occurred in Europe and in the civil-law countries. The precursors and sequels of the movement and its adversaries and allies have counterparts there, often under different labels. The failure to remain faithful to the greater vocation of legal thought is a worldwide failure, with global consequences.

From the outset, I viewed the critical legal studies movement as a contribution to a worldwide change in the direction of legal thought. It is in that same spirit that I here reconsider the events and ideas with which this book deals. My interest is less in what is distinctively American than in what has significance for legal thought around the world.

Let the reader correct for the specialness of the American situation and the American words. Let him give the argument its most inclusive reach. In this effort, I shall help him by addressing the movement and this manifesto in a manner designed to emphasize what is of worldwide rather than of merely provincial significance in the situation and in the future of legal thought.

Critical legal studies was never intended to generate a permanent genre of legal writing, or to take its place among a standing cast of schools of legal theory. It was a disruptive engagement in a particular circumstance. Consider now the context in which it appeared, first from the standpoint of its relation to the then dominant practice of legal analysis and second from the perspective of its connection with the political

situation that it faced in the United States and in the world. Let me call these two perspectives the internal and the external contexts, if by internal we might mean what has to do with law and legal thought and by external what regards the condition of society. We can in turn distinguish methodological and substantive aspects of the internal point of view: those that have to do with ways of thinking about law and those that concern the content of law.

The practice of legal analysis that the movement found in command of legal thought represented law as a repository of impersonal principles of right and of policies responsive to the public interest. It interpreted each fragment of law by attributing purposes to it. It described those purposes in the idealizing language of policy and principle. Call this approach to law, as it was called by some of its theoreticians, the method of reasoned elaboration.

According to this method, law was to be interpreted in the best possible light—that is to say, the light least tainted by the powerful interests that were likely to have exerted the predominant influence in the political contest over the content of law, especially through legislation. By putting the best light on the law, the professional interpreters of law, within or outside adjudication, could, according to this view, improve the law. They could become the agents through whose efforts the “law works itself pure,” even in an age in which legislation had long come to overshadow law made by jurists, whether holding judicial office or not.\*

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\* By jurist I mean a lawyer with higher pretensions and ambitions: he claims to deploy a method that authoritatively interprets the law or develops it in the service of ideals as well as of interests. He defends his initiatives in a discourse of public reason before his fellow jurists and his fellow citizens. He may be an academic lawyer, a judge, a critic of established law, or what in the tradition of Roman law was called a *jurisconsult*. His activities may include representing private or governmental clients within or outside a judicial setting. However, these activities always reach beyond that function to participating in the contest over the future of law and thus of society: engagement with the struggle over the future of law is the chief distinguishing trait of a jurist among other legal professionals. He may hold a public office, such as that of judge. But it is a view of the office rather than the office itself that makes him a jurist as well as an official. For better or worse, jurists take care of law in every legal system. They do so whether they are more or

The major schools of jurisprudence differed in how they proposed to ground the impersonal principles and public-regarding policies that were supposed to control the interpretation of law. For one school, these policies and principles were to be couched in a political theory of rights; for another, in a normative view of efficient resource allocation; and for yet another in a conception of the methods suitable to each agent in the legal system—legislators, administrative agencies, and “private orderers,” as well as courts.

Regardless of these theoretical differences and disputes, the reasoned elaboration of law—purposive, generalizing, and idealizing—made the same crucial assumptions. To a large extent the guiding conceptions of policy and principle that enabled the interpreter to make sense of law and that guided him in his practical work were supposed to be already latent in the extant law, waiting to be revealed by the legal analyst.

To affirm that the story of policy and principle was fully there would be to make an incredible claim. How could the political struggle over the content of law, especially as organized and legitimated by democracy, produce if not a system then at least a series of fragmentary normative conceptions, addressed to each domain of law and social practice and capable of retrospective expression in the language of magnanimous policy and neutral principle? Those who had struggled in politics over the content of law in the name of clashing interests and visions would have acted as the unwitting servants of an immanent logic of social evolution. Had they done so, the pretense of democracy to subject the terms of social life to collective self-determination would be discredited.

It was thus necessary to claim that the ideal element in law was only incompletely expressed in established law. The judge or non-judicial jurist had to complete this ideal element through the proper exercise of his responsibility to advance, case by case, the reasoned elaboration of law.

To suppose, however, that the narrative of policy and principle already contained in the law was at best inchoate or contradictory, and that most of it would have to be an invention rather than a discovery,

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less accountable to political masters and whether or not their pretensions are well founded and their ambitions realistic. In this introduction I use the terms jurist and lawyer interchangeably, although jurists form only a subset of lawyers.

would be to undermine even a relative distinction between making and applying law. It would be to grant the interpreter a measure of revisionary power that no sovereign, much less the people and their representatives under democracy, would be likely to accept. It was thus indispensable to assume that the story of policy and principle was largely, but not completely, latent in the established law. It conflicted with only a limited portion of the received understanding of law. At any given time the practitioner of reasoned elaboration would need to reject only a limited portion of the received understandings of law; the exercise of revisionary power would remain moderate. Nothing, however, seemed to guarantee this happy balance, although everything in the assumptions of the dominant practice of legal analysis required it.

What made it seem less unlikely that the content and character of law would support these extravagant expectations was the unquestioning acceptance of the basic institutional arrangements for the organization of the market economy, of democratic politics, and of civil society outside the market and the state. The arrangements of social life, expressed in the details of the law in force, could then be seen as the seat of a higher scheme of social organization, made explicit in the ideas and arguments of the jurists. The proponents and theoreticians of the method of reasoned elaboration presented it as the outcome of a rebellion against nineteenth-century doctrinalism; it was, instead, its disguised continuation.

The first task of the method of reasoned elaboration was to deal with a reorganization of substantive law in the mid-twentieth century. A new body of public law, governing the public and regulatory activity of government, came to be superimposed on a largely untransformed corpus of private law. Such changes as took place in private law could easily be represented as the outcome of a continuous evolution.

As a result, legal thought could conceal from itself the full significance of one of its most important analytical achievements: the discovery of the legal indeterminacy of the idea of a market economy. At each turn in the translation of abstract ideas about the market into specific institutional arrangements, it had become apparent that there were choices to be made. It was impossible—so the cumulative work of both practical

lawyers and legal thinkers had demonstrated—to make such choices by inference from the abstract conception of a market economy. They inevitably involved choosing among competing visions and interests.

The relative stability of private law worked to strip this discovery of its significance. It perpetuated, in direct contradiction to the thesis of the legal indeterminacy of the market, the idea that certain varieties of private property and contract were the natural and necessary legal basis of a market economy, with limited scope for variation. The same way of thinking could then easily be applied to democracy and to civil society as well: they, too, were claimed to have a natural and necessary institutional form.

The proponents and historians of the style of legal analysis against which the critical legal studies movement revolted liked to describe it as a revolutionary break with the “doctrinal formalism” of the nineteenth century. In fact, the purposive, policy-oriented, and principle-based style of legal reasoning, the method of reasoned elaboration (which, in a later book, I called rationalizing legal analysis), represented a close continuation of the analytic and argumentative practice that it claimed to have repudiated. It loosened or weakened rather than replaced each of its crucial assumptions and commitments, retreating to what seemed to be more defensible ground.

The self-appointed central task of nineteenth-century legal science had been to work out what it took to be the inbuilt legal content of a type of social, political, and economic organization: notably, the legal regime of a “free society.” It was a conception that conservative jurists shared with the necessitarian social theories of the same period, even those, like Marxism, that saw the prevailing regime as destined to be superseded. According to this typological idea, the established institutional and ideological order, expressed in law, is an indivisible system, with inherent legal substance, not just a loose and contingent amalgamation of compromises, impositions, and accidents. It has both an institutional and an ideological logic. For the jurist, this logic was most clearly revealed in the basic categories of private law, especially the law of contract and of property. Public law was to be evaluated chiefly by the standard of its ability to support, or of its power to subvert, these private rights.

When legal science was driven, even against its inclinations, to recognize the legal indeterminacy of the market, it undermined its own typological method. The contradiction was resolved in practice by failing to press the idea of such indeterminacy to its conclusion: the exploration of alternative ways to organize production and exchange. Instead, indeterminacy served as an invitation to strike a balance among competing interests in the development of legal doctrine.

The theory and practice of the purposive, policy-oriented, principle-based style of legal argument that became ascendant in the second half of the twentieth century avoided any explicit embrace of the typological notion. Its advocates preferred to misrepresent the earlier legal-analytic practice as a superstitious attempt to infer the right answer to every legal question from a gapless system of rules by the use of a quasi-deductive method of inference.

The characteristic strategy of the new approach was to distance itself from the heroic assumptions of the typological view without defying them. The practice of reasoned elaboration made it possible to continue treating the law as a system. Underlying the system of legal rules, standards, policies, and principles was the institutional and ideological regime of society itself, represented as a flawed approximation to an intelligible and defensible plan of social life. The continuity of that plan and its expression in the details of the law, as well as in the guiding policies and principles, encouraged the jurist to persist in his effort to show that law is something more than ephemeral conflict and compromise among clashing interests and visions. If the result of this exercise was not the typological approach of nineteenth-century legal science, it was the closest approximation to this approach that had come to seem credible.

The affinity between nineteenth-century legal science and the new practices of reasoned elaboration of law becomes ever clearer when we consider the relation between the contrasts that were decisive for each of these two moments in the history of legal thought. For nineteenth-century legal science, the organizing contrast distinguished good, hard law with respect to the distribution of advantage from bad, soft, politicized law. Good, hard law was the impersonal law of coordination, supposedly embodied in the system of private

rights, especially of contract and property. Respected in its purity, it would remain innocent of distributive consequences. The chief task of public law was to maintain an environment in which the integrity and the neutrality of the regime of private rights had the best chance of being upheld.

In the idiom of American constitutional law, this contrast is derided as *Lochnerism*: the superstitious invocation and constitutional entrenchment of a natural private order as a bar to the regulatory and redistributive initiatives of an activist government. Its core conception has survived, however, in vestigial form in any number of doctrines that are admitted without complaint to the stock of contemporary notions in good standing. Among these vestiges, to stay with the American setting, is the *state-action doctrine*, professing to restrict constitutional principles to situations that government has been complicit in making. It thus draws a distinction between social situations that are assumed to be pre-politically existent and situations that have been shaped by politics. That distinction was the essence of the contrast that the putatively more advanced legal thought of the later period claims to have repudiated. No situations in society are somehow just there, apart from politics and governmental power.

In this later period, the controlling distinction became the contrast between law as an embodiment of impersonal principles of rights or of policies responsive to the collective interest and law as *ad hoc* deals, or truce lines, among clashing interests and ideologies. From law as deals, no intelligible and defensible plan of social life, no matter how fragmentary, could be expected to result. The conception of law as the outcome of an endless series of episodes of conflict and compromise among interests and ideologies that had mobilized to secure influence over legislation was widely regarded as an acceptable understanding of law in the setting of legislative politics. Yet it was commonly rejected as a basis for the professional interpretation of law, except in special, even extreme circumstances. The reasoned elaboration of law after the fact, both within and outside adjudication, began by representing law in the disinterested language of policy and principle.

The key element in this distinction, and the one that most intimately connected it with the contrast between law as neutral coordination and



law as politicized redistribution, was devotion to an idea of reason in history: a form of reason that, under the tutelage of the jurists, could exhibit the law as a coherent and perfectible scheme of collective life. It was thus yet another of a long series of reinventions of the practice of legal doctrine, aggressively contrasted by its theoreticians and practitioners to a view of law as simply the will of the sovereign. Under democracy the people are this sovereign.

The idea that there exists no such rational plan “working itself pure” through the cumulative practice of legal doctrine was denounced as legal nihilism. It was so denounced even though there was nothing either nihilistic or radical in the conventional, conservative approach to law, expressed in the vocabulary of interest-group pluralism, as ad hoc contest and compromise. Nevertheless, the legal outcome of such compromises and contests could not be plausibly represented as an evolving rational plan, suitable for explication and refinement by the jurists. The denial by the practice of reasoned elaboration of irrepressible conflict in the law shows the continuity between this approach to legal analysis and the doctrinal formalism that it misrepresented and claimed to have replaced.

From the new method there resulted the same evils that had beset its predecessors. The first such evil was mystification: the representation of law as an approximation to a prescriptive system, or a set of systems, in each domain of legal doctrine and social practice. The practical consequence was radically to understate variety and contradiction in the legal materials. It was to marginalize solutions and arrangements diverging from the predominant models in each area of law. Among such models are the unified property right and the bilateral executory contract. Each of the suppressed and understated anomalies might be developed into an alternative way of organizing the whole field.

The second such evil was usurpation of inordinate power by the jurists, to the detriment of democracy. They found the authority for their usurpation in the pretense of discerning the hidden rational script of policy and principle in the seemingly spiritless and accidental matter of the law. However, they could not plausibly claim to find the script all there, ready-made. For how could law, produced through conflict among interests and among ideologies, come to look, after the fact, in

the hands of its professional interpreters, as if a single mind and a single will had conceived it? And if these apparent differences of interest and ideology paled in comparison to what the clashing positions had in common—a consensus thick and robust enough to generate the policies and principles guiding the interpretation of law, yet unrecognized by the political agents themselves—how could we take the claims of democracy seriously? The hidden script of policy and principle needed therefore to be only incompletely latent in the law: latent enough to exempt the jurists from seeming to fabricate it entirely themselves. The missing part is the part that they would complete, in the exercise of their proper role of putting the best face on the law: the face least beholden to self-serving class or factional interest and most responsive to the common good or to impersonal right.

The third such evil was the most important. The other two matter chiefly because they contribute to it. It is the inhibiting spell that is cast by the method of reasoned elaboration, as it was cast by earlier practices of legal analysis, on the most hopeful mechanism of social change through law: the dialectic between reshaping our institutions and practices and reinterpreting our interests and ideals. The quickening of this dialectic is the opposite of a practical nihilism; it is the chief device by which we can hope to master the established structure of society rather than allowing it to master us.

Both the earlier and the later doctrinalism committed this evil by making the same wager. Their implicit message was: jurists are priests, not prophets. Let us make the best of what we have, and let us do so by imagining the established law to be purer, by our lights, than it in fact is. Let us diminish the quota of self-dealing and unresolved conflict in the established rules and doctrines, the better to increase, under our watch, the purchase of public-regarding reason on the content of law.

It was this approach to law, with its multiple evils and its unjustified claim to have broken with the earlier doctrinal formalism, that the critical legal studies movement found preeminent in legal thought when it appeared in the United States in the 1970s. Already then the method of reasoned elaboration, or rationalizing legal analysis, had begun to be promoted throughout the world as the advanced and indispensable successor to what was denounced as doctrinal formalism and as the

responsible alternative to the extreme forms of legal skepticism disseminated in the course of the twentieth century. The two most influential seats of this method—the United States and Germany—became the chief bases from which it was exported and promoted to the rest of the world. The older doctrinal method had retained its influence in that rest more than it had in the United States or in many Western European countries. As a result, reasoned elaboration was often received there as a liberation from an inherited and long fossilized practice of legal doctrine.

However, it was a false freedom that the defenders of reasoned elaboration offered. The vices of this practice of legal analysis, especially its antagonism to institutional imagination in law, were already damaging in its North Atlantic home ground. They proved calamitous when carried to countries in which even the most basic advances toward democracy and socially inclusive growth required institutional innovation. It was not by the light of the discredited ideological abstractions of the past two centuries, such as the ideas of capitalism and socialism, that these societies could guide their steps. It was rather by enlisting established small-scale institutional variations, expressed in the details of law, in the effort to develop larger-scale institutional alternatives. It was by refusing to commit themselves to dogmatic institutional blueprints and by preferring arrangements that would be corrigible in the light of experience and make it possible to define a path while treading it. It was consequently also by rejecting judges as the chief addressees of legal analysis, and refusing to take the question—how should judges decide cases?—as the defining problem in jurisprudence.

To achieve these goals, it was necessary to find another future for legal thought. Critical legal studies attacked, at the center of world legal culture, the jurisprudential program that was then being offered, and that continues to be proposed, as the wave of the future.

The relation of the movement to the then prevailing tendencies in jurisprudence becomes clear only when we look beyond legal thought to the political realities and the intellectual circumstance of the world in which it emerged: its external context. If the proximate aim of the movement, in its better self and its better moments, was to propose

an alternative future for legal thought, its ulterior goal, in that same character and those same times, was to make legal thought more useful to the demarcation of an alternative future for society.

Historical experience supplies an endless series of threats to the established arrangements and assumptions of a society and therefore as well to the interests embedded in them. Such disruptions are most often met by accommodations minimizing disturbance to established interests and preconceptions. To this minimalism of disturbance we might give the name: the path of least resistance. The aim of transformative practice and transformative thought is to create an alternative to the path of least resistance. In the light of such an alternative, it becomes possible to reinterpret interests and even identities.

There has been no major institutional and ideological renovation in North America and Western Europe since the social-democratic settlement of the mid twentieth century. This settlement began to be designed in the period between the two great wars of the twentieth century and acquired its canonical form after the second one. By its terms, any effort fundamentally to reshape the organization of production and of power—the market and the state—was abandoned.

The state strengthened its power to regulate, to redistribute by compensatory tax-and-transfer, and to manage the economy counter-cyclically, thus helping ensure the profitability of private firms as well as the protection of the moneyless classes against the extremes of economic insecurity. However, the horizon of active dispute over the organization of society shrank. In the years when the critical legal studies movement was most active, the limits of the political-economic debate that has prevailed ever since were already apparent. The core question that this debate sought to answer was how American-style economic flexibility and European-style social protection could best be reconciled. The modest and localized institutional innovations of the recent past, such as the “flexsecurity” arrangements of reformed European social democracy, weakening defenses against dismissal while strengthening portable endowments and benefits, served this goal.

Critical legal studies found in command of the practice of legal analysis the method of reasoned elaboration: the purposive interpretation of law in the vocabulary of policy and principle. The champions of

this method sought to understand and elaborate law as an approximation to an authoritative plan of social life—or at least to a series of such plans, addressed to different areas of social practice. They accepted the established institutional and ideological settlement as the template for this exercise of ameliorative interpretation. It was a practice that cast over the contradictory reality of the settlement, expressed in the rules and doctrines of law, the halo of prestigious ideals.

If you looked beyond North America and Western Europe to the restless world outside, you saw no appealing alternative to this set of institutions and ideas. The large rightwing and leftwing ideological adventures of the twentieth century had everywhere been abandoned, only to be replaced by a combination, in varying proportions, of neo-liberal orthodoxy, state capitalism, and compensatory redistribution by tax-and-transfer—the residual form of social democracy.

Thus, a dictatorship of no alternatives held sway almost everywhere. Its rule consisted in the perpetuation of a very restricted range of institutional options for the ordering of different parts of society: the relations among firms, workers, and governments and the organization of production and exchange; the arrangements of democratic politics; civil society outside the market and the state; the family and the child. In each of these domains there appeared to be at best only a few feasible forms of organization. Such innovation as remained often amounted to an attempt to combine these familiar institutional variants in changing proportions.

One of the greatest merits of the critical legal studies movement was to have created an intellectual space in which law and legal thought could be better used to resist the dictatorship of no alternatives. Its limited but important contribution to such resistance was the development of ideas about alternatives, made from the contradictions and variations in established law. The greatest failure of the movement was not to have embraced and executed this task more fully.

The significance of such work becomes clear in the light of two considerations. The first consideration is the impossibility of solving or even understanding and addressing the basic problems of contemporary societies within the limits of the social-democratic settlement of the mid twentieth century, or of the subsequent attempts (the “third

way," the "Nordic model") to attenuate its historical rigidities and its contrast between insiders and outsiders. Among these problems was the hierarchical segmentation of national economies between the advanced and backward forms of production in the wake of the decline of mass production; the reorganization of labor in the guise of decentralized networks of contractual relations and the consequent danger of universal economic insecurity; the failure to make finance serve the real economy rather than allowing it to serve itself and to generate, as a result, periodic crises; the need to engage civil society, in association with the state, in the experimental and competitive provision of public services in the broad middle range between a universal floor of state-provided services and a ceiling of complex and costly services that only the state could develop; and the continuing dependence of the established low-energy democracies—with their low levels of popular engagement in political life, their disposition to perpetuate impasse rather than resolve it, and their inability to encourage, in particular localities and sectors, the creation of counter-models of the national future—on crisis as a requirement of change. All these problems demanded responses rich in that in which the social-democratic settlement and the prevailing political and economic doctrines were poor: institutional innovation in the arrangements of the market economy, of democratic politics, and of independent civil society.

A second consideration accounting for the importance of the task is its conceptual and methodological difficulty. To describe that difficulty is to turn to another aspect of the broader setting in which the critical legal studies movement appeared: the situation of thought about society and history. Across the entire field of social and historical study, the prevailing tendencies retreated from the structural ambitions of classical European social theory: its effort to subsume the present organization of social life within a broader range of regimes open, in the future, to the advanced societies of the day. Instead of radicalizing this idea by rescuing it from the incubus of the necessitarian assumptions that circumscribed its reach in the earlier social theories, these tendencies relinquished structural vision altogether. They colluded, directly or indirectly, in a normalization or a naturalization of social life.

In each major area of social life, this disconnection of insight into

social reality from imagination of social possibility took distinct form. In the hard social sciences, especially economics, it was achieved by treating present arrangements as winners in a functionalist contest that had selected what works best. Such a view could readily be developed into what became known as the convergence thesis: the idea that contemporary societies are converging to the same set of best practices and institutions, realized in the details of law. In the normative disciplines of political philosophy and legal theory, it was manifest in the use of philosophical abstractions to justify the retrospective attenuation of inequalities through compensatory tax-and-transfer as well as through the idealization of law in the vocabulary of impersonal policy and principle. In the humanities, its characteristic expression was an open-ended exploration of varieties of individual experience and consciousness, prefigured in the history of literary and artistic modernism, and detached from any transformative engagement with the structure of society.

Whatever the critical legal studies movement achieved, it accomplished by providing an example of intellectual practices at war with these supposedly antagonistic but in fact allied tendencies. To have temporized with them more than it should have, or needed to, was the source of many of its failures.

The history of law and legal thought to this day has exhibited a characteristic rhythm: a recurrent succession of three moments. In each of these moments, legal thought, in its most ambitious endeavors, undertakes distinct tasks. This rhythm can easily be mistaken for a permanent and inexorable feature of legal and social history. In fact, we may hope to escape it and, by escaping it, to advance our most basic material and moral interests.

The first moment in this recurrent process is the time of refoundation. Here the institutional and ideological settlement is reimagined and remade. Radical reforms change pieces of the framework of institutional arrangements and ideological assumptions that have, until then, shaped the routine practical and discursive activities of a society. They do so, among other ways, by redefining access to the resources, of economic capital, political power, and cultural authority, with which the existing social forces create the future within the present. These

reforms are characteristically undertaken in situations of war and ruin: crisis works as the enabler of change.

In the United States, such moments of refoundation were those of the establishment of the Republic, of the period of Civil War and Reconstruction, and of the New Deal. The last major episode of refoundation in the history of the North Atlantic countries was the social-democratic compromise of the mid twentieth century. Roosevelt's New Deal was its American form.

Legal thought shares in the work of refoundation. Radical reforms must be expressed as law, for it is in law that the institutional arrangements of society are established and in law that they are represented in relation to the ideals and interests that make sense of them. The jurists share, often as a distinct segment of a governing elite, in the work of revising the inherited settlement. Rarely prophets, they nevertheless exceed the limits of their accustomed priestly role.

A second moment is the hour of normalization. The crisis that provoked the refoundation has passed. The redrawing of the new institutional settlement must be translated into definite institutional arrangements as well as into prescriptive conceptions of different areas of social life. Legal doctrine represents the arrangements in the light of the conceptions. Both the typological method of the nineteenth century and the twentieth-century practice of reasoned elaboration in the vocabulary of impersonal policy and principle did such normalizing work.

The normalized settlement is commonly represented as a system. It is supposed to be indivisible: all of its parts stand or fall together. A comprehensive logic of normative conceptions or of practical imperatives and laws of change is invoked to account for the unity of the settlement. The truth, however, is that such institutional or ideological settlements are not systems. They are ramshackle constructions. Once taken for granted in the way people understand their interests and identities, they become recalcitrant to change. However, we are not entitled to interpret this recalcitrance as a sign of their systemic integrity. They are divisible: when they change, they change piecemeal. Such piecemeal change can become radical in outcome if it persists in a certain direction.



The characteristic form of normalization in legal thought has been the turning of the new settlement into a comprehensive set of legal rules, doctrines, and categories, informed by prescriptive accounts of whole areas of law and social practice, and served by distinctive methods of legal analysis and argument. The normalized institutional and ideological settlement is made to look like the system that it is not: a system of a peculiar sort, one that expresses the marriage of institutional arrangements with normative beliefs about what people are entitled to expect from one another in different departments of social life.

In this period, the jurists are more likely to stand apart from the power holders. They strive to represent and to enforce the authority of the system of which they are the designated or self-appointed custodians against the waywardness of those who find themselves in the seats of political power. In the moment of normalization, legal doctrine has its heyday: the earlier moment of refoundation is close enough to remain legitimate and to guide, but not so close that it consumes the pretenses of the doctrinalists in the fire of a struggle over fundamentals.

In late twentieth-century America, the phase of normalization extended from the immediate aftermath of the Second World War to the 1970s. The consensus in legal thought then began to be disturbed. The country found itself increasingly unable to solve its problems under the arrangements of the late New Deal, with its retreat from institutional experimentation and its narrower focus on mass consumption and economic security. A similar shift occurred in the law and politics of the Western European countries. The normalization of social democracy and the development of a new body of public law against the background of a largely unchanged body of private law were one and the same endeavor.

Then comes a third moment in this repeated succession: the period of darkening. The institutional and ideological settlement now recedes into the past. It is contested, as social democracy and the New Deal were contested by the neoliberal tendencies of the late twentieth century. Above all, it becomes less pertinent: it ceases to speak with clarity to the living issues of the day.

Among the attributes of legal culture in a period of darkening, three stand out. A first characteristic is a greater readiness to defy the

reigning consensus about both the substance of law and the method of legal analysis. There is an experience of disorientation resulting in a greater willingness to travel other paths, if only by retaking roads that were rejected in the past. However, the absence of political events that could inspire another refoundation discourages any more consequential challenge. The result is more likely to be a waning of faith than the development of a new faith.

A second such trait of the consciousness of lawyers in the era of darkening is the spread of an ironic, instrumental, and tactical attitude to the prevailing practices of legal analysis. The assumptions of these practices become increasingly hard to credit: for example the assumption, characteristic of the method of reasoned elaboration, that the narrative of policy and principle (whether expounded in the language of a theory of right, of a prescriptive conception of the market economy, or of a view of the distinctive tasks and methods of each institutional role within the legal order) is already largely latent in the extant law.

The ironical and strategic lawyer nevertheless clings to the practice in whose premises he has ceased to believe: he becomes the priest, standing in tedious embarrassment before cold altars, invoked at the end of this book. He clings to it both self-interestedly, to find a place, and disinterestedly, to make a difference. He seeks a place that can give him authority—the authority of his profession and discipline—above the common ground of politics. The difference that he hopes to make is one enabling him to use the practice in which he has ceased fully to believe to advance ends to which he remains committed. His true motives, goals, and methods lie hidden behind a screen: often obscure to him as well as to others. Deprived of light, he easily becomes the victim of his own ironic distancing from the discourse that he deploys instrumentally. By this posture, he denies himself the benefit of a passage from faith to disillusionment to new faith. He finds himself imprisoned in half-belief.

A third mark of legal culture in the time of darkening is the prominence that it accords to theory. Schools of jurisprudence rival one another in the attempt to ground the vocabulary of the doctrinal practice of the day in ideas transcending established law but claiming to be

embodied, though imperfectly, in that law. Thus in the United States today, with respect to the method of reasoned elaboration, each of the major schools of legal thought proposes a distinct view of how or where the discourse of policy and principle, guiding legal analysis and represented as immanent in established law, is to be grounded.

Theory, at the hour of darkening, begins to occupy some of the space of the receding institutional and ideological settlement. As the settlement loses both authority and clarity, theory tries to stand in its place, supplementing the guidance that the fading settlement is ever less able to provide. Such theoretical commitments, however, make a poor substitute for the transformative energy of the foundational moment and a weak rival to the instrumental and ironic attitude.

Darkening is what has prevailed generally in the legal culture of the North Atlantic societies from the 1970s and 1980s to the present. Its ascendancy coincides with the troubles and the evisceration of historical social democracy. It coincides as well, in these same countries, with the propagation of theories of justice that offer a philosophical defense for compensatory redistribution at a time when social democracy has long been in retreat.

The years when the critical legal studies movement emerged in the United States were a time when normalization had begun to give way to darkening. Critical legal studies and its equivalents in Europe were both an expression and an accelerator of this passage. The critical legal studies movement seized the opportunity to disrupt a consensus that had already begun to weaken. It went on to suggest, implicitly when not explicitly, a different future for legal analysis, not simply the continuation of the existing practice with an ironic and tactical proviso. Its failures were the failures of half-hearted prosecution of this intellectual program, many of them occasioned by half-conscious acceptance of the beliefs and methods against which it revolted.

At its best, the movement differed from the leading schools of jurisprudence in the United States—theories of right, law and economics, and legal process—both by its proximate and its ultimate goals. They took as their proximate goal to anchor the method of reasoned elaboration and its vocabulary of policy and principle in a conception that could make up for the erosion and ambiguity of the

receding settlement. To this end, they accepted the decisive importance of the settings in which the legal profession operated—adjudication first among them. The movement, at its best, wanted to reorient the practice of legal analysis and to treat the citizen, rather than the judge or his professional equivalent, as the most important interlocutor of legal thought.

Their ulterior objective was the maintenance and improvement of the inherited institutional and ideological settlement, the same one that was fast losing both clarity and authority. The movement, at its best, saw the chance to use legal analysis as a method for the development of alternatives, from the bottom up and from the inside out: that is to say, by recognizing, deepening, and extending institutional variations already present or presaged in law and doctrine but understated or obfuscated by the prevailing analytic practice and the dominant legal theories. That this combination of shallower and deeper goals was never fully understood or accepted by many of those who came to see themselves as participants in the movement helps account for how much it fell short.

This picture of the moments of refoundation, normalization, and darkening suggests the intimate relation between the problems of legal thought and the understanding of structural discontinuity in history. An account of these three moments could only be a view of how institutional and ideological frameworks—the formative contexts of social life—get made and remade. That was and remains the central topic of social theory. The future of social theory must be shaped by the answers that it gives to this question. Similarly, if there is to be a powerful practice of programmatic argument in the service of radical reform, it must have as its major theme the development of such structural alternatives. The problems and prospects of legal thought are thus bound up with those of programmatic argument and social theory—a fact the implications of which have never been fully acknowledged.

When we recognize this inescapable entanglement, we come to see as well the significance of an issue that has remained almost entirely unremarked in jurisprudence. We should not want simply to occupy a predestined place in the recurrence of refoundation, normalization, and darkening. Those who, as we do, find ourselves in an epoch of

darkening should not need to wait for the next age of war and ruin to experience the next opportunity of refoundation, especially if the better part of our lives happens to fall in such an interval.

We may then come to see our personal stake in not having to wait for events that may occur only after our deaths as convergent with our collective stake in creating institutions and practices, including discursive practices and methods of inquiry, that no longer require crisis as the condition of change. The point is not simply to live the moment that history has assigned to us; it is to get off this treadmill by mastering the structure, practically as well as intellectually. We cannot, however, master it unless we change its character as well as its content: that is, the extent to which it facilitates its own remaking, dispensing with crisis as the condition of change.

Moreover, this interest of ours finds reinforcement in another fact. Significant change is structural change: the transformation, albeit gradual and fragmentary, of the institutional arrangements and ideological assumptions of society. In recognizing the primacy of structural change, we continue to think as the most consequential reformers and the deepest social theorists have always thought. Unlike many of the theorists and ideologists of the past, however, we can and should no longer embrace a dogmatic structural blueprint, proposing to put one system in the place of another. Such blueprints were, for example, the systems of rules and rights defended by the liberals of the nineteenth century, or the substitution of capitalism by one or another scheme of state socialism or worker self-management. We must define a direction and select, in the situation in which we find ourselves, steps by which to begin to move in that direction.

How can we nurture structural ambitions without succumbing to a structural dogmatism? Part of the answer lies in the development of institutions and practices that possess, in superior measure, the attribute of corrigibility, allowing us experimentally to discover the path as we advance. The implications for reshaping market economies, democratic polities, and independent civil society may be both numerous and tangible. As law and legal thought deal with structure in the details, they offer a preferred place in which to look for the equipment that the execution of this task requires.

Change in the quality as well as the substance of the institutional and ideological regime of social life is a principal concern of this book, often implicit and sometimes explicit. However, it had little place in the shared concerns of the critical legal studies movement.

### **The Movement and Its Sequel**

Critical legal studies became active in the United States in the mid 1970s and continued as an organized force only until the late 1980s. Its life as a movement lasted for barely more than a decade. Contrary to common misconception, its founders never meant it to become an ongoing school of thought or genre of writing. They wanted to intervene in a particular circumstance: the internal and external contexts that I have just described.

American legal thought was then nearing the end of what I earlier called the moment of normalization. The New Deal reformation of law had been accomplished, with little trouble for the inherited body of private law. Those who led the then prevalent consensus in legal thought believed that whatever was useful in legal realism or legal skepticism had already been absorbed: the discrediting of what they imagined to be the deductivism and conceptualism of the earlier form of legal thought. All sound jurists would occupy and defend a middle position between those who, in the manner of the earlier dispensation, supposedly reduced to a minimum the place for discretion in interpreting law and those who viewed interpretation as politics by other means. The only question of significance left open was on what basis this methodological and political centrism was to be described and developed.

The proximate shared aim of those who organized the movement was to attack this consensus at a time when they understood it to be vulnerable. They were divided in the extent of their opposition to reasoned elaboration of law in the vocabulary of policy and principle, as well as to the political and economic settlement that this practice served. They disagreed yet more about the positive methodological and political alternatives that should replace this consensus. They made use

of a device common among agitators and subversives: they pretended that the movement already existed, the better to bring it into existence.

In the pursuit of the immediate goal uniting them, they were more successful than they had imagined possible. Not only was the dominant consensus in American legal thought disrupted; it has never since been reestablished in the legal academy. Academic legal thought is now the only major social discipline in the United States that is not in the grip of a methodological orthodoxy. No one would have expected it: in that country, as in many, law is the discipline closest to power. The major law schools continue to play a significant part in the education of the governing elite. No wonder its appearance in those schools provoked an often bitter resistance, accompanied by all the forms of derision and marginalization with which the university system anathematizes the defiant.

However, in no other country did the imagination of alternatives in legal thought achieve, even briefly, a similar success, if we measure success by the novelty of the message rather than by the number and prominence of the messengers. There were leftist and critical tendencies in legal thought in every country. In many they established organizations and disseminated ideas through meetings and journals. In some countries the academic presence of self-styled adherents to critical legal studies was larger and more long-lasting than it had ever been in the United States. Overwhelmingly, however, they were seen and saw themselves as a fringe in national life, representing in law the more or less conventional concerns of the left. It was a left more committed to neo-Marxist theory and to the defense of working-class interests than the American left had become. However, it was often even more deficient than the American movement in what should have been the greatest contribution of legal thought to the left: institutional imagination.

When it spoke in its most original voice, critical legal studies remained a heresy in one country. Only when it had relinquished this originality as a result of the events that I next examine did it begin to seem superfluous.

Despite its success in opening a space for the imagination of approaches resisting both the method of reasoned elaboration and the established institutional and ideological settlement, the critical legal studies movement suffered two defeats. The first resulted from its relation to the larger political society; the second, from its internal hesitations.

As soon as critical legal studies began to present itself as something more than a collection of individual, isolated thinkers and to suggest trouble and division in the discipline closest to power, it brought on itself the hostile scrutiny of the American newspapers and the friendly attention of all who were searching for alternative approaches to law and society. One consequence of this attention was to provoke the authorities in American universities like Harvard to rein in a tendency that they regarded as more embarrassing than dangerous. Another consequence was to attract to critical legal studies and to its meetings and initiatives American progressives who had either no vital connection to law or no interest in rethinking the assumptions of their own discourse and strategy. Critical legal studies was soon filled with representatives of the then prevailing varieties of progressive politics, notably the spokespeople for the politics of group identity and the virtual representatives of minorities. Such was, in the closing decades of the twentieth century, the tenor of progressive politics in the United States.

For what did critical legal studies stand? There were three main strands in this movement of ideas before it was overwhelmed by the concerns of the conventional American progressivism of the time.

A first current of ideas was the radicalization of legal indeterminacy. Call it the indeterminacy or deconstruction approach to critical legal studies. Its antecedents lay in antiformalist legal theories, in literary deconstruction, and in structuralist approaches to the history of shared forms of consciousness. It viewed past or contemporary doctrine as the statement of a particular vision of society while emphasizing the contradictory character of doctrinal argument and its susceptibility to doctrinal manipulation. Its characteristic thesis was the radical indeterminacy of law.\*

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\* For an example see Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harvard Law Review* 1686 (1976).



Given any piece of law to be interpreted and any accepted stock of interpretative procedures as well as of substantive policies and principles, it was easy to deploy the hermeneutic procedures as well as the substantive arguments to produce the result preferred by the interpreter. For example, in contract law, policy and principle arguments emphasizing the value of freedom to contract and of freedom of contract were balanced against others playing up reliance, economic duress, or good faith. In corporate law, rules and doctrines holding managerial discretion to account were weighed against the doctrine of business judgment. So it went, in one area of law after another. From the pervasiveness of such opposing armies of stereotypical argument in legal discourse, the proponents of radical indeterminacy seemed mistakenly to infer the conclusion that any skillfully argued interpretation was as good as any other.

A theoretical proviso hedged the thesis of radical indeterminacy. Law might be indeterminate if considered only at the surface of its controversies. However, it became determinate to the extent that its credentialed interpreters shared a way of thinking about society as well as about law. Such a mode of thought was all the more powerful because it was left largely inexplicit. The hidden form of consciousness is what made the indeterminate determinate. Because this proviso was characteristically unaccompanied by any view of how such ways of thinking were made and could be remade, it was without practical consequence. What counted in practice was the claim of radical indeterminacy.

However, this claim was misdirected: it did not mean what it seemed to mean, and it failed to advance what it intended to promote. No one really disputed that meaning could be fixed by joint sharing in a form of life. The intention was to criticize the institutional and ideological assumptions that enabled meaning to be settled and conveyed. However, the ideas and words expressing the thesis of radical indeterminacy did nothing to equip such a campaign.

The teaching of radical indeterminacy seduced its proponents into an intellectual and political desert and abandoned them there without recourse or prospect. It appeared to be the exorbitant theoretical nimbus of the effort of the liberals of that time to circumvent political politics by an appeal to judicial politics. It tempted and enervated those who

had found it irresistible with a dose of wishful thinking with which they would not have dared regale themselves, were it not concealed under the veneer of the prestigious abstractions favored by the deconstructionist doctrine. It hardly mattered who won and lost in politics; once made by the winners, the laws could be made to mean something else by the friends of the losers so long as they were lucky enough to hold a judicial office or at least a professorial chair. It handed to its declared adversaries—adepts of the method of reasoned elaboration—the priceless advantage of allowing them to cast themselves as the sensible defenders of a middle line between a mechanical conceptualism, mistakenly attributed to their nineteenth-century precursors, and the wild anything-can-mean-anything thesis that its proponents seemed to espouse.

A second tendency in critical legal studies combined functionalist methods with radical aims in the study of law. Call it the neo-Marxist approach. Its point of departure has been the thesis that law and legal thought reflect, confirm, and reshape the divisions and hierarchies inherent in a supposedly universal and indivisible type or stage of social organization such as “capitalism.” As capitalism is a stage of the evolution of society, so there are stages of capitalism. To each of them there may correspond a distinctive form of law and of legal thinking—a conception attractive to many a conservative jurist, once purged of any association with transformative aims. It found its chief inspiration in classical European social theory, especially the social theory of Karl Marx and, to a lesser extent, of Max Weber and the approaches to history influenced by their ideas.\*

The deficiencies of this tendency are those of the theoretical tradition informing it. In its most stringent form, the tradition embraced the idea of an indivisible social and economic system, with fixed legal requirements and expressions. The intellectual strategy of those who recognized the complaints that historical research and political experience had brought against this extreme necessitarianism was to loosen

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\* For an example see Morton Horwitz, *The Transformation of American Law, 1780–1860*, (Cambridge, MA: Harvard University Press, 1977). For an example of the conservative uses of neo-Marxist functionalism, see Robert C. Clark, “The Four Stages of Capitalism,” 94 *Harvard Law Review* 561 (1981).

its assumptions, emphasizing the relative autonomy of both culture and politics.

What resulted, however, from such a loosening was not an alternative explanatory view; it was simply a dilution of the old necessitarianism to make more room for the accidents of history. Nothing in this continuum from the necessitarian to the accidental helped generate an alternative understanding of structure. Nothing elucidated the detailed regime of dominant and deviant solutions in any body of law, or exploited the ways in which the latter could turn into the former. Nothing therefore supported the movement from explanation and criticism to proposal—from the *is* to the *ought*, from the actual to the adjacent possible—without which legal thought ceases to be the practical discipline that it has always been and loses its transformative potency.

There remained a third position in critical legal studies. It was the least remarked because it was the most novel. However, it has proved to be the most long-lasting. Its central idea was that legal thought can become a practice of institutional imagination. Call it the institutionalist approach. Now, long after critical legal studies has ceased to be an organized collective intervention in the controversies of legal theory, many who were closely associated with the deconstructionist and neo-Marxist views have begun to write in the spirit of this institutionalist tendency. They have done so without either renouncing their earlier allegiances or clarifying the presuppositions of their new practice.

The comparative advantage of legal thought according to this approach lies in its ability to use the small-scale variations in established law, and the deviant or subordinate solutions in current doctrine, as instruments with which to imagine and develop alternatives for society. In this exercise, it infers its direction from professed ideals and recognized interests as well as from a vision of unrealized human opportunity. Its materials are the existing varieties and contradictions of the law and legal thought, constrained or concealed by the systematizing and idealizing illusion of the method of reasoned elaboration and its predecessors. Its proximate goal is to enlarge in law and in politics the penumbra of the possible that we can make happen from where we are now. Its most pressing problem is to lack a ready-made form of agency as well as an institutional setting for its work.

American legal realism did not need, or at least did not think it needed, an institutional program. It had one of sorts in Roosevelt's New Deal. Coming at a moment when normalization passed into darkening, rather than at a time of refoundation, critical legal studies had no such surrogate for a vision of its own.

To be consequential, any advance in the institutionalist direction had to meet three threshold requirements, each of them exacting in its own way. The first requirement was to break the idealizing spell that reasoned elaboration and its nineteenth-century antecedent had cast on the law. That spell was not to be replaced by the thesis that law is a system, even one that deserves no halo, expressing the necessary content of a type of social and economic organization, such as capitalism was supposed to be according to the more extreme forms of the neo-Marxist thesis. Neither was it to be succeeded by a view of law as a kit of rhetorical devices, prevented from being manipulated at the pleasure of its professional interpreters only by their unwitting participation in a form of consciousness that controlled them from the shadows, as the radical indeterminacy thesis taught.

Instead, the spell had to give way to recognition of the distinctive coexistence of dominant and deviant solutions in each branch of law. The pattern of that coexistence is less the product of an institutional and ideological regime than it is its content or constitution. Such a regime is never an indivisible system, shaped by inescapable constraints, in the manner of the materialist or cultural determinisms that have exercised so powerful an influence on the history of ideas about society. It is a set of leading and exceptional or countervailing arrangements and assumptions manifest in law. We might call it a system only with two qualifications: that its unity consists in a set of contradictions or countercurrents and that its precarious stability, or latent instability, rests on the partial containment and temporary interruption of practical and visionary strife.

A corollary of this requirement is the development of an alternative view of doctrine and its uses. In any given place and time the law has a shape, formed by the interplay between dominant and deviant solutions. The deviant solutions can serve as beginnings for new dominant solutions. Controversy over the description of the shape of the law is

inseparable from debate about the direction of its reshaping. The influence goes both ways.

Because accounts of the law are interested accounts, with an explicit or implicit stake in the choice of directions of change, and because, except in the qualified sense just defined, the law is not a system—much less one deserving or supporting idealization—doctrine is unstable and contested. Its unstable and contested character make it more, not less useful to the work of institutional reimagination. We must consequently reject the choice between doing doctrine as it has been done under the aegis of the idealizing and systematizing approaches of the past and casting it aside. It is not enough to put the received practice of doctrine to new uses. The task is to reinvent doctrine, under new assumptions and with a new method. I exemplify the execution of this task in this book and develop its theory and practice in another work, *What Should Legal Analysis Become?*

It is a goal that we cannot accomplish without changing our conception of who doctrine addresses and of what it is for (the second requirement below). Similarly, it is an aim that we cannot achieve unless we make the understanding of institutional structure and the imagination of institutional alternatives internal to the work of legal thought (the third requirement below).

The second requirement was to resist the self-interested commitment of legal professionals to ways of thinking that enlarged their power to influence the evolution of law. The judge, or the jurist whispering into the ears of an actual or hypothetical judge, could no longer be the defining protagonist of legal thought, nor could the question of how judges should decide cases remain its central issue. Much more important is the making of society in the details of the law.

The third requirement was to anticipate elements of a better way to address the institutional and ideological structure of society and its transformation. The relation between the institutional and the ideological aspects of a regime of social life is the innermost reality of law: in law the institutions and practices of society must be brought under conceptions that make sense of them. Such conceptions, as well as the clash among them, are not theories about a subject matter that is distinct from the conceptions. They help create the subject matter; they

form part of it. This fact provides doctrine with its perennial starting point. It is also the reason why we need to reinvent and reorient doctrine rather than to discard it.

Legal thought is not at fault for the deficit of structural imagination long evident across the whole of social and historical studies. Nor can it be expected all by itself to rescue and to radicalize the original insight of classical social theory into the made and imagined character of social life. However, it can play a part in redressing the deficit of structural imagination. It confronts the enigma of structure at the level at which this enigma can best be understood and overcome: the level of detailed arrangements and representations. At that level, we can no longer take refuge in ideological abstractions that have lost their meaning and their bearing. We must teach ourselves to think in a different way.

From the outset, I defended the institutionalist position within critical legal studies and wrote this book from its vantage point.

The critical legal studies movement helped disturb the consensus in the study of law and offered a different way to engage legal culture in the period of darkening. However, it largely failed in its most important task: to turn legal thought into a source of insight into the established institutional and ideological structure of society and into a source of ideas about alternative social regimes. The significance of this failure is made clear by the character of the two tendencies that have acquired the greatest influence in the subsequent thirty years. Neither of these tendencies, nor both of them together, have succeeded in reestablishing the consensus in legal theory and method. Nevertheless, they are characteristic of beliefs and attitudes that are now widespread. Call them retro doctrinalism and shrunken Benthamism.

Once again, my focus is the United States. However, both these currents of thought have close European counterparts. In their American and European forms, they have in turn been propagated throughout much of the world. They diverge from the assumptions and consequences of the practice of reasoned elaboration in law, and of its supporting schools of jurisprudence. They nevertheless move in what is broadly the same direction as that method, if not in their approach to

law, then in their attitude to the established institutional arrangements and ideological assumptions.

These tendencies fail to exhaust the major influences in contemporary American and world legal thought. There is at least one other current of ideas, enjoying yet greater effect than these two. It long preceded them. It is sure to survive them. I consider it before addressing them. This third presence in the situation of legal thought is the attempt to use public law—especially constitutional law, the law of supranational organizations such as the European Union, and the international law of human rights—as both the ultimate constraint on political struggle and the highest expression of our political ideals. Its characteristic product is the development of public-law doctrine as the instrument of a high-minded and high-handed minimalism: the defense of fundamental rights as minimums that all political forces must respect.

The fear from which this minimalism takes its cue is that politics always stands on the verge of degenerating into a struggle among ravenous interests, when it is not overtaken by ideological adventures resulting in abuse and oppression. The immediate political circumstance to which the minimalism often responds has been the failure to provide, in the circumstances of today, a sequel to the social-democratic settlement of the mid twentieth century the better to preserve the greatest historical achievement of social democracy: a high level of investment in people and in their endowments. The theoretical premise of the minimalism is that the most important work of both domestic and international public law is to subject all law and all politics to the discipline of basic entitlements.

The preferred minimalist method is a transcendental formalism: the defense and development of a system of rights on a two-fold basis. The system is validated by constitutional documents, understandings, and traditions. However—and this is its transcendental element—it also defines and upholds the presuppositions of a free society, or of a democratic state, or of a qualified and therefore acceptable and fertile pluralism of forms of national life in the world. The care of fundamental rights is, on this view, the kernel of public law and the most important responsibility of the jurists. They exercise this responsibility

by interpreting the laws and, when necessary, by invalidating them in their capacity as constitutional or supranational judges.

This high-minded and high-handed minimalism, served by the transcendental formalism that is its favored (but far from exclusive) method, suffers from two main defects. They are inseparable.

The first flaw is a failure to acknowledge that the distinction between the supposedly invariant and the transformable elements of political life can only be relative. Our view of fundamental safeguards, prerogatives, and endowments must change according to our vision of the political, economic, and social alternatives. One of the most important issues in dispute in the contest of such alternatives is the extent to which a certain way of understanding and shaping basic rights takes for granted an ordering of political and economic life that belittles and subjugates us. If the defense of such an ordering, and of the conception of basic rights it implies, is that there are no better alternatives, then the debate about the rights must turn into a debate about the alternatives. However, the point of the higher minimalism is to preempt such a turn.

The second vice is a failure to recognize what the protections are for: they matter because they empower. The discourse of fundamental rights is at best a prelude to a story that is never told. The parent says to the child: I love you unconditionally and will do my best to protect you; now go out and raise a storm in the world. The higher minimalism knows only the part about the protection, not the part about the storm. It proposes to cut our losses in politics and has no view of how to increase our gain.

In the United States, the chief home of the high-minded and high-handed minimalism has been constitutional law: the terrain on which the twentieth-century method of reasoned elaboration and the nineteenth-century typological notion showed their most aggressive face. Throughout the controversies with which this reconsideration and this book deal, American jurists continued to expound constitutional law in the spirit of the higher minimalism, often using the devices of transcendental formalism.

Americans are devoted to their Constitution. Many take it to be a sacrosanct political invention. Their premise is that the country



discovered at the time of its foundation the definitive formula of a free society, to be adjusted from time to time under the pressure of crisis. The rest of humanity must either subscribe to this formula or continue to languish in poverty and despotism. The plea of many American thinkers, from Jefferson on, to repudiate the idolatry of the Constitution has almost always fallen on deaf ears.

Awarded a constitution that they can change only rarely and with difficulty and that associates a liberal principle of fragmentation of power with a conservative principle of the slowing down of politics (embodied in the Madisonian scheme of checks and balances), Americans are brought up to treat this constitutional plan as both part of the national identity and expressive of all that democracy should be. What resulted from this plan, however, is a proto-democratic liberalism that subsequent constitutional innovations have never decisively disturbed. American jurists find themselves perennially tempted to read into the constitution whatever view of democracy seems best to them. Changing the constitution outright can, for them, be only the exceptional device of Constitutional revision; the preferred move is to pretend that the constitution means something different from what it had previously been taken to mean.

However, the constructive interpretation of the Constitution is better suited to achieve some goals than to accomplish others. It serves the reinterpretation of rights within an unchanged institutional framework more easily than it promotes any reshaping of the institutional arrangements of government and of its relations to American society: it is easier to pretend that equal protection or due process actually mean something different from what they had been taken to mean than to feign that the Constitution allows either of the political branches to call early elections or that it provides for a fourth branch of government, designed, equipped, and financed to intervene in particular areas of social practice in an effort to rescue disadvantaged groups from circumstances of exclusion or subjugation that they are unable to escape through the forms of collective action available to them.

To evade the consequences of this bias, it is not enough to appeal to the idea of a partnership between constitutional judges bent on radical reinterpretation of the Constitution and organized social movements

that would seize on the transformative opportunity opened up by acts of judicial statecraft. In the absence of change in the political and economic institutions of the country, such a partnership holds little promise. If the price of constitutional idealization is to accept the anti-institutional bias, the price is too high.

The habits of mind evoked by the method of reasoned elaboration thus found support in an older approach to the development of constitutional law: the attempt to put the best face on the established institutional regime, the disposition to treat it as the definitive template for the advancement of our ideals and the fulfillment of our interests, and the premise that a higher reason was to be found in what history had already produced, if only one brought to the task the right conceptual equipment. It was as if the method of reasoned elaboration simply generalized attitudes that had long been ascendant in dealing with the Constitution.

Other countries were less inclined to revere their constitutions. Nevertheless, they often experienced a lesser version of the same alliance between the method of reasoned elaboration and the political theology of a constitutionalism deficient in institutional imagination. The persistence of a chastened version of the social-democratic settlement of the mid twentieth century, under the conditions of the dictatorship of no alternatives, combined with a constitutional tradition established in the early twentieth century that worked against structural change. The new constitutions did little either to raise the temperature of politics (the level of organized popular engagement in political life) or to hasten its pace (the ability to accommodate decisive experiments in the political transformation of society, while encouraging in particular sectors or parts of the country the creation of counter-models of the national future). Instead, they specialized in the promise of social and economic rights for the realization of which they provided no adequate institutional machinery. They dulled the criticism of the existing low-energy democracies. They invited a scarcely more subtle version of the idealizing, structure-accepting attitudes that the method of reasoned elaboration extended to the whole of law.

Unlike theorizing about fundamental rights in public law, retro doctrinalism and shrunken Benthamism represented something new. However, they were novelties pressed into the service of antiquities.

Retro doctrinalism sought to recover and to develop legal doctrine as it was understood before suffering the attacks of the anti-doctrinal skepticism that became widespread in the twentieth century, including the attacks mounted by critical legal studies. It represented a body of rules and doctrines in a particular branch of law as an explication of the inherent logic of that domain of legal rules and social practice. It looked beyond the vagaries of legislation and case law to what it imagined to be the inbuilt structure of the part of law and of social life that it addressed. It had an undisguised affinity to the typological conception informing nineteenth-century legal science. Its home was private law (one of its names has been “the new private law”).\* It could, however, sometimes be extended to public law by a stretch of its assumptions as well as of its scope, merging into what I have defined as the transcendental formalist approach to basic rights.

Three circumstances helped account for the existence and content of retro doctrinalism. A first circumstance was that in the twentieth century private law was held relatively constant, even as a new corpus of public law came to join it. The relative stability of private law emboldened many to see it as it had been seen so often in the past: as the expression of a deep-seated, rational order of economic and social relations.

A second circumstance was the combination of the erosion of faith in the method of reasoned elaboration with the misunderstanding of the character of nineteenth-century legal science. In the period of darkening, the assumptions of the purposive, policy-oriented, and principle-based style of legal analysis, with its approach to law as a perfectible approximation to a prescriptive plan of social life, became less and less credible. The most heroic versions of the method were precisely the ones most likely to be propounded in the legal academy. The

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\* For an example see Henry E. Smith, “Property as the Law of Things,” 125 *Harvard Law Review* 1691 (2012).

major schools of legal thought offered alternative programs for their grounding and development. That the narrative of policy and principle was already largely present in the law, deeper and more important than rule and doctrine and requiring to be completed by the professional interpreter, was the key premise shared by those jurisprudential schools. Few could bring themselves to believe it.

At the same time, the predecessor to this method and to the many forms of legal skepticism that had proliferated in the course of the twentieth century was habitually misrepresented as a crude fetishism of legal abstractions and an equally primitive disposition to view law as a gapless system of rules. From such a system the interpreter was expected to infer, by a quasi-deductive method of inference, the single correct solution to every problem of legal choice. This misrepresented the true character of nineteenth-century legal thought: its commitment to uncover the inherent legal content of each type of economic, political, and social organization and to expound this structure as a system of concepts, rules, and doctrines. Retro doctrinalism could embrace the typological notion all the more readily because it failed to associate it with nineteenth-century legal science, which it viewed, in a manner that had become traditional, with contempt.

Retro doctrinalism, however, upheld the typological conception only in qualified and diminished form. It did not explicitly advocate the thesis of a closed list of types of social organization, each with its built-in legal content. However, it worked—on a smaller, more fragmentary scale—in the same direction. What such half-hearted agreement with nineteenth-century legal science meant can readily be seen by the treatment of property. This example has special importance because the property right has been for the last several hundred years the exemplary right: our view of rights in general has been formed on the template of property.

The proponents of retro doctrinalism criticize the idea of property as a bundle of relations. They emphasize that property as the “law of things” has a particular architecture, determined by its function within the structure of a market economy. They oppose the account of property as a bundle of relations—of distinct powers that can be disassembled and vested in different kinds of right-holders—on the

ground that it mistakenly views the legal relations governed by the law of property as shapeless clay that can be reshaped at will.

In this criticism, they mistake the significance of the idea of property as a bundle of relations. For one thing, this idea recalled a historical fact: that the unified property right is a historical anomaly. In both the common-law and the civil-law traditions, it was a creation of the nineteenth century. Over the course of legal history, the powers that it assembled and granted to the same right-holder—the owner—were disaggregated and vested in different tiers of right-holders, holding distinct and superimposed claims on the same resources. For another thing, and more importantly, the view of property as a bundle of relations expressed the single supreme analytical achievement of legal theory in the period from the middle of the nineteenth century to the middle of the twentieth: the discovery that a market economy has no single natural and necessary form and that it can be organized in very different ways, with consequences for the arrangements of production and exchange as well as for the distribution of advantage and opportunity. The point of the bundle-of-relations idea of property is not that property is shapeless, but that it can have alternative shapes according to the version of a market economy that it helps define.

The leading currents of both legal thought and post-marginalist economics proved incapable of building on this insight. On the contrary, they worked to suppress its programmatic significance. The law of property could then be represented as a law about things within a market economy. The core arrangements of that economy could, according to this view, not be other than what they were. In fact, the law of property has always been not a law about things but a law of relations among people with respect to things, within a particular economic regime, including a distinctive market order.

These cumulative and connected misunderstandings, exemplified by the rejection of the idea of property as a bundle of relations, elucidate the sense in which this latter-day doctrinalism recalled the typological idea of nineteenth-century legal thought. It did so, however, at a lower level of ambition and of clarity. Its defining work was the legal rationalization of the existing institutional form of the market economy. Rather than look for a compass to principles and policies supposedly

latent in the extant law, it searched for guidance, beyond the surface of the law, in the supposedly inherent organization of the established regime of social and economic life.

A third condition favoring the dissemination of retro doctrinalism was the turn evoked in my earlier account of the broader intellectual setting in which the critical legal studies movement appeared. In the positive social sciences, rationalizing tendencies prevailed: explanations of present arrangements that represented them as deserving winners in an evolutionary contest. In the normative disciplines of political philosophy and legal theory, humanizing efforts were in command: the resort to pseudo-philosophical justifications of ameliorative practices—compensatory redistribution by tax-and-transfer as well as idealization of laws in the vocabulary of policy and principle. In the humanities, an adventurism of subjectivity, disconnected from the reimagination and remaking of society, ran wild. These rationalizing, humanizing, and escapist currents of thought severed the link between insight into the actual and explorations of the adjacent possible.

In such a climate of opinion, deficient in the imagination of structural constraint, structural change, and structural alternatives, it was easy to believe that the existing arrangements could not be the accidental product of a series of practical and visionary contests and compromises. The institutions in place shared, according to this view, in the quality of a system. Their systemic character was held to result from a cumulative discovery of best practice under the pressure of worldwide economic, political, and ideological competition.

Such beliefs would have met with little sympathy in a period of intense conflict. They began, however, to seem plausible under the conditions of the dictatorship of no alternatives: an age in which the familiar radical challenges to established arrangements had been discredited and no emerging powers proposed a different future for humanity. Retro doctrinalism represented, in this circumstance, a return to normalcy in legal thought when normalcy meant giving up on fundamental transformation, even if achieved experimentally and piecemeal—at least until the next great national or world crisis. It was a way to retreat from the more extravagant ambitions of the method of reasoned elaboration and of its supporting cast of legal theories. It

was also, however, a way of continuing to do the doctrinal work that jurists had always done when left undisturbed by compelling events or higher powers.

If the half-hearted return to an earlier conception of doctrine was one current of ideas salient in the thirty-year period since the heyday of critical legal studies, a second was a shrunken Benthamism. It viewed law instrumentally, as a set of tools for the marginal adjustment of incentives and constraints on human behavior.\* Such adjustment was to be undertaken in the pursuit of aims set by enlightened experts and ultimately—but only ultimately—validated by democratic authority. It found support in a would-be scientific study of mind, brain, and behavior.

Following Bentham, it saw in law a source of devices by which to push human conduct in the direction of beneficent social ends. Incentives and disincentives were to be designed accordingly. It resembled Bentham in its impatience with any distinctive procedures and restraints of conventional legal reasoning as well as with the accidental and historical character of much law. Its attitude was broadly “consequentialist” in the terms of the school philosophy of the day: judging arrangements by their effects. Most significantly, its moral psychology recalled Bentham’s in its emphasis on the power of reward and punishment to modify behaviors anchored in the primordial calculus of pleasure and pain.

In all other respects, however, shrunken Benthamism was nothing like the real thing. Bentham had a radical plan for institutional reconstruction. Shrunken Benthamism took the established institutional arrangements largely for granted. It proposed to modify them, if at all, only insofar as some adjustment might be required by its effort to steer behavior in a direction recommended by its calculus of costs and benefits. That calculus contemplated no major change in human experience, such as Bentham envisaged and sought. The policy adjustments that it recommended implied no substantial alteration in the institutional regime. Bentham stood as the remorseless reformer judging the social

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\* See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness*, 2008.

order by the light of a higher vision of unrealized human opportunity. He wielded an intransigent method of criticism. The little Benthamites presented themselves as experts deploying methods well established in the psychology and economics of their time to achieve goals that were episodically, but never systemically, contentious.

Retro doctrinalism and shrunken Benthamism appeared to be opposing conceptions. They were in fact rivals for influence in the early twenty-first century. What united them, however, was stronger and deeper than what divided them: a passive attitude to the arrangements and assumptions of the established regime; a conviction that these assumptions and arrangements reflected something profound and respectable about the existing order (a rational architecture underlying the institutional design; a hope of marrying reason and history); the rightwing Hegelian impulse; and a trust in a cadre of experts—jurists and policy specialists—who would improve the institutional design in the light of the rational architecture under the distant watch of an inhibited democracy, impressed by their credentials.

This deep and hidden unity helps explain how the same academic lawyer could sometimes be alternately a retro doctrinalist and a shrunken Benthamite in different parts of his work and at different times of his day. The contrast between the radical Benthamite's antagonistic view of the law from the outside, as an object of criticism and change, and the doctrinal jurist's committed engagement with present law from the inside, as the bearer of an evolving and perfectible plan of social life, was muffled by these cumulative equivocations and confusions.

The influence enjoyed by these two supposedly opposed but in fact allied tendencies revealed the limits of what the critical legal studies movement had achieved when it disturbed the consensus in legal thought. The limits presage the work to be done in the next historical period.

## **The Book**

This short book began as a long after-dinner speech, delivered at the Sixth Annual Conference in Critical Legal Studies in March of 1983.



I expanded the talk into an essay, published the following year in Volume 93 of the *Harvard Law Review*. The barely revised essay was in turn published as a book by Harvard University Press in 1986.

It was a time when legal thought in the United States and in much of the North Atlantic was passing from the period of normalization of the mid-twentieth-century settlement—social democracy in Western Europe, the New Deal in the United States—to an era of darkening. The method of reasoned elaboration had achieved canonical status as the successor to the misunderstood doctrinal formalism of the nineteenth century and was in the process of being disseminated worldwide as its successor. The passage to the epoch of darkening was accompanied by the spread of ironic and tactical attitudes to the presuppositions of a practice of legal analysis that its practitioners had more and more trouble believing, but continued nonetheless to find useful.

It was also a time when the critical legal studies movement, having attracted national attention within the country, received an influx of sympathizers who saw it as no more than a vehicle for the advancement of then conventionally progressive policies and ideas in American law. With this turn of events, critical legal studies risked losing any chance of a distinctive methodological and programmatic identity. As an echo in the legal academy of progressive political pieties and passing intellectual fashions, it could amount to little. The result was to reinforce, in the broader political and intellectual public, the conviction that in critical legal studies they were dealing with an event as easy to label as it was to dismiss: an aftershock of American legal realism and a statement of well-known left-leaning beliefs.

Because of my circumstances, I approached critical legal studies with an interest in the future of legal thought worldwide, not just or chiefly in the United States. Because of my programmatic position in politics, I regarded as a calamity the reduction of critical legal studies to the then predominant forms of American progressivism, with their characteristic emphasis on group identities and interests, their failure to contribute to the making of a successor to the New Deal, responsive to the needs and aspirations of the broad working-class majority of their own country, their lack of institutional proposals for the reconstruction of the state and the economy, and their antipathy to theoretical

ambition and structural imagination. Because of the nature of my work, I viewed legal thought as one more terrain in which to develop an agenda of ideas that could be labeled as philosophical only in the sense that it refused to give the last word to the disciplinary distinctions around which university culture was organized, with its typical marriage of each discipline to a method. For me, a practical alternative to institutionally conservative social democracy and to identity politics needed help from a theoretical alternative to Marxist social theory and to liberal political philosophy.

Five polemics shaped this book.

The first was the polemic against neo-Marxist and deconstructionist tendencies within critical legal studies. Neo-Marxist functionalism, especially within legal history, repeated the mistakes of necessitarian social theory. If it attenuated these mistakes, it did so only by weakening the claims and assumptions of that theoretical tradition, rather than by replacing them. Deconstructionism, centered on the radicalization of indeterminacy in legal reasoning, reduced the law to something that it has never been: a series of opportunities for rhetorical manipulation, limited only by the influence of an entrenched, shared, and unacknowledged ideology or form of consciousness. It proved to be an intellectual and political dead end, supplying no instruments for the fulfillment of its transformative intentions.

The second was the polemic against institutionally conservative social democracy, which had become the default position in progressive politics, and its minor rival and counterpoint, the politics of recognition and identity. There is no way of solving or even addressing the central problems of contemporary societies without innovating in the institutional arrangements of the market economy, of democratic politics, and of independent civil society. To renounce such innovation was part of what defined these diminished versions of the left cause.

The third was the polemic against the objection to constructive and comprehensive theorizing about both law and society. It might seem that such an objection could exert no influence. And yet it did. The effort to achieve a comprehensive understanding was mistaken for the forms that this effort had taken in classical European social theory or

in the practice of philosophy as a super-science, towering above the disciplines and claiming to explain the framework of our existence. The result was fatally to weaken our prospect of escaping the gravitational field of present ideas. It confined us to a series of episodic guerrilla attacks on different pieces of those ideas and on the luminaries who expounded them.

The fourth was the polemic against the method of reasoned elaboration and its promotion throughout the world as the enlightened and progressive successor to nineteenth-century legal dogmatics. In fact, the successor was much closer to its precursors than its votaries claimed it to be. It betrayed the higher vocation of legal thought—its role in the detailed imagination of the alternative futures of society—harming democracy. It cast over the lesser vocation of legal thought—its work in the adjudicative setting—a halo of fabricated mysteries, presenting the law as an incomplete and flawed approximation to an intelligible and defensible plan of social life, rather than as the hodgepodge of dominant and subordinate doctrines that it really is. Its mystification served the empowerment of legal notables and the disempowerment of their fellow citizens. Legal thought can have another, better future.

The fifth was the polemic against the reification and the consequent condemnation of legal doctrine, identified by its critics with the forms that it took under the major variants of the systematizing idealization of law in the recent past: the twentieth-century method of reasoned elaboration and the nineteenth-century typological view. A concern of the book is to help rescue and reinvent the ancient and universal practice of doctrine and to enlist it in the service of both the greater and the lesser callings of legal thought.

Legal thought can deal in detail with the interactions between institutions and practices and our understanding of our interests and ideals. Such interactions are the lifeblood and substance of the law. To make good on this potential, however, we must cast off both the insistence on representing established law as an idealized system and the single-minded focus on the judicial decision as the priority of jurisprudence.



## TWO

# *The Vocation of Legal Thought Now*

### **The Two Vocations of Legal Thought**

**L**aw is the institutional form of the life of a people viewed in relation to the interests and ideals that make sense of such a regime. Our interests and ideals always remain nailed to the cross of the institutions and practices representing them in fact. Law is the site of this crucifixion.

Law, however, has also been the special affair of experts. For these professionals, and for the schools in which they are educated, concern with what they can do with law becomes paramount and drives the understanding of law. It is easy for them to believe that law is what courts and lawyers do. The question—how should judges decide cases?—becomes the central issue in legal theory.

Whenever, under the constraints of democracy, jurists and the political forces with which they are allied seek to circumvent political politics by resort to judicial politics, and to obtain from the courts what the people have refused to support, this narrowing of view finds further encouragement. The stake of the legal notables in the priority of their perspective becomes confused with the pretense of carrying out a higher mission in the affairs of the republic.

To grasp the relation of institutions and practices to an established understanding of interests and ideals and to do so on the broadest scale, unencumbered by any restraint of professional specialization, will always be an activity of vast consequence to society. Large changes ordinarily begin in small ones. Every branch of law contains a range of deviant solutions, exceptions, anomalies, and contradictions. Each of these deviations can serve as a point of departure for an alternative way of organizing an area of law and social practice: the exception can become the rule; the anomaly, a different approach to the ordering of part of social life. What begins as a reform of the arrangements for the sake of our interests and ideals, as we view them, is likely to end in a changed understanding of what we want and profess: our ideals and interests seem evident to us only so long as they remain wedded to institutions representing them in fact. No sooner do we dissolve this marriage than we find reason to question what had seemed self-evident.

Successive practices of legal doctrine over the last several centuries, including the typological method in the nineteenth century and reasoned elaboration in the twentieth, have understated and even concealed the contradictory nature of law. Each of them has bewitched us into seeing established law as an imperfect approximation to an idealized system—an intelligible and defensible plan of social life, though each has characterized this system in a different way. In this exercise, each of them has been influenced by the stake that lawyers have in finding important work to do without challenging the basis on which power is wielded in the state.

By breaking the spell cast by such idealizing systems, legal thought can recognize the law for the contradictory reality that it is and enlist contradiction in the service of transformative insight and practice. To become a practice of institutional imagination engaging, through the details of law, the regime of society as it is and exploring what we can and should turn it into next, is the larger vocation of legal thought.

This task gains special significance under the conditions of the dictatorship of no alternatives now prevailing in the world. A requirement for the overthrow of this dictatorship is that we enlarge the restricted list of alternative set-ups for the organization of different areas of social life that is now on offer. We cannot do so simply by deploying

ideological abstractions inherited from the past. We can do so only by working with the conceptual and institutional materials that we have been handed by history: law is where we find these materials in their richest and most precise detail.

Legal thought has a lesser as well as a greater vocation: its use in the vindication of rights and the settlement of disputes, within and beyond the adjudicative setting. A refusal to sacrifice the greater vocation to the lesser one does not entitle us to deny the importance of the latter. If the question of how judges (and other quasi- or extra-judicial interpreters of law and settlers of disputes) should decide cases cannot be the central issue in legal theory, it is nevertheless a question that a theory of law needs to answer.

Our view of the lesser vocation, however, must not contradict our understanding of the greater one. It must rely on the same assumptions and serve the same ends if our understanding of law is to be coherent.

In collecting the elements of such a view, we need not begin from scratch. A misunderstood and forgotten impulse in the history of late nineteenth- and early twentieth-century legal thought offers the best point of departure. An approach to the lesser vocation can start from where this impulse left off.

There was a moment in the history of legal ideas when the project of nineteenth-century legal science had already come under attack under labels such as formalism, conceptualism, doctrinalism, and pandectism, but the method of reasoned elaboration in the language of policy and principle had not yet taken its place. These proponents of another future for legal analysis insisted that law was to be interpreted purposively: interpretation had to be justified by explicit or implicit ascription of purpose in a particular historical context, according to the assumptions and interests prevailing in that circumstance. In every real such setting, there would be a wide area of agreement over meaning—not because words have fixed meanings or because the things to which they refer express stable essences, but because the purposes controlling interpretation need to be made manifest only when they are disputed.

This approach could not allow, however, a bias toward an idealizing systematization of law: a bias expressed, in different ways, by both

the typological method of the nineteenth century and the policy and principle discourse of the twentieth. What substituted for any such idealization was the recognition of law as a historical product of contained conflict among interests and among visions. In such conflict, some positions prevail for a while. They never prevail forever, and they rarely prevail completely. Even in their triumph, they coexist with contrary solutions, which remain as vestiges, countercurrents, and prophecies of a different future, within the extant law.

Thus, this view of how best to fulfill the lesser vocation of legal thought was often but not always expressed by what I later call the fighting theory of law: the view of law at any time, in any place, as the residue of fitfully interrupted and relatively contained conflict over the terms of social life. It was an approach that refused to understand law as an approximation to an intelligible and defensible plan of social life.

Among the jurists associated with this interlude between the discrediting of nineteenth-century legal science and the ascendancy of the method of reasoned elaboration were Jhering, Gény, and Holmes.

They proposed a realistic and deflationary view of legal reasoning in a professional, especially an adjudicative, setting. Such a view was always less a proposal than a description. It became, however, a proposal as well as a description to the extent that it rejected the representation of law as an idealized system: whether described as the intrinsic content of a type of social organization or as the expression of a set of public policies and impersonal principles of right. The ineradicable element of discretion in legal interpretation meant that we can draw only a relative, not an absolute contrast between the making and the interpretation of law, or between the contests of interest and vision bearing on the latter and those driving the former. To say that the contrast is relative was not to dismiss it as either unreal or unimportant. The professional interpretation of law was not, according to this view, simply the continuation of politics by other means; it was its continuation disciplined by constraints and commitments that changed its nature.

Once this deflationary view of professional legal interpretation was accepted, the interpretation of law in the light of ascribed purpose



and with the help of analogical reasoning could be reconciled with deference to plain meanings and established precedent in the great majority of situations. Only when the interests at stake seemed to be both contradictory and of comparable weight did the purposes guiding interpretation need to be made explicit, the better to be subject to criticism within and outside the community of professional interpreters.

In the lower courts, where the judge or the arbitrator dealt first-hand with the human reality of the litigants, the decision recommended by the standard practice of legal interpretation might justifiably be trumped by equitable adjustment. If the outcome recommended by such practice diverged too starkly from the reciprocal, role-based expectations in the social milieu in which the dispute took place, the adjudicator could set the outcome aside in favor of the more equitable alternative without pretending to change the law in force.

In the highest, especially the constitutional courts, standard practice could give way occasionally to exceptional acts of judicial statecraft. Faced with national crisis, provoked or perpetuated by an impasse between the political branches of government, the judges could intervene by radical reinterpretation of the constitution or the laws. They could in effect appeal to the future, or to the deadlocked political branches, or to the people. They would be likely to be successful in their efforts to cut a Gordian knot only if they had as their unacknowledged partners powerful and organized movements in society below. The work of such partners could seize the opportunity that judicial statecraft had opened up, and begin to turn a perilous judicial adventure into a self-fulfilling constitutional prophecy.

Nothing in this approach to the problems of interpretation and adjudication requires acceptance of the higher pretenses of nineteenth- and twentieth-century legal doctrine, nothing that cannot be reconciled with the claims of democracy, nothing that denies the contingent and contradictory nature of any body of law, and therefore as well nothing that negates, in the pursuit of this lesser mission, the assumptions of the larger task of legal thought. The modesty of the former complements the ambition of the latter. Both serve, each in its own way and context, the democratic cause.

The meaning of this unadorned approach to the problems of professional legal interpretation becomes all the more clear by contrast to a view for which it may easily be mistaken. According to this other view, legal reasoning is an ineffable art of practical judgment. It defies reduction to any system of abstract ideas because it embodies a way of thinking that cannot be accommodated by the standard procedures of deduction, induction, and abduction, or reduced to any system of general ideas. It can be mastered only by long practice within a professional community, sustained by acquaintance with the affairs of the social setting in which it is practiced and by intimate knowledge of the ideas, interests, and sentiments of those whose lives it touches.

Such was the view that the would-be successors of the Roman jurists of the Republican period had of their practice, in opposition to the influence of Greek philosophy and the demands of imperial despotism. It formed part of the self-description of common lawyers over long periods in the history of Anglo-American law. It is invoked even today, under the disguise of pseudo-philosophical labels such as prudence and *phronesis*, by those who would define a loose and homely set of methods as a priestly mystery. However, it adds nothing but illusion, at the service of specious authority, to what I have described as the deflationary and realistic view of the lesser vocation of legal thought.

When we open the black box of this supposedly exquisite and elusive craft all that we find are the elements of that view: the pervasive recourse to analogical reasoning, the understanding that conventional morality consists largely in our role-based reciprocal claims on one another, and the recognition that an ability to deal successfully with practical affairs requires familiarity with the interests and ideals that command influence in a particular social world and with the means for advancing them that are available and accepted. Nothing else remains. There is no such ineffable art, no such theory-defying craft. There is only another way of putting the lesser vocation of legal thought in the place of the greater one, to the benefit of the jurists and to the detriment of society.

## **The Universal History of Legal Thought**

The best way to understand the larger vocation of legal thought is to place it in world-historical context. Only when we see it from a distance can we fully grasp its content and its consequences.

There have been three elements in the universal history of legal thought. They recur and persist across a wide range of legal traditions (including both the civil and the common law) and historical periods. Two of these elements lie at the surface of debate; between them, they have almost fully occupied the agenda of jurisprudence. The third has played a silent role. The future of legal thought and the fulfillment of its larger calling depend on a rearrangement of the relation among these three elements, radical enough to dissolve their distinct and conflicting identities.

One protagonist in the universal history of legal thought is the idea of law as the product of a doctrinal quest for immanent moral order in social life. A second position is the idea of law as the will of the state or of the sovereign. Each of these two ideas is incomplete and has required the other to support a comprehensive view of law. Nevertheless, the two ideas also contradict each other—a contradiction that democracy does more to aggravate than to overcome. Much of the history of legal theory, even today, consists in managing this contradiction.

Moreover, each of these two views of law is also incomplete in another way. Each takes for granted how society is actually organized and represented in the minds of those who inhabit it: the established arrangements and assumptions and in particular the formative part of these assumptions and arrangements that we can call the structure of society. Only in combination with the structure does either approach to law—as the doctrinal quest for immanent normative order or as the will of the state or the sovereign—work in practice.

Law as the structure of society is the third idea of law at work in the universal history of legal thought. The role of this idea, however, has always remained largely tacit. The structure stays in the shadows: unexplained, unjustified, and even unseen.

In most periods of legal history, jurists have encountered law in the first instance as a set of conceptions, categories, and rules that together define a plan of common life. They have refused to see law as the arbitrary will of the state, even if it is a democratic government, much less as the haphazard outcome of a clash among interests and among visions. Instead, they have insisted on viewing it as a cumulative movement toward a project of social coexistence that can be publicly understood and justified.

When doctrinal categories and ideas have not amounted to a spiritless scholasticism, they have drawn significance and authority from serving such an endeavor. The traditional seat of the doctrinal quest has been private law: the doctrines of the law of contract, property, and tort have pointed in the direction of such a normative architecture latent in the recurrent relations and transactions of a society. The typological method of the nineteenth century and the twentieth-century method of reasoned elaboration represent simply its most recent instances.

What is doctrine? The assumptions of doctrinal work in law are so alien to our present ways of thinking that its nature eludes us. Like theology by contrast to the sociology or the comparative history of religion, and like grammar by contrast to linguistics, it is constitutive of its subjective matter; it is not a meta-discourse, that is, a view of a subject matter from which it can be distinguished. On the other hand, its subject matter is a symbolic, two-dimensional reality: the surface categories, conceptions, and rules express a deeper subtext—the intelligible and defensible plan of social life of which they represent fragmentary expressions. Rejecting the posture of a detached observer, it takes the position of the insider, committed to a community of discourse and to a tradition. It claims that its results should have practical consequence for the use of governmental power.

Its historical presuppositions are the existence of a state seeking to make and impose law and of a high culture, relating, as Plato did, order in society to order in the world and in the soul. Because it begins under the double shadow of a state claiming to be a source—if not the sole source—of law, and of a culture representing a view of our place in the cosmos, its relation to that state and to that culture have from the beginning been cause for anxiety and confusion.

The motivation perennially to reinvent doctrine arises from defining features of social life. To enact our institutions and practices we must represent them by means of conceptions: we cannot enact them unless we make sense of them. The contest over the terms of social life cannot be temporarily interrupted and relatively contained unless these conceptions justify the arrangements by relating them to a vision of our life together: of what such a life can and should be like in different parts of society.

However, the practice of doctrine has never ceased to be both troubled and incomplete. It is troubled because of its contested relation to the other main idea of law in the universal history of legal thought: the law made by the state and by whomever claims sovereign power and exercises it in fact. How can law be an immanent normative order, at once revealed and refined through labors of doctrine, while also being whatever the sovereign power in the state has decided that it should be? This question has been the central enigma in legal theory for as long as both the state and doctrine have existed. Democracy makes this conundrum more acute, because it turns an offense to the will of the democratic sovereign into a scandal unless the offense can be justified by constitutional restraints that the democratic sovereign has imposed upon itself.

So it continues to be the central enigma today. Just ask from where the policies and principles invoked by the method of reasoned elaboration come. They must be already implicit to a large extent in the law. Otherwise the jurists would have invented them, in derogation of the authority of democratic institutions to make law. If the narrative of policy and principle that should guide the purposive interpretation of law is described as already lying in the legal material, waiting to be excavated by professional interpreters, trouble comes from another side. How can law, forged on the anvil of a struggle among interests and among visions, come to look after the fact, in the moment of professional interpretation, as if it exhibited a plan that can be described in the language of policy and principle? Ideological abstractions or a minimalist "overlapping consensus" would never suffice to compose such a plan; the guiding beliefs need to be detailed enough to account for the content of law, and to guide its development, in each area of

social practice. If such a thick consensus existed, how could it be reconciled with the claim of democracy to decide how society should be organized? To these questions there are no satisfactory answers, only a series of fudges and evasions in legal theory and practice.

Not only does the doctrinal search for immanent moral order in society contradict the other major idea of law—the will of the state or the sovereign; it also remains radically incomplete, yet unable to acknowledge the fact and the implications of its incompleteness. We cannot understand or implement any system of doctrine except by reference to the social and cultural world to which it belongs. Its categories are meaningless and lifeless if they fail to draw life and meaning from this context, and especially from the formative arrangements and assumptions of a society: those that organize its routine economic, political, and cultural activities, including the activities by which it makes the future within the present. Such assumptions and arrangements comprise the structure of social life: the third element in the universal history of legal thought and the silent partner of the other two elements.

The second presence in this universal history is the view of law as the will of the state or of the sovereign. Under constitutional democracy, the power to make law is shaped and sanctioned by the democratic constitution. The ultimate test of its reality, however, remains the fact of habitual obedience.

According to this view, law is whatever those who exercise power in the state say that it is. It is not, however, in the manner of John Austin's jurisprudence, a simple series of commands. It is (according to one version of this approach, analytical jurisprudence) a legal system; what the sovereign wills it must will as change in such a system, subject to its peculiar nature, instruments, and constraints. Or it is (according to another version, which I here call the fighting theory of law) not a system at all, but the picture of a correlation of forces: the outcome, in historical time, of a struggle among interests and among visions. At each point, some forces prevail over others. Their victory, however, is rarely complete.

This view of law has had proponents for as long as there has been a

state. Recently, however, it has been formulated in two very different forms: analytical jurisprudence and the fighting theory of law—the second deeper and more important than the first.

For analytical jurisprudence (led in the twentieth century by Hans Kelsen and Herbert Hart) law is a hierarchical system of rules giving general form to the will of the sovereign power. Its theory of the representation of law provides a vocabulary in which to describe law without entangling the description in either sociological issues of efficacy or normative concerns of justice. Its theory of legal reasoning acknowledges that rule-guided reasoning must coexist with a quantum of brute discretion in the interpretation of law; the will of the state cannot be translated into particular decisions without creating space for the conflict among interests and among visions to reappear in smaller form at the moment of decision.

The methodological aspiration of analytical jurisprudence is, like that of post-marginalist economics, to remain invulnerable to causal and normative controversy. The price of such invulnerability is emptiness. The political goal of analytical jurisprudence is reinforcement of the rule of law: a framework of right standing above the clash of interests and of visions. The political aim conflicts with the methodological one: the lawyer cannot apply and elaborate law without representing it, and he cannot represent it without understanding it as a particular way of settling that clash and tilting its outcome in one direction or another.

More significant is the fighting theory of law. Law is, according to this view, the order resulting from a temporary interruption and a relative containment of perennial struggle over the terms of social life. The struggle must be contained and interrupted not only for the sake of security and peace but also so that a coherent form of social life, capable of nurturing strongly marked individuals, can emerge and develop behind the shield of state power.

The fighting theory of law has been represented both by practical jurists (Holmes, Jhering) and by political philosophers (Thomas Hobbes, Carl Schmitt).

The larger normative commitment of this conception of law is to a metaphysical idea of vitality: the sustenance of the diverse forms of life

that the division of the world into sovereign and often warring states allows. Its political attitude is one of hostility to the powers intermediate between the state and the individual. It sees these powers as a threat to the distinctive form of life that the state can protect and encourage. It regards neither reason nor right as able to arbitrate the blind contest of ideologies, states, communities, and classes.

Yet its skepticism about value and its respect for power have not prevented it from serving as inspiration for the least dangerous and the most realistic account of the lesser vocation of legal thought—its use in adjudication—to have appeared in the history of jurisprudence over the last several centuries. This account affirmed the purposive character of legal reasoning but rejected the idealizing systematization common to the dominant approaches of the nineteenth and the twentieth century. Although its deflationary realism and its lack of any developed theory of the making of structure in society prevented it from having a view of the larger vocation of legal thought, it kept the space for such a view open.

Both as analytical jurisprudence and as the fighting theory, the idea of law as the will of the state has weaknesses symmetrical to those of its chief opponent in the history of jurisprudence: the explication of immanent normative order through doctrine. It has coexisted with the opposing idea of law for as long as there have been central states and high cultures. The philosophers, if not the legal theorists, of the fighting theory of law may have dismissed the project of doctrine as both subterfuge and impediment. The historical reality of law has not obliged them: the two approaches of law have been made to live together even though no conception has been able to reconcile them. As a result, their coexistence in practice has always been ad hoc, even if the chief concern of jurisprudence has been to demonstrate that it is not.

The contradictory coexistence of the two ideas of law is nowhere more evident than in the nature of codification in civil-law legal systems. The common lawyer may imagine them to be code-based regimes. In fact, the basic civil law codes, at least on their home ground of private law, have been little more than summations and updates of the doctrinal orders that preceded them, adjusted at the margin to



reflect some new correlation of political forces or some discrete concern of the state. The jurists have written them in their double capacity as agents of the political authorities and custodians of the doctrinal tradition. They have ordinarily taken care to subordinate the first of these two offices to the second, pretending to serve their political masters even as they continued to do the work of legal dogmatics.

Moreover, the notion of law as the will of the state, imposed top-down on society, has continued to be as incomplete, and as dependent on a preexisting structure of society that it fails to justify, explain, or even acknowledge, as the idea of an immanent normative order, revealed and refined by doctrine. For this idea of law to succeed in its proposal, all the arrangements of society would have to be approved, when not designed, by the sovereign power. No such thing happens: in no society has law legislated by the state ever been more than a series of episodic interventions in an order that is simply there: barely disturbed and hardly seen. It is as if the law-making pretenses of both authoritarian and democratic states amounted to little more than an updating of the *gubernaculum* of a medieval European prince, intervening from time to time in a body of common law reproduced and developed by the lawyers' doctrinal *jurisdictio*.

A brazen fiction would say that the law-making authorities acquiesce in whatever part of the established order they fail to change, according to the maxim *qui tacet consentire videtur*. However, this argument loses plausibility as soon as we recognize the real-world obstacles to the imposition of the will of either an authoritarian or a democratic state. If the destruction of the intermediate powers, favored by the proto social theory associated with the fighting theory of law, facilitates the imposition of a political will from the top in some ways, it may inhibit it in others: a disorganized society may be as recalcitrant to the transformative will of the government as one that is organized to resist that will. As a variant of authoritarian politics, only a revolutionary despotism could hope to go further. It would do so, however, at the cost of seeing its endeavors consumed in violent conflict and hostage to the self-interest of the despots as well as to the opposition of their victims. As a variant of democratic politics, a radical or high-energy democracy, capable of mastering the structure of society, has yet to be created.

A more elaborate and believable fiction, designed to suit democratic theory and constitutionalism, distinguishes between the ordinary affairs of the state and momentous change of the fundamental arrangements and assumptions. The people delegate the former to a political class whose rivalries it arbitrates. The popular sovereign awakens and acts more directly only when the fundamentals—of society and of the state—are in question. It consents to delegate when half asleep. It affirms its residual but decisive power when waking up, under the provocation of danger, opportunity, and crisis. The silence accompanying its half-sleep can then more credibly be taken as consent to what the inexpressive sovereign leaves undisturbed.

However, if the people are unlikely to influence the ordinary affairs of state, they may be even more unlikely to guide government in the midst of a storm or to direct any change in the structure of society. They may wake without commanding. It would require another kind of democracy—a kind that does not yet exist—to make that structure susceptible to their will and to diminish the distance between the ordinary moves that we make within a framework that we take for granted and the extraordinary ones by which, under the pressure of calamity or the promptings of fervor, we change pieces of it.

The third element in the universal history of legal thought is the real structure of society: its formative arrangements and assumptions, presupposed by the other two elements yet left by them unexplained, unjustified, and unacknowledged.

Unless and until legal thought has a way of dealing with this third element, it cannot fulfill its higher calling. But what would it mean to deal with it? The task is practical even more than it is theoretical: to establish the institutions and practices that can in fact bring the structure under our control.

Consider first the lesser, theoretical part of this effort: the development of a way of thinking. We do not know how to think about structural change or structural alternatives. The central insight of classical European social theory—that the structures of society are our alienated creations and that we can understand them because we made them—was from the outset compromised by illusions of false

necessity. These illusions left their mark on the supreme achievement of classical social theory: Karl Marx's theory of history and of capitalism.

For the closed-list illusion, there is a defined set of alternative types of economic, political, and social organization in history, each of them, just as nineteenth-century legal science claimed, with a predetermined institutional content. Class and other interests have an objective content, generated by the place of each class in the social division of labor, according to the logic of the respective type.

For the indivisibility illusion, each of these types is an indivisible system. Its parts stand or fall together. Politics must be either the revolutionary substitution of one system for another, or the reformist management of a system and of its contradictions.

For the historical-laws illusion, there are higher-order laws driving the succession of such indivisible systems in history and then lower-order laws governing the operation of each of them. Programmatic thinking amounts to mere voluntarism. History and its laws supply the project.

Social science has repudiated the illusions of false necessity only to the extent that it has forgotten the central insight of social theory. Its characteristic procedures are complicit in giving to the established structure a semblance of naturalness, necessity, or superiority, sometimes to the point of presenting its arrangements as the outcome of a narrowing funnel of convergence, over historical time, to what works best. It has severed the crucial connection between insight into the actual and imagination of the adjacent possible: the penumbra of the *theres* to which we can get from *here*.

In such a circumstance the first responsibility of the mind is to rescue the original insight of classical theory into the made and imagined character of the structures of society, to free it from the incubus of the illusions of false necessity, and by so freeing it to radicalize it.

Legal thought cannot be content to await the outcome of this campaign. It cannot be the sole and sufficient source of an alternative view faithful to the core conception of classical social theory. However, no such view can be built without its help. It must be its co-author as well as its beneficiary.

The reason for this participation of legal thought in the development of the needed alternative becomes clear as soon as we consider two characteristics of the formative institutional and ideological regime of a society that any such alternative must be able to recognize and to elucidate.

The basic arrangements and assumptions of a social order—the structure of society—exert an overriding influence on the practical and discursive routines of that social world. They are also resistant to change: variably, as I shall next remark. Nevertheless, they are in no sense a system. They are not indivisible. They cannot be explained as either the product of laws of historical change or the expression of an intelligible and defensible plan of social life. On the contrary, they have a makeshift quality. This quality becomes evident only when we address them in institutional detail.

The recalcitrance of such structures to change is not uniform. They, and the practices by which they are reproduced, can be arranged so as to either inhibit or facilitate their revision. They can be entrenched and naturalized, or wear their openness to revision on their face. A set of institutional arrangements can be designed either to deepen or to undermine such entrenchment. They can make the impulse to change more or less dependent on trauma, of which war and economic ruin have been the chief instances.

Our greatest material and moral interests are engaged in this choice of direction. Once again, the details of the institutions and practices matter: not democracy, but what kind of democracy; not the market, but what manner of market. Such particulars are expressed in law. They, and what they can be turned into, represent the proper subject matter of legal thought in the pursuit of its greater vocation.

By helping develop a view of structure and structural change, legal thought would help create the equipment with which to carry out its larger task. It would share in the work of making ideas that can inform the imagination of institutional alternatives. It would discredit once and for all the false pretenses of the two dominant views of law in the universal history of legal thought. However, it would do nothing to dissolve the contradiction between those views or to redress the incompleteness of each. The solution to those contradictions and the remedy

for this incompleteness lie in practice rather than in theory, even if in a practice that requires, and has yet to receive, a theory.

The self-construction of society gives the sole and sufficient answer to the conundrums of legal history. More particularly, the answer is the part of the self-construction of society that has to do with legal pluralism in the context of radical democracy.

Legal pluralism is the making of law in many forms and from many sources: from the bottom up by organized civil society, as well as from the top down by democratic government. In the absence of a deepening of democracy, legal pluralism implies devolution of power to the many hierarchies of advantage and citadels of subjugation marking, to a greater or lesser extent, all the societies that have existed until now.

A deepened, high-energy democracy is one that passes a triple test. It masters the structure of society, subjecting it to effective challenge and revision. It diminishes the dependence of change on crisis. It weakens the power of the dead over the living.

A series of institutional innovations would, by their combined and cumulative effect, move to meet this threefold test. Some such innovations would raise the temperature of politics by heightening the level of organized popular engagement in political life. Some would quicken the pace of politics through the rapid resolution of impasse among parts or branches of government. Some would exploit the ability of an invigorated federalism, or of radical devolution combined with the assertion of strong central authority, to create counter-models of the national future. Some would establish in the state a power to come to the aid of groups that find themselves caught in circumstances of subjugation and exclusion from which they are unable to escape, and to do so by means of initiatives that are at once localized and structural. And some would enrich representative democracy with elements of direct or participatory democracy without weakening the safeguards of the individual against public or private oppression. The high-energy democracy resulting from these innovations would create the conditions under which legal pluralism could express a wide dissemination of power rather than a surrender to the major and minor potentates of an unequal society. It would be the

antidote to the fate imposed by a structure that no one chose or even understands.

It is not, however, a sufficient antidote. It requires counterparts in other domains of social life. Among these counterparts are the democratizing of the market economy and the education of the people.

The message from democratic politics will remain powerless if it fails to be honored amid the habits and constraints of material life. The hope of advancing in the zone of feasible intersection between the institutional requirements for the development of powers of production, and the institutional conditions for liberation from the hold of entrenched social divisions and hierarchies, depends on our success in reshaping the institutions of the market as well as the arrangements of democracy.

The signs of such a democratization are both multiple and connected. It is not enough to regulate the market or to attenuate its inequalities, as institutionally conservative social democracy desires, through retrospective and compensatory redistribution by tax-and-transfer; it is necessary to change the institutional content of a market regime. A democratized and innovation-friendly market economy should be so organized that it leaves our hands untied in our efforts at cooperation. It should avoid subordinating our opportunities to cooperate to any scheme of hierarchy and division in society. It should not be fastened to a single version of itself; alternative regimes of private and social property can coexist within the same market economy. It should combine encouragement of a fever of creative and entrepreneurial activity prospectively with a draconian method of competitive selection of the products of this fever retrospectively. It should make people secure in a haven of immunities and capabilities, the better to throw everything else in social life open to experiment and innovation.

In each economic order there will be a vanguard. If it is the most productive sector of the economy, that is not only because it has more technology, supported by science; it is also because it is the sector in which the technical division of labor most closely resembles the workings of the imagination—the aspect of the mind that is neither modular nor formulaic, that has power to recombine everything with everything else, that advances in insight by defying its own methods and

presuppositions, and that subsumes everything actual under a penumbra of nearby possibles. Here lies a deep bond between our economic advance and our democratic aspirations: the most advanced economy is the one in which the affinity between production and imagination is most completely developed and the vanguard most tightly linked with all other sectors of production, so that each is transformed, in turn, on the model that the vanguard embodies. Production, which in the most primitive stages of economic growth was limited by the size of a coercively extracted surplus over current consumption, and in richer economies comes to rely on the translation of science into technology, now becomes science at work in the transformation of fragments of the material world. Technology appears in its true character, not as a set of gadgets but as a channel connecting our experiments with cooperation to our experiments with nature.

As we advance toward such a democratized market economy, hospitable to permanent disruption and innovation, the relation between the worker and the machine changes. The worker no longer works as if he were a machine. Instead, he works as the opposite of a machine. The machine does whatever we have learned to repeat, saving our time for the not yet repeatable.

Such a change is unlikely to occur so long as economically dependent wage labor remains the predominant form of free labor; the stake that the buyers of labor have in short-term gain and in control will ordinarily trump the larger potential for cooperation at work. For that potential to be more fully tapped, wage labor would need gradually to give way to the higher and complementary forms of free labor: self-employment and cooperation. Such a transition would in turn require experiment with the ways of allocating capital, the better to reconcile a greater decentralization of economic initiative and opportunity with the requirement of economies of scale: thus, the wider establishment of temporary, conditional, and fragmentary property rights alongside the unified property right that the nineteenth century bequeathed to us.

However, all such experimentation with the institutional form of the market economy would continue to fall short if it failed to be reinforced by changes in how society builds people with higher capabilities,

including the power to resist their circumstance. To this end, the young must be educated in schools that see themselves as the voice of the future, recognizing in every child a tongue-tied prophet and giving him access to alien experience. Such schools can best do so through an education that is analytical in its method, selective and deep in its use of information as an opportunity for the acquisition of analytical capabilities, cooperative rather than individualist and authoritarian in its social setting, and dialectical in its approach to received knowledge, introducing every subject from clashing points of view. Even as government guarantees a universal minimum in the provision of people-making public services, it must engage civil society as its partner in the competitive and experimental provision of such services.

The aggregate effect of all these initiatives, with regard to the deepening of democracy, the democratizing of the economy, and the development of people, is to give practical content to the idea of the self-construction of society. This self-construction is the true end of the universal history of legal thought and the solution to its riddles. It is not an end to which this history spontaneously and naturally tends—only an end to which we can make it tend through our political and spiritual inventions.

Thus, the self-construction of society is neither the consequence nor the beginning of a convergence toward a single, universal, and definitive form of social life. Its characteristic innovations would allow societies further to diverge on a basis affirming the priority of the differences that we create over the ones that we inherit, of prophecy over memory. A shared attribute of such divergent forms, however, would be to ensure that none of them is entrenched against reinvention and that all of them respect our individual and collective power of resistance: the pragmatic residue of the otherwise mystifying discourse of human rights.

What results in a world of democracies is not a single view of humanity, established in a worldwide institutional formula. It is a platform for a new clash among visions of the human—of what we ultimately are and can and should become. Among such visions, however, there are some that bear the most intimate relation to the most distinctive developments in contemporary legal thought, discussed in the next part of



this argument. They are the visions emphasizing our identity as the beings who transcend all the social and conceptual worlds that they build and inhabit.

What this view of the end of the universal history of legal thought takes from the idea of law as the will of the state is the recognition that society lacks a natural form, and that it can create its own order. What it rejects is the thesis that this form can have only one source: the will of the state.

What it takes from the idea of law as an immanent order found and developed by legal doctrine is the notion that even when there is a state, law always arises to some degree, and should result in ever greater measure, from society, not just from government. What it rejects is the conception that there is an inherent moral logic in social life, waiting to be discovered and refined by the lawyer.

### **The Genius of Contemporary Law**

Each period in the history of law has its genius. This genius lies in the ideas that reveal its most characteristic impulse, expressed in the marriage of institutions and practices, about what the relations among people can and should be like in each area of social life. The most distinctive impulse is not the average or preponderant one. So long as the ideal of the self-construction of society fails to be more fully realized, we shall remain in the thrall of regimes that no one chose, or that the dead chose for us, the living, or as the way things are and have to be. The law in force will remain an accumulation of many layers of historical experience, each superimposed on the ones preceding it. The genius of the epoch in legal history may be hard to discern amid both the prodigious vestiges of past eras and countercurrents in the new one.

In the nineteenth century, especially in the proto-democracies of Western Europe and North America, the genius of law lay in the exploration of the inbuilt legal content of what was supposed to be a type of economic, social organization: the type of a free society. This genius found its clearest expression in the categories and doctrines of private law. To uphold the predetermined system of rights inherent in this type

was to preserve this scheme against the corrupting influence of class or party interest.

In the twentieth century, throughout a wider part of the world, the genius of law came to lie in a dialectical reshaping of all law as an interplay between rules and rights of individual and collective self-determination and initiatives of the law designed to ensure that these rights would be for real, not empty promises. The rights revered by the nineteenth century came to be seen as defeasible: they depended for their effective enjoyment on practical conditions that might fail to be fulfilled.

In the twenty-first century, the genius of law in much of the world will consist in the answers that it gives to a conundrum presented by our place in the universal history of legal thought. We recognize the need for structural solutions to structural problems. However, we can no longer believe, as the nineteenth-century liberals and socialists did, in definitive blueprints for the organization of society.

How can we achieve structural insight without succumbing to structural dogmatism? We cannot do so by taking refuge in the illusion of neutrality, the pretense of the existence of regimes that fail to tilt the scales among competing visions of the good and opposing conceptions of humanity. We can do so only by creating arrangements that to the greatest degree allow themselves to be corrected in the light of experience. As we revise our institutions and practices for the sake of our recognized interests and professed ideals, we change our understanding of these ideals and interests. Our reward for this effort is the enhancement of our ability to engage a particular social world without surrendering to it and to trade institutional habits for untried opportunities of cooperation. No entrenched regime of social division and hierarchy can survive such a strengthening of our powers of initiative.

The genius of contemporary law is manifest in a number of its most characteristic ideas. I next refer to four of these ideas. They, and all those that we might add to them, fail to outline a program of social reconstruction. They nevertheless represent part of the conceptual and institutional equipment that we need if we are to give effect to the goal of the self-construction of society and to the projects of democratizing the market and deepening democracy that advance this goal. They are

more than lifeless tools; they represent fragments of a way of thinking about law and about society in the spirit of that aim.

The first pair of ideas bears directly on the concerns of private law and of the remaking of the market. The second pair—higher-order legal ideas—cuts across all branches of law and social life. All four are familiar, if not (with regard to the last two) by the names that I give them, then by the legal developments to which these names refer.

*The idea of disaggregated property.* That the component elements of the unified property right can be disassembled and vested in different types of right-holders, holding concurrent stakes in the same resources, is a conception that has been common in the history of law. From a comparative-historical perspective, the unified property right represents the exception rather than the rule. The disaggregation of property has often served to organize a hierarchical form of the social division of labor, as it did, for example, under European feudalism. It acquires new meaning when its purpose is to improve our chances to cooperate, by allowing us better to combine decentralization of access and initiative with economies of scale. More can participate if each can have a claim on the same set of resources that is temporary, conditional, or otherwise limited.

The unified property right may continue to prevail in some areas of economic activity, enabling a determined entrepreneur to proceed at his own risk and on his own convictions. In other areas, however, including those central to the economy emerging in the wake of the decline of mass production, it may be crucial to provide for parallel and distinct stakes in the same resources. The direct benefit is to enlarge the stock of our forms of cooperation. The indirect advantage is to help create the conditions for a market economy that is no longer fastened to a single version of itself. Experimentalism stands to gain, both directly and indirectly.

*The idea of relational contract.* The unified property right has remained the exemplary form of property and indeed of rights generally, even though the qualifications to its occurrence multiply. Similarly, the bilateral executory promise continues to be the standard form of contract, although incomplete, relational contracts have always shaped much of social life, and may in the future shape it even more.

The relational contract is ongoing rather than exhausted in a one-time performance. The relation amounts to more than any one transaction; its survival confirms its fecundity. Above all it embodies a bargain that remains only partly articulated, unlike the fully bargained-out bilateral executory promise, in which the failure to settle important terms gives cause to deny that a contract was ever struck. Because it is incomplete and ill defined, it requires as well a higher level of trust.

Although dismissed as peripheral, relational contract has always been the primary form of contractual relations. However, it acquires new significance in the contemporary vanguards of production. Wherever cooperative competition is paramount and high trust indispensable to support a circulation of people, practices, and ideas among people, especially across boundaries between firms, relational contract and disaggregated property must work together to shape the new cooperative practices. They must do so all the more when wage labor gives way to the higher forms of free work: self-employment and cooperation.

Relational contracts acquire central importance under a form of productive activity such as now begins to emerge, in all major economies in the world, in the aftermath of mass production. Permanent innovation is its watchword; the attenuation of the contrast between conception and execution one of its marks; the effacement of any sharp contrast between manufacturing and services, as manufacturing turns into crystalized, idea-laden services, one of its consequences and conditions; the assignment of components of a plan of production to many producers one of its characteristic practices; and the need to organize joint work, in the service of permanent innovation, without being able to rely on the hierarchical structure of the firm one of its resulting problems. Relational contract must therefore be one of its favored devices.

The market economy as we have known it thrives on the ability of strangers to trust one another: the universalization of a modicum of trust. It has seemed to be impossible where there is no trust and unnecessary where there is high trust. The bilateral executory promise is a characteristic legal expression of that world of respectful arm's-length dealings. The collaborative experimentalism of the higher, emerging

forms of production requires a higher trust. The contractual language that best suits it is the language of relational contract.

It is one thing for such a style of production to flourish in relatively isolated, advanced sectors from which the vast majority of the labor force remains excluded. It is another for it to penetrate a major part of the economy. It could do so only through an organized and sustained broadening of economic and educational opportunity. One requirement of such a broadening would be the development of alternative ways of providing for the decentralized allocation of claims to capital resources, thanks to the dismemberment and reshaping of the unified property right. In such an economy, relational contract and disaggregated property would need to work together. Our reward would be the enhancement of productivity that would result from giving arms, eyes, and wings to the vast but wasted constructive energy of ordinary men and women. It would also be to embody in the routines of economic life the aspirations of a society that refuses to remain imprisoned in any entrenched structure. Such a society takes permanent disruption, in the small as well as in the large, to be part of the price of freedom.

Meanwhile, however, the reorganization of production in the form of a decentralized network of contractual relations among a multitude of producers threatens to subject workers around the world to radical economic insecurity. What we take to be the standard apparatus for protecting and representing labor—collective-bargaining law—is premised upon mass production: the assembly of a large workforce, in large productive units, under the aegis of big corporations. That reality, which had its heyday from the middle of the nineteenth century to the middle of the twentieth, was preceded by several centuries in which production and commerce were largely organized on the basis of decentralized networks of contractual relations, such as the “putting-out system” that Marx describes early in *Capital*.

A new putting-out system now develops throughout the world, threatening insecurity for all as the alternative to security for some. For labor to be protected, organized, and represented under the conditions that this system introduces, there must be new law, at first to supplement collective bargaining, and later to replace it. Such law will

help secure the conditions under which disaggregated property and relational contract can be used together in the design of a democratized and radically experimentalist market economy.

The next pair of legal ideas has wider scope, applying to the whole of social life, not just to the set-up of production and exchange. They are higher-order legal ideas because they describe the broader setting within which first-order ideas, like disaggregated property and relational contract, can achieve their full effect.

*The idea of a structure-revising structure.* All our activities require a well-defined framework: the arrangements and assumptions on which we can rely. We have come, however, to understand that no such framework for all society, or for any part of it, is good for everything or good forever. More generally, we need structural solutions in big and little politics, but have reason to eschew enduring structural fixes. The solution to these connected enigmas is the design of a structure that provides for its own correction and ceases to exact surrender as the price of engagement.

This idea would remain a philosophical abstraction if it failed to be embodied, as it must be to become meaningful, in institutional projects expressed in legal detail. One of the two most important such projects is a democratized market economy, uncommitted to a single version of itself and hospitable to permanent disruption and innovation. The other such project is a deepened, high-energy democracy that through the sets of institutional innovations I earlier sketched meets the triple test of mastering the structure, weakening the power of the dead over the living, and diminishing the dependence of change on crisis.

*The idea of plasticity-enabling endowments.* The structure-revising structure requires as its protagonist the context-transcending agent. He must be unafraid and capable in his circle and in himself. He must have a stake: a social inheritance—the contemporary equivalent of forty acres and a mule—in a property-owning democracy and an assurance of a universal minimum of people-making public services provided by government and enhanced by the engagement of civil society in their provision. He must have access to a form of education, both in his childhood and throughout his life, acknowledging and developing his prophetic powers of resistance to his circumstance and to his time. He

must be safe against all forms of private as well as public oppression. All these safeguards he must be given so that he may rebel against those who provided for his protection and enjoy a better chance to share in reshaping arrangements and assumptions that he found in place. Guarantees and instruments that are universal, detached from any job or place and freely portable, are the practical residue of the discourse of fundamental rights.

We take something out of the agenda of short-term politics, and secure it as firmly as can be against erosion amid the swings of economic and political life, only so that we can open everything more fully to ceaseless experiment. The endowments and immunities are the reverse side of the plasticity, which they enable. Humanity, in the individual, the group, the nation, and the species, turns the tables on the structures and rises to a greater form of life.

### **The Jurist as Priest and as Prophet**

Jurists have traditionally held two priestly offices.

They have served as priests of a collective force: the nation, or the legal tradition. In this first sacerdotal role they have claimed to discern in the history of law a moral and political meaning, which their work both reveals and develops. *Veni creator spiritus*, they pray, not to a transcendent deity but to the voice of reason in the history of law, which they set out to hear and to gloss. Amid what may seem to be an endless and pitiless war, they offer the continuity of a sacramental presence: the indwelling of higher purpose in the arrangements of society. Priesthood implies special powers to mediate between the sacred and the profane, between spirit and an otherwise spiritless reality.

Jurists have also been priests of the state. In this second office, their impulse is to represent the rules made by government as fragments of a vision. They revere power and those who hold it. Officiating at the altar of empire, they may justify this piety as deference to procedure and to the responsibilities of their role. Some states may deserve such deference more than others. Nevertheless, the imperial liturgy and the attitudes associated with it have been remarkably constant across the

history of law and of politics, regardless of how despotic or democratic government may have been.

The premises of these two priestly offices may seem to be in insurmountable contradiction. The same lawyers, however, regularly perform both. To reconcile their two offices they must make a series of further claims, no less implausible than the assumptions of each office separately. They must, for example, pretend that the higher order they profess to discover in the history of the tradition that they expound is already largely there, waiting to be brought into the light of day; that it is not an artifact of their own making. Then they must go on to describe the law-making activity of the state—not always and in each instance, but over time—as serving the same progressive evolution and the same spiritual plan.

The priests with the two hats may have trouble persuading even themselves of these beliefs. From time to time, in periods of darkening, they may, as this book suggests, lose their faith and keep their jobs.

Legal thought need not condemn itself to reinvent these two cults forever. Jurists can simply defrock themselves and cease to play their priestly roles.

Seeing our interests and ideals nailed to the cross of our institutions and practices, they may decide that neither of their priestly offices does justice to the promise of this crucifixion. They may begin to think that spirit is better served by abandoning the pretense that it speaks through history and is on intimate terms with power and the powerful. They may conclude that the effort to inform the public conversation in a democracy about our alternative futures is more credible and more valuable than the attempt to impose a particular scheme on society and its law by pretending that the scheme is already there. They may prefer the professional interpretation of law in the adjudicative setting to be conducted in a manner recognizing the decisive role of attributed purpose and the existence of winners and losers in the politics of law-making, while prizing real contradiction above fabricated uniformity.

They cannot complete such a turn without paying a price. In the performance of their greater task of institutional imagination, they will no longer be able to assert unique authority or to commit governmental power. They will lose their ready-made role together with



their priestly prerogative, while the channels and means by which they can best speak to the citizenry and to the political parties and social movements have yet to be defined. In their lesser job of authoritative interpretation of law, in the shadow of governmental power, they will need to renounce views encouraging them to turn this humble office into a would-be redemption of society from its political mistakes.

Having paid this price and turned their backs on the altars at which they had carried out their priestly functions, they will have a chance to become prophets instead of priests. However, under democracy their work will become prophetic only insofar as everyone's does: each in his own way, according to his circumstance. A society capable of mastering its own structure is one in which prophetic powers can be—must be—widely disseminated among ordinary men and women.

A prophet never predicts. He envisages an accessible future, which he sees prefigured in aspects of present experience. He views the flawed actual in the light of a better adjacent possible. He offers tangible anticipations of a greater life. He needs no optimism—a passive and contemplative attitude—because he has hope—an impulse oriented to action.

Jurists can become prophets without ceasing to be jurists.



PART II

*The Critical Legal Studies  
Movement (1986)*



### THREE

## *Introduction: The Tradition of Leftist Movements in Legal Thought and Practice*

The critical legal studies movement has undermined the central ideas of legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics.

What I offer here is more a proposal than a description. But it is a proposal that advances along one of the paths opened up by a movement of ideas that has defied in exemplary ways perplexing, widely felt constraints upon theoretical insight and transformative effort.

The antecedents were unpromising. Critical legal studies arose from progressive and leftist traditions in modern legal thought. Two overriding concerns have marked these traditions.

The first concern has been the critique of formalism and objectivism. By formalism I do not mean what the term is usually taken to describe: belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice. Formalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life—disputes variously dubbed ideological, philosophical, or visionary. Such conflicts fall far short of the closely guarded canon

of inference and argument that the formalist claims for legal analysis. This formalism holds impersonal purposes, policies, and principles to be indispensable components of legal reasoning. Formalism in the conventional sense (the search for a method of deduction from a gapless system of rules) is merely the anomalous, limiting case of this jurisprudence.

A second distinctive formalist thesis is that only through such a restrained, relatively apolitical method of analysis is legal doctrine possible. Legal doctrine or legal analysis is a conceptual practice that combines two characteristics: the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively within this tradition, to elaborate it from within in a way that is meant, at least ultimately, to influence the application of governmental power. Doctrine can exist, according to the formalist view, because of a contrast between the more determinate rationality of legal analysis and the less determinate rationality of ideological contests.

This thesis can be restated as the belief that law-making, guided only by the looser and more inconclusive arguments suited to ideological disputes, differs fundamentally from law application. Law-making and law application diverge in both how they work and how their results may properly be justified. To be sure, law application may have an important creative element. In the politics of law-making, however, the appeal to principle and policy, when it exists at all, is supposed to be both more controversial in its foundations and more indeterminate in its implications than the corresponding features of legal analysis. Other practices of justification allegedly compensate for the diminished force and precision of the ideal element in law-making. Thus, legislative decisions may be validated as results of procedures that are themselves legitimate because they allow all interest groups to be represented and to compete for influence or, more ambitiously, because they enable the wills of citizens to count equally in choosing the laws that will govern them.

Objectivism is the belief that the authoritative legal materials—the system of statutes, cases, and accepted legal ideas—embody and sustain a defensible scheme of human association. They display, though

always imperfectly, an intelligible moral order. Alternatively, they show the results of practical constraints upon social life: constraints such as those of economic efficiency, that, taken together with constant human desires, have a normative force. The laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority.

The modern lawyer may wish to keep his formalism while avoiding objectivist assumptions. He may be happy to switch from talk about interest group politics in a legislative setting to invocations of impersonal purpose, policy, and principle in an adjudicative or professional one. He is plainly mistaken: formalism presupposes at least a qualified objectivism. For if the impersonal purposes, policies, and principles on which all but the most mechanical versions of the formalist thesis must rely do not come, as objectivism suggests, from a moral or practical order exhibited, however partially and ambiguously, by the legal materials themselves, where could they come from?

They would have to be supplied by some normative theory extrinsic to the law. Even if such a theory could be convincingly established on its own ground, it would be miraculous if its implications coincided with any large portion of the received doctrinal understandings. At least it would be miraculous, if you had not already assumed the truth of objectivism.

If the results of this alien theory failed to overlap with the greater part of received understandings of the law, you would need to reject broad areas of established law and legal doctrine as mistaken. You would then have trouble maintaining the contrast of doctrine with ideology and political prophecy that represents an essential part of the formalist creed: you would have become a practitioner of the freewheeling criticism of established arrangements and received ideas. No wonder theorists committed to formalism and the conventional view of doctrine have always fought to retain a remnant of the objectivist thesis. They have done so even at a heavy cost to their reputation among the orthodox, narrow-minded lawyers who otherwise provide their main constituency.

Another, more heroic way to dispense with objectivism would be to abrogate the exception to disillusioned, interest-group views of politics

that is implicit in objectivist ideas. This abrogation would require carrying over to the interpretation of rights the same shameless talk about interest groups that is thought permissible in a legislative setting. Thus, if a particular statute represented a victory of shepherders over cattlemen, it would be applied, strategically, to advance the shepherders' aims and to confirm the cattlemen's defeat. To the objection that the correlation of forces underlying a statute is too hard to measure, the answer may be that this measurement is no harder to come by than the identification and weighting of purposes, policies, and principles that lack secure footholds in legislative politics. This "solution," however, would escape objectivism only by discrediting the case for doctrine and formalism. Legal reasoning would turn into a mere extension of the strategic element in the discourse of legislative jostling. The security of rights, so important to the ideal of legality, would fall hostage to context-specific calculations of effect.

If the criticism of formalism and objectivism is the first characteristic theme of progressive and leftist movements in modern legal thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second. The connection between skeptical criticism and strategic militancy seems both negative and sporadic. It is negative because it remains almost entirely limited to the claim that nothing in the nature of law or in the conceptual structure of legal thought—neither objectivist nor formalist assumptions—need stand as an obstacle to the advancement of progressive aims. It is sporadic because short-term leftist goals might occasionally be served by the transmutation of political commitments into delusive conceptual necessities.

These themes have now been reformulated while being drawn into a larger body of ideas. The results offer new insight into the struggle over power and right, within and beyond the law. They redefine the meaning of radicalism.



## FOUR

### *The Criticism of Legal Thought*

**W**e have transformed the received critique of formalism and objectivism into two sets of more precise claims that turn out to have a surprising relation. The two groups of critical ideas state the true lesson of the law curriculum—what it has come to teach, rather than what the law professors say that it teaches—regarding the nature of law and legal doctrine. The recitation of the lesson carries the criticism of formalist and objectivist ideas to an unprecedented extreme. This very extremism, however, makes it possible to draw from criticism elements of a constructive program.

#### **The Critique of Objectivism**

In refining the attack upon objectivism, we have reinterpreted contemporary law and legal doctrine as the ever more advanced dissolution of the project of the classical, nineteenth-century lawyers. Because both the original project and the signs of its progressive breakdown remain misunderstood, the dissolution has not yet been complete and decisive. Nineteenth-century jurists were engaged in a search for the built-in legal structure of democracy and the market. The American nation,

at the Lycurgan moment of its history, had opted for a particular type of society: a commitment to a democratic republic and to a market system as a necessary part of that republic.

The people might have chosen some other type of social organization. In choosing this one, in choosing it for example over an aristocratic and corporatist polity on the old-European model, they also chose the legally defined institutional structure that went along with it. This structure provided legal science with its topic and generated the purposes, policies, and principles to which legal argument might legitimately appeal.

Two ideas played a central role in this enterprise. One was the distinction between the foundational politics, responsible for choosing the social type, and the ordinary politics, including ordinary legislation, that operated within the framework established at the foundational moment. The other idea was that to each type of social organization there corresponds a distinct legal regime inherent in the type.

Many may be tempted to dismiss out of hand as implausible and undeserving of criticism this conception of a logic of social types, each type with its intrinsic institutional structure. It should be remembered, however, that in less explicit and coherent form the same idea continues to dominate the terms of ideological debate and to inform all but the most rigorous styles of microeconomics and social science. It is apparent, for example, in the conceit that we must choose between market and command economies, or at most combine these two exhaustive and well-defined institutional options into a "mixed economy." The abstract idea of the market as a system in which a plurality of economic agents bargain on their own initiative and for their own account becomes more or less tacitly identified with the particular market institutions that triumphed in Western history. Moreover, the abandonment of the objectivist thesis would leave formalism, and the varieties of doctrine that formalism wants to defend, without a basis, a point to which my argument will soon return. The critique of objectivism that we have undertaken challenges the idea of types of social organization with a built-in legal structure, as well as the more subtle but still powerful successors of this idea in current conceptions of substantive law and doctrine. We have conducted this assault on more than one front.

Successive failures to find a universal legal language of democracy and the market suggest that no such language exists. An increasing part of doctrinal analysis and legal theory has been devoted to containing the subversive implications of this discovery.

The general theory of contract and property provided the core domain for the objectivist attempt to disclose the built-in legal content of the market, just as the theory of protected constitutional interests and of the legitimate ends of state action was designed to reveal the intrinsic legal structure of a democratic republic. The execution, however, persistently belied the intention. As the concept of property became more general and incorporeal, it faded into the generic conception of right. This conception in turn proved to be systematically ambiguous (Hohfeld's insight), if not almost empty.

Contract, the dynamic counterpart to property, could do no better. The generalization of contract theory revealed, alongside the dominant principles of freedom to choose the partner and the terms, the counterprinciples: that freedom to contract would not be allowed to undermine the communal aspects of social life, and that grossly unfair bargains would not be enforced. Though the counterprinciples might be pressed to the corner, they could be neither driven out completely nor subjected to a system of meta-principles that would settle, once and for all, their relation to the dominant principles.

In the most contested areas of contract law, two different views of the sources of obligation clash. One, which sees the counterprinciples as mere ad hoc qualifications to the dominant principles, identifies the fully articulated act of will and the unilateral imposition of a duty by the state as the two exhaustive sources of obligation. The other view, which treats the counterprinciples as possible generative norms of the entire body of law and doctrine, finds the standard source of obligations in only partly deliberate ties of mutual dependence, and redefines the two conventional sources of obligation as extreme, limiting cases. Which of these rival conceptions provides the real theory of contract? Which describes the institutional structure inherent in the nature of a market?

The development of constitutional law and constitutional theory throughout the late nineteenth and the twentieth centuries tells a

similar story of the discovery of indeterminacy through generalization. This discovery was directly connected with its private-law analogue. The doctrines of protected constitutional interests and of legitimate ends of state action were the chief devices for defining the intrinsic legal-institutional structure of the scheme of ordered liberty. They could not be made coherent in form and precise in implication without freezing into place, in a way that the real politics of the republic would never tolerate, a particular set of deals between the national government and organized groups. Legitimate ends and protected interests exploded into too many contradictory implications; like contract and property theory, they provided in the end no more than retrospective glosses on decisions that had to be reached on quite different grounds.

The critique of this more specific brand of objectivism can also develop through the interpretation of contemporary law and doctrine. The current content of public and private law fails to present a single, unequivocal version of democracy and the market. On the contrary, it contains in confused and undeveloped form the elements of different versions. These small-scale variations, manifest in the nuances of contemporary doctrine, suggest larger possible variations.

The convergent result of these two modes of attack upon objectivism—the legal-historical and the legal-doctrinal—is to discredit, once and for all, the conception of a system of social types with a built-in institutional content. The very attempt to work this conception into technical legal detail ends up showing its falsehood. Thus, a cadre of jurists with no subversive intentions helped develop subversive insights into the institutional indeterminacy of the concepts of democracy and of the market. Those who officiate in the temple may delight in the thought that the priests may sometimes outdo the prophets.

### **The Critique of Formalism**

We have approached the critique of formalism in an equally distinctive way. The starting point of our argument is the idea that every branch of doctrine must rely, tacitly if not explicitly, upon some picture of the forms of human association that are right and realistic in the

areas of social life with which it deals. For example, a constitutional lawyer needs a theory of the democratic republic that describes the proper relation between state and society and the essential features of social organization and individual entitlement that government must protect, come what may.

Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies. It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible. A common experience testifies to this possibility: every thoughtful law student or lawyer has had the disquieting sense of being able to argue too well or too easily for too many conflicting solutions. Because everything can be defended, nothing can; the analogy-mongering must be brought to a halt. It must be possible to reject some of the received understandings and decisions as mistaken, and to do so by appealing to a background normative theory of the branch of law in question or of the realm of social practice governed by that part of the law.

Suppose that you could determine, on limited grounds of institutional propriety, how much of the law a style of doctrinal practice may regularly reject as mistaken. With too little rejection, the lawyer fails to avoid the suspect quality of endless analogizing. With too much, he forfeits his claim to be doing doctrine as opposed to ideology, philosophy, or prophecy. For any given level of revisionary power, however, there is a choice to be made about which portion of the received understandings in any extended field of law to repudiate.

To determine which part of established opinion about the meaning and applicability of legal rules you should reject, you need a background prescriptive theory of the relevant area of social practice, a theory that does for the branch of law in question what a doctrine of the republic or of the political process does for constitutional argument. This is where the trouble starts. No matter what the content of this background theory, it is, if taken seriously and pursued to its ultimate conclusions, unlikely to prove compatible with a broad range of the received understandings.

Yet just such a compatibility seems to be required by a doctrinal practice that defines itself by contrast to open-ended ideology. For it

would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that law-making involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory. The dominant legal theories in fact undertake this daring and implausible sanctification of the actual. The unreflective common sense of orthodox lawyers tacitly presupposes it. Most often, the sanctification takes the form of treating the legal order as a repository of intelligible purposes, policies, and principles, in abrupt contrast to the standard, disenchanted view of legislative politics.

This argument against formalism may be criticized on the ground that the claimed contrast between the game of analogy and the appeal to a background conception of right is untenable; analogy is from the outset guided by such a conception, so the criticism would suggest. But for analogy to be guided by such a conception would require the miracle of pre-established harmony between the content of the laws and the teachings of a coherent theory of right. Or, again, it may be objected that in law such background views benefit from a self-limiting principle, introduced by the constraints of institutional context.

Such a principle, however, must rely either upon a more or less tacit professional consensus about the rightful limits of institutional roles or upon an explicit and justifiable theory of institutional roles. Even if a consensus of this sort could claim authority, it simply does not exist. The proper extent of revisionary power, that is, the power to declare some portion of received legal opinion mistaken, remains among the most controversial legal topics, as the American debates about judicial “activism” and “self-restraint” show and as the history of all legal traditions—sacred as well as secular—demonstrates. An explicit theory of institutional roles can make sense and find support only within a substantive theory of politics and rights. We thus return to the initial implausibility of a widespread convergence of any such theory with the actual content of a major branch of law.

Having recognized this problem with doctrine, legal analysis tries to circumvent it in a number of ways. It may, for example, present an

entire field of law as the expression of underlying theoretical approaches to the subject. According to one suggestion, these implicit models fit into a coherent scheme or, at least, point toward a synthesis. In this way it seems possible to reconcile acknowledgement that the interpretation of law requires an appeal to a theory of right and social practice with the inability to show that the actual content of law and doctrine in any given area coincides, over an appreciable area of law, with a particular theory. But this recourse merely pushes the problem to another level. No extended body of law in fact coincides with such a higher-order plan, just as no broad range of historical experience coincides with the implications of one of the evolutionary views that claim to provide a science of history. (That this comparison counts as more than a faint resemblance is a point to which I shall return.) It is always possible to find in the law inconsistent clues about the range of application of each of the models and indeed about the identity of the models themselves.

Once the lawyer abandons these methods of compensation and containment, he returns to a cruder and more cynical device. He merely imposes upon his background conceptions, his theories of right and social practice, an endless series of ad hoc adjustments. The looseness of the theories and the resulting difficulty of distinguishing the ad hoc from the theoretically required make this escape all the easier.

There emerges the characteristic figure of the modern jurist who wants, and needs, to combine the cachet of theoretical refinement, the modernist posture of seeing through everything, with the role and influence of the technician whose results remain close to the mainstream of professional and social consensus. Determined not to miss out on anything, he has chosen to be an outsider and an insider at the same time. To the achievement of this objective he has determined to sacrifice the momentum of his ideas. We have denounced him wherever we have found him, and we have found him everywhere.

One more objection might be made to this attack upon formalism and upon the doctrinal practice that formalism justifies. According to this objection, the attack succeeds only against the systematic constructions of the most ambitious academic jurists, not against the specific, problem-oriented arguments of practical lawyers and judges. It is hard,

though, to see how such arguments could be valid, how indeed they might differ from rhetorical posturing, unless they could count as tentative fragments of a possible cohesive view of an extended body of law.

The implication of our attack upon formalism is to undermine the attempt to rescue doctrine through these several stratagems. It is to show that a doctrinal practice putting its hope in the contrast of legal reasoning to ideology, philosophy, and political prophecy ends up as a collection of makeshift apologies.

### **The Critiques of Objectivism and Formalism Related: Their Significance for Current Legal Theories**

Once the arguments against objectivism and formalism have been rendered in these specific ways, their relation to each other gains a new and surprising clarity. As long as the project of the nineteenth-century jurists retained its credibility, the problem of doctrine failed to emerge. The miracle required and promised by objectivism could take place: the coincidence of the greater part of substantive law and doctrine with a coherent theory, capable of systematic articulation and relentless application.

The only theory capable of performing the miracle would have been one that described the inner conceptual and institutional structure of the type of social and governmental organization to which the nation had committed itself at its foundational moment. Such a theory would not have needed to be imported from outside. It would not have been just somebody's favorite system. It would have translated into legal categories the abiding structure of ordinary political and economic activity. Once the objectivist project underlying the claim to reveal the inherent content of a type of social organization ceased to be believable, doctrine in its received form was condemned to the self-subversion that our critique of formalism has elucidated. Because the nature and defects of the project appeared only gradually, so did the permanent disequilibrium of doctrine.

This view of the flaws in objectivism and formalism and of the close link between the two sets of ideas and the two critiques explains our



approach to the most influential and symptomatic legal theories in America today: the law and economics and the rights and principles schools. Each of these theories is advanced by a group that stands at the margin of high power, despairs of seeing its aims triumph through governmental politics, and appeals to some conceptual mechanism designed to show that the advancement of its program is a practical or moral necessity. The law and economics school has mainly dealt with private law; the rights and principles school is concerned with public even more than private law. The law and economics school has invoked practical requirements (with normative implications) that supposedly underlie the legal system and its history; the rights and principles school, moral imperatives allegedly located within the legal order itself. The law and economics school has chiefly served the political right; the rights and principles school, the liberal center. Both theoretical tendencies can best be understood as efforts to recover the objectivist and formalist position. It is as restatements of objectivism and formalism that we have rejected them.

The chief instrument of the law and economics school is the equivocal use of the market concept. These analysts give free rein to the very mistake that the increasing formalization of microeconomics was largely meant to avoid: the identification of the abstract market idea or the abstract circumstance of maximizing choice with a particular social and institutional regime. As a result, an analytic apparatus intended, when rigorous, to be free of restrictive assumptions about the workings of society and subsidiary to an empirical or normative theory requiring independent justification gets mistaken for a particular empirical and normative vision. More particularly, the abstract market idea is identified with a specific version of the market, the one that has prevailed in most of the modern history of most Western countries, with all its surrounding social assumptions, real or imagined. That version of the market is taken to be the anointed vehicle of allocational efficiency; to cleanse it of imperfections is the best way to enable economic growth. Such are the sophistries by which the law and economics school pretends to discover both the real basis for the overall evolution of the legal order and the relevant standard by which to criticize occasional departures of that order from its alleged vocation. From this source

supposedly come the purposes and policies that do and should play the paramount role in legal reasoning.

The rights and principles school achieves similar results through other means. It claims to discern in the leading ideas of the different branches of law, especially when illuminated by a scrupulous, benevolent, and well-prepared professional elite, the signs of an underlying normative order. Once the presence of such an order in the law becomes manifest, it can serve as the basis for a system of more or less natural rights. This time, the compass guiding the main line of legal evolution and informing criticism of its numerous though marginal aberrations is a harshly simplified set of political and moral conceptions supposedly expressed in authoritative legal materials and susceptible to description in the vocabulary of policy and principle.

No longer able to appeal to the idea of the built-in institutional structure of a type of social organization, this school alternates confusedly between two options, both of which it finds unacceptable as a basis for legal theory. One option is that moral consensus (if only it could actually be identified) carries weight just because it exists. The alternative view is that the dominant legal principles count as the manifestations of a transcendent moral order whose content can be identified quite apart from the history and substance of a particular body of law.

The third, mediating position for which the school grasps, that consensus on the received principles somehow signals a moral order resting mysteriously upon more than consensus, requires several connected intellectual maneuvers. One is a drastic minimization of the extent to which the law already incorporates conflict over the desirable forms of human association. Another is the presentation of the dominant legal ideas as expressions of higher normative insight, an insight duly contained and corrected by a fidelity to the proprieties of established institutional roles, a fidelity that must itself be mandated by the moral order. Yet another is the deployment of a specific method to reveal the content and implications of this order: generalize from particular doctrines and intuitions, then hypostasize the generalizations into moral truth, and finally use the hypostasis to justify and correct the original material. The aim of all this hocus pocus is clearer than the means used to achieve it. Its result is to generate a system of principles and rights

that overlaps to just the appropriate extent with the positive content of the laws. Such a system has the suitable degree of revisionist power, the degree necessary to prove that you are neither an all-out and therefore ineffective apologist, nor an irresponsible revolutionary.

The law and economics and the rights and principles schools supply a watered-down version of the enterprise of nineteenth-century legal science. The endeavor of the classical nineteenth-century jurists in turn represented a diluted version of the more common, conservative social doctrines that preceded the emergence of modern social theory. Such doctrines pretended to discover a canonical form of social life and personality that could never be fundamentally remade and reimagined, even though it might undergo corruption or regeneration.

At each succeeding stage of the history of these ideas, the initial conception of a natural form of society becomes weaker: the categories more abstract and indeterminate, the champions more acutely aware of the contentious character of their own claims. Self-consciousness poisons their protestations. Witnessing this latest turn in the history of modern legal thought, no one could be blamed for recalling, in a spirit of hope, Novalis's remark that "we are near waking when we dream that we dream."

A large part of this history consists in the attempt to deflect the critique of formalism and objectivism by accepting some of its points while saving increasingly less of the original view. The single most striking example in twentieth-century American legal thought has been the development of a theory of legal process, institutional roles, and purposive legal reasoning as a response to legal realism. The most credible pretext for these endless moves of confession and avoidance has been the fear that, carried to the extreme, the critique of objectivism and formalism would leave nothing standing. The results might undermine any practice of legal doctrine, even of normative argument generally.

Thus, ramshackle and plausible compromises have been easily mistaken for theoretical insight. For many of us, the turning point came when we decided, at the risk of confusion, paralysis, and marginality, to pursue the critical attack to the hilt. When we took the negative ideas relentlessly to their final conclusions, we were rewarded by seeing these ideas turn into the starting points of a constructive program.



## FIVE

### *From Criticism to Construction*

#### **The Constructive Outcome of the Critique of Formalism: Deviationist Doctrine**

**T**he defense of the received forms of doctrine has always rested on an implicit challenge: either accept the ruling style, with its aggressive refusal of controversy over the basic terms of social life, as the true form of doctrine, or find yourself reduced to the inconclusive contest of political visions. This dilemma is merely one of many conceptual counterparts to the general choice: either resign yourself to some established version of social order, or face the war of all against all. The implication of our critique of formalism is to turn the dilemma of doctrine upside down. It is to say that if any conceptual practice similar to what lawyers now call doctrine can be justified, the class of legitimate doctrinal activities must be sharply enlarged.

We need not choose between rejecting doctrine and practicing it under the spell of a systematizing idealization of established law. The view that extant law represents an approximation, albeit flawed and incomplete, to an intelligible and defensible plan of social life has been a central feature of doctrinal methods over the last several centuries.

It characterizes today's policy- and principle-based approach to law, just as much as it marked the earlier conception of a type of social and economic organization with a predetermined institutional form and legal content.

However, it has not always prevailed in the history of legal thought. Others have broken the spell in the past, moved less by transformative commitment than by realism and disbelief. We can break the spell more decisively now, for the sake of a transformative vision. We can reshape the methods and assumptions of doctrine.

Such a revision of doctrinal practice would share with the traditional forms of doctrine a willingness to take the extant authoritative materials as starting points and a claim to normative authority. It would, however, avoid the arbitrary juxtaposition of easy analogy and truncated theorizing that characterizes the most ambitious and coherent examples of legal analysis today.

Some may wonder why proponents of social reconstruction should be interested in preserving doctrine at all. At stake in the defense of a suitably expanded doctrinal practice is the validity of normative and programmatic argument; at least when such argument takes the standard form of working from within a tradition, rather than the exceptional one of appealing to transcendent insight. As long as necessitarian theories of historical change (the belief that the content and sequence of social systems reflect inescapable economic or psychological imperatives) remained persuasive, views of how society ought to be changed seemed misguided and superfluous. The disintegration of such theories, which has been the dominant feature of recent social thought, creates an opportunity for normative and programmatic ideas while depriving these ideas of a criterion of political realism.

Expanded or deviationist doctrine, the genre of legal writing that our movement has begun to develop, may be defined by several related traits. On one description its central feature is the attempt to cross both an empirical and a normative frontier: the boundaries that separate doctrine from empirical social theory and from argument over the proper organization of society, that is, from ideological conflict. Enlarged doctrine crosses the normative boundary by deploying a method that differs in no essential way from the loose form of

criticism, justification, and discovery marking ideological contests over the arrangements of society.

Deviationist doctrine moves across the empirical boundary in two different ways. One way is familiar and straightforward: to explore the relations of cause and effect that lawyers dogmatically assume rather than explicitly investigate when they claim to interpret rules and precedents in the light of imputed purpose. The settled interpretation of a rule is often justified by a two-step operation: the interpreter first imputes to the rule a purpose, such as the promotion of family cohesion, then decides which reasonable understanding of the rule is best calculated to advance this end. Characteristically, however, he makes no serious effort to support or revise the causal assumptions taken for granted in the second stage of this procedure. The causal dogmatism of legal analysis is all the more remarkable given the star role that our ordinary understanding of history assigns to the unintended consequences of action and to the paradoxical quality of causal connections. The other way the empirical element counts is more subtle and systematic: it opens up the petrified relations between abstract ideals or categories, such as freedom of contract or political equality, and the legally regulated social practices that are supposed to exemplify them. Its aim is to show, as a matter of truth about history and society, that such abstractions can receive—and almost invariably have received—alternative institutional embodiments. Each such embodiment gives a different cast to those ideas.

On an alternative account, the decisive feature of deviationist doctrine is the refusal to see law as an idealized system. Successive approaches to legal reasoning have struggled to understate and to diminish conflict and anomaly in the law. Of these approaches, the present representation of law as a body tending to coherence because informed by policy and principle is simply the most recent. Mystification of the law as an idealized system has served usurpation of power by jurists—to the detriment of democracy when the state is democratic. It has helped contain and inhibit, rather than explore and excite, the tension between our recognized interests or our professed ideals and the institutions or practices that are supposed to represent them. Unwillingness to view law in such an idealizing and systematizing light has nevertheless been

mistakenly dismissed as incompatible with the practical responsibility of lawyers, and especially of judges, to make the best of the law.

The disposition to view each part of law as a structure of dominant and deviant solutions, and to mobilize contradiction in the service of transformation, leads to a different understanding of doctrine. One way to develop such an understanding, exemplified later in this book, is to trace in each part of law a dialectic of principle and counterprinciple and to recognize in such disharmonies signs of broader contests among prescriptive conceptions of social life. In this exercise, our chief concern will be with the future of society, as well with the present reality of law, rather than with courts, cases, and judges.

Nothing, however, in this break with systematic idealization of law need trouble adjudicators in doing their jobs. When meaning is disputed, they will still have to find it by ascribing purpose in context. When purpose is controversial, they must still accept that our moral and political arguments continue, albeit under distinctive constraint, in our legal arguments. However, they will no longer be able to pretend to find guidance in an idealized system, latent, though imperfectly and incompletely, in established law. They will be left to themselves and to their fellow citizens.

Yet another description of expanded doctrine is presupposed by the previous two and makes explicit what they have in common. The revised style of doctrine commits itself to integrate into standard doctrinal argument the controversy over the right and feasible structure of society, over what the relations among people should be like in the different areas of social activity. In the rich North Atlantic countries of today, the imaginative vision of the ways in which people can have a life in common appeals to a particular ideal of democracy for the state and citizenry, to a picture of private community in the domain of family and friendship, and to an amalgam of contract and impersonal technical hierarchy in the everyday realm of work and exchange.

This social vision helps make the entire body of law look intelligible and even justifiable. Above all, it serves to resolve what would otherwise be incorrigible indeterminacy in the law. Just as the ambiguities of rules and precedents require recourse to imputed purposes or underlying policies and principles, so the ambiguities of these policies and



principles can be avoided only by an appeal to a background scheme of association of the sort just described. Yet the conflicting tendencies within law constantly suggest alternative modes of social life. The focused disputes of legal doctrine repeatedly threaten to escalate into struggles over the ordering of social life.

The dominant styles of legal doctrine often included all three levels of analysis: the authoritative rules and precedents; the ideal purposes, policies, and principles; and the conceptions of possible and desirable human association to be enacted in different areas of social practice. Each such set of conceptions made a particular version of society stand in the place of the indefinite possibilities of human connection. To identify this set is to see how power-ridden materials, susceptible to easy argumentative manipulation, gain a semblance of authority, necessity, and determinacy and thus how formalism and objectivism seem plausible. It is to illuminate the mental world within which impersonal purposes, policies, and principles make sense and claim authority.

Most legal traditions of the past incorporated the final level of legal argument by relying upon a secular or sacred vision of the one right and necessary order of social life. Legal doctrine, however, now works in a social context in which society has increasingly been forced open to transformative conflict. It exists in a cultural context in which, to an unprecedented extent, society is understood to be made and imagined rather than merely given. To incorporate the final level of legal analysis in this new setting would be to transform legal doctrine into one more arena for continuing the contest over the right and possible forms of social life.

Jurists and their philosophers have generally wanted to avoid this result. They have avoided it at the cost of stark and arbitrary intellectual restrictions whose ultimate effect is to turn legal doctrine into an endless array of argumentative tricks. Through its constructive attempts to devise a less confined genre of legal analysis, the critical legal studies movement has insisted upon avoiding this avoidance.

The rationality for which this expanded version of legal doctrine can hope is nothing other than the practice of giving reasons in the everyday modes of moral and political controversy. You start from the conflicts between the available ideals of social life in your own

social world or legal tradition and their flawed expressions in present society. You imagine these expressions changed, or you change them in fact, if only by extending an ideal to some area of social life from which it had previously been excluded. Then you revise the ideal conceptions in the light of their new practical embodiments.

Call this process internal development. To engage in it self-reflectively you need make only two crucial assumptions: that no one image of how people can and should deal with one another in any part of society has conclusive authority, and that the mutual correction of abstract ideals and their institutional realizations represents the last best hope of the standard forms of normative controversy. The weakness of such a method is its dependence upon the starting points provided by a particular tradition; its strength, the richness of reference to a collective history of ideas and institutions. Legal doctrine, rightly understood and practiced, is the conduct of internal argument through legal materials.

The distinctive character of internal development becomes clear when this method is compared to the other major recourse of normative thought: visionary insight into a reordered social world. Such insight presents an entirely new plan of collective life, a plan supported by a credible theory of transformation, informed by an image of personality, and guided by the effort to extend opportunities of human connection. Whereas internal argument starts by exploring conflicts between ruling ideals and established arrangements, or among those ideals themselves, and then pushes by gradual steps toward ever more drastic ways of reimagining society, visionary insight begins with the picture of a reordered human world.

The political prophet can be understood and can persuade only because the principles of the world he invokes may be discerned already at work in the anomalies of personal encounter and social practice. No clear-cut contrast exists between the normal and the visionary modes of argument, only a continuum of escalation. The strongest proof of their similarity is that both resort to the same preferred device: they try to seize upon deviations in current experience and to imagine them transformed, or to transform them, into organizing conceptions and practices. A resemblance in character underlies this similarity of

method. Short of claiming access to authoritative revelation or privileged intuition, every normative argument must in some wider sense be internal. If not internal to the conversation between ideals and institutions within a particular tradition, it must be internal to an analogous conversation on the scale of world history.

There are many reasons of prudence, relative propriety, or sheer incapacity for not carrying internal argument very far in a particular institutional context. A state may even be more or less deliberately set up to deny to certain transformative activities (including the bolder sorts of internal development) effective institutional instruments. The existing low-energy democracies are such states.

When asked whether deviationist doctrine can suitably be used by judges, we answer as follows. We are neither servants of the state (not at least in the conventional sense) nor their technical assistants. We have no stake in finding a pre-established harmony between moral compulsions and institutional constraints. We know, moreover, that the received views of institutional propriety count for little except as arguments to use against those who depart too far from professional consensus. Most of what courts actually do—brokering small deals against a background of disputed facts and uncontested though vaguely conceived rights, and supervising the police and prosecutors as they decide which violent members of the underclass to imprison—hardly fits those conceptions of institutional competence.

Two countervailing considerations should guide an appreciation of the limiting effects of the judicial role upon the use of deviationist doctrine. On the one hand, there is the need not to seek in doctrinal breakthroughs a substitute for more tangible and widely based achievements, nor to see doctrinal dispute as a replacement for other varieties of practical or imaginative conflict. On the other hand, there is no magic in an established institutional set-up: our inherited institutions are designed to inhibit the activities that might, in any sphere, be able to change them. The refusal to sanctify existing arrangements implies a willingness to brave the incongruous use of institutional roles. It is unlikely that any general theory of institutional roles could ever develop from clashing considerations like these. If it could, its effect would not be to ensure the overall compatibility of authoritative theories of right

with the actual content of the legal order. Thus, it would be of no use to those who had expected the most from it.

A revised practice of legal analysis, the constructive outcome of our critique of formalism, solves the problem of doctrine only by redefining its terms. The received doctrinal procedures and the legal theories that try to justify them seek a method guaranteed both to possess just the right degree of revisionary power and to reaffirm the contrast between legal analysis and ideological conflict. The actual result of this search, however, is to reduce all legal reasoning to a tenacious exercise in sophistry, compelled in its most serious and systematic moments to invoke background theories of right and social practice whose implications it must also contain.

Deviationist doctrine employs a method, internal development, whose reach of revision can in the end be limited solely by institutional considerations. Such considerations lack any higher authority. It lays claim to no privileged status capable of distinguishing it clearly from ideological dispute. Thus, when pushed beyond a certain point, it ceases to look like what we now call doctrine or to serve the narrow purposes of professional argument, especially when such argument takes place in an adjudicative context. At every point, however, it promises only what it can deliver: its looser and more contestable approach to justification requires no mixture of bold theoretical claims and saving ad hoc adjustments.

Such a reinvention of doctrine has a broader significance as well. Every stabilized social world depends, for its serenity, upon the redefinition of power and preconception as legal right or practical necessity. The mundane and visionary struggles over the form of social life must be stopped or circumscribed, and the truce lines reinterpreted as a plausible though flawed version of a rightful regime.

Legal norms and doctrines define the basic institutional arrangements of society. Such arrangements determine the limits and shape the content of routine economic or governmental activity. The rules setting formative practices must be interpreted and elaborated as expressions of a more or less coherent normative order, not just as a disconnected series of trophies with which different factions mark their victories in the effort to enlist governmental power in the service of private

advantage. Otherwise, the restatement of power and preconception as right would not have been fully accomplished. The generality of rules and the stability of rights would lie in permanent jeopardy. The interpretive elaboration of the norms governing a social world would turn into an occasion to begin all over again the fight over the structure of this world.

In the societies with which contemporary legal theory deals, the organization of social life has been subject to continuing conflict and cumulative insight and thereby deprived of some of its halo of naturalness and necessity. The appeal to abstract categories of legal right and technical necessity becomes all the more important, and the required truncations of legal or technical reasoning become all the more obvious and abrupt. The single most important example of such truncation in legal doctrine and legal theory has already been mentioned: the silence over the divergent plans of social life that are manifest in conflicting bodies of rule, policy, and principle.

Deviationist doctrine sees its opportunity in the dependence of every society on an institutional regime that is in turn hostage to a vision of right. In a limited setting and with specific instruments, the practice of expanded doctrine begins all over again the fight over the terms of social life. It is the legal-theoretical counterpart to a social theory that sees transformative possibilities as built into the mechanisms of social stabilization. Such a theory refuses to explain the established forms of society, or the sequence of these forms in history, as the expressions of irresistible practical or psychological imperatives. Enlarged doctrine extends into legal thought a social program committed to moderate the contrast between routinized social life and its occasional revolutionary re-creation. It wants something of the quality of the latter to pass into the former.

### **The Constructive Outcome of the Critique of Objectivism: Redefining the Institutional Forms of Democracy and the Market**

The constructive outcome of our critique of objectivism is to turn us toward the search for alternative institutional forms of the available

institutional ideals, most especially the market and the democracy. The chief medium in which we pursue this quest is deviationist doctrine itself, including the historical and analytic criticism of received legal conceptions. For its full development, such a search requires three bodies of supporting and animating ideas.

The first set of ideas is a credible view of social change. Without such a view, we would lack standards by which to distinguish more or less realistic programmatic ideals. Programmatic debate would then fall back into its characteristic modern dilemma. The proposals that depart sharply from existing realities end up looking like utopian fantasies that merely invert a social reality that they do not seriously imagine transformed; the proposals staying close to established reality represent marginal adjustments that hardly seem worth fighting for. The programmatic imagination alternates between the two converse and complementary dangers of effortless redefinition and unconditional surrender.

The second supporting group of ideas is a conception of the ideal that should guide the reconstruction of institutional forms. This ideal may represent a product of visionary insight responding to a particular historical circumstance. Or it may be simply an attempt to capture and generalize the meaning of a particular process of internal development.

A third series of ideas offers a conception of the proper relation of law to society. The alternative institutional forms, like the arrangements that they replace, must be worked out in legal categories. To do so forms part of the work of deviationist doctrine.

One way to clarify the origin and character, if not the justification, of the ideal inspiring our programmatic institutional ideas is to say that our program arises from the generalization of aims broadly shared by the great secular doctrines of emancipation of the recent past—both liberal and socialist—and by the social theories that supported them. At the heart of each of these doctrines lay the belief that the weakening of social divisions and hierarchies would reveal deeper commonalities and liberate productive and creative powers. The theoretical and practical consequences of this belief were drastically constricted by dogmatic assumptions about the possible forms of social change and their possible institutional expressions. We have attacked

the second set of constraints and therefore, by implication, the first. The result is a more generalized or radicalized version of the social ideal. Our attack on these constraints has led us to rethink the content of the progressive cause.

There are three equivalent ways to state a view of that cause informed by such acts of reimagination. The goal, according to a first rendering, is a cumulative loosening of the fixed order of society, its plan of social division and hierarchy, its enacted scheme of the possible and desirable modes of human association. The sense of this progressive dissolution is that to every aspect of the social order there should correspond a practical or imaginative activity that makes it vulnerable to collective conflict and deliberation. (Expanded doctrine itself exemplifies such an activity.) In this way no part of the social world can lie secluded from destabilizing struggle.

A second statement of the ideal that guides the elaboration of alternative institutional forms is that the life chances and life experiences of the individual should be increasingly freed from the tyranny of abstract social categories. A person should not remain the puppet of his place in the contrast of classes, sexes, and nations. The opportunities, experiences, and values conventionally associated with these categories should be deliberately jumbled.

A third, equivalent version of the ideal is that the contrast between what a social world incorporates and what it excludes, between routine and revolution, should be broken down as much as possible; the active power to reimagine and remake the structure of social life should enter into the character of everyday existence. None of the social and mental forms within which we habitually move, nor all the ones that have ever been produced in history, describe or determine exhaustively our capabilities of human connection. None escapes the quality of being partial and provisional. But these mental and social worlds nevertheless differ in the severity as well as the character and content of their constraining quality. The search for the less conditional and confining forms of experience is the quest for a social world that can better do justice to a being whose overriding attribute is the power to overcome and revise, with time, every social or mental structure in which he moves. These three equivalent versions of the ideal, stated here with

extreme abstraction, can help guide such a revision. Nevertheless, at every stage of the advance toward concreteness the transition to the next level remains loose and speculative.

Together with this approach to the social ideal goes a conception of law and its desirable relation to society. There was a time, in the pre-revolutionary Europe of aristocratic and corporatist polities, when the most influential doctrines held that the law in general and the constitution in particular should be an expression and a defense of the underlying order of social division and hierarchy. The system of rights was meant to exhibit on its surface the gross structure of society, like a building whose facade transcribes its internal design.

The most important shift in the history of modern legal thought may have been the turn from this conception to the idea that the constitution and the law should mark the range of possible dealings among people, as property owners and as citizens, without regard to the place individuals occupy within existing society. According to this view, the system of rights would rise above the real social order. Rights would be clear and effective either as if this order did not exist, or as if it could be adequately tamed and justified by the mere expedient of treating it as nonexistent for purposes of rights definition.

The critical legal studies movement has committed itself to another change in the conception of the relation of law to society, potentially equal in scope and importance to the shift to rights indifferent to social rank and place. Law and constitution are now to be seen as just the reverse of what pre-revolutionary theory demanded. They become the denial rather than the reaffirmation of the plan of social division and hierarchy. The aim of the system of rights, taken as a whole and in each of its branches, is to serve as a counterprogram to the maintenance or reemergence of any scheme of social roles and ranks that can become insulated against challenge.

Such a counterprogram may seem to require an extreme and almost paradoxical voluntarism. Consider, however, the factors that may help turn apparent volunteerism into transformative insight. First, this view merely takes the preconceptions of liberal legal and political theory seriously and pushes them to their conclusions. It asks what would be needed for social life itself to acquire in fact the features that to



a considerable extent liberal politics already possesses. Far from representing a sudden reversal of the experiences of society and social thought, it builds upon a history of theoretical insight and practical politics: the insight into the artifactual character of social life, the politics of destroying the immunity of fixed social structures to politics. Second, one of the most important bases of this view of the relation of law to society is the recognition that societies differ in the extent to which they lay themselves open to self-revision. To see this difference, it is enough to compare the liberal democracies themselves with the societies that preceded them. Third, the antagonistic view of the relation of law to society need not, indeed it could not, be applied all at once. It serves as a regulative ideal capable of guiding modest but potentially cumulative changes. The next parts of my argument may help to show how this process can happen and what in greater detail it means.

### **From a Social Ideal to an Institutional Program**

#### *Political and Cultural Revolution*

The social ideal and the view of the relation of law to social life that I have just described can be translated into a program for the reconstruction of democracy and, more generally, of the established institutional regime. They can also be taken as the basis for a vision of transformed personal relations. I begin by suggesting how a program for reconstructing the basic institutional arrangements of society can be inferred, by internal development, from the criticism of existing institutional practices and ideals, especially the ideals and practices of democracy. I then go on to outline this reform program in three contexts: the organization of government, the organization of the economy, and the system of rights.

The ultimate stakes in politics are always the direct practical or passionate dealings among people. The institutional order constrains, when it does not actively shape, this fine texture of social life. A vision of transformed personal relations may serve in turn to inspire major institutional change.

This view may be seen as a development of the social ideal described earlier. It works out the significance of this ideal for the contemporary and especially the advanced Western societies. Conversely, we may regard it as an interpretation of the politics of personal relations already at work in those societies, an interpretation corrected by an independently justified social ideal and by the image of personality that this ideal deploys. The immediate intellectual background to the cultural-revolutionary politics of personal relations that we witness is the literary and philosophical achievement of early twentieth-century modernism, whose subversive insights into self and society have become ever more widely shared in the West and throughout the world. The deeper source of this politics, however, lies in an awareness of the infinite quality of the personality: the power of the self to transcend the limited imaginative and social worlds in which it moves. This idea gains a more tangible and even a deeper meaning by its association with the reordering of both personal relations and institutional arrangements.

The guiding and unifying aim of the cultural-revolutionary practice I have in mind is to remake all direct personal connections, such as those between superiors and subordinates or between men and women, by freeing them from a background plan of social division and hierarchy. Such a plan provides these dealings with a prewritten script. It makes the opportunities of practical exchange or passionate attachment respect the limits imposed by an established power order. It assigns fixed roles to people according to the position that they hold within a predetermined set of social or gender contrasts.

The cultural-revolutionary program may at first seem entirely negative. We can nevertheless restate it in an affirmative mode. It wants the opportunities and experiences available to different categories of people to be more freely recombined. Such facility for recombination matters both as a good in itself and as an occasion to improve the character of social life. It is easy enough to understand how such a facility might respond to practical concerns: productive capabilities may develop as the forms of production and exchange become more independent of any given rigid organizational or social context. The hope of improvement also extends, though more obscurely and controversially, to the domain of community and passion. For example, people may be

enabled and encouraged to combine in a single character qualities that ruling stereotypes assign separately to men and women.

To the extent that this cultural-revolutionary practice remains cut off from the struggle over the institutional structure of society, it sinks into a desperate self-concern and becomes liable to place gratification and the denial of commitment—to people, institutions, or ideas—in the place of self-transformation and transcendence. This remark turns us back to the criticism and reimagination of institutional arrangements.

The program outlined here may be directly justified as an account of what a particular social ideal and its corresponding image of personality require for our historical circumstance. We can reach similar results by applying the method of internal argument: by taking the available ideals of democracy and comparing them to existing institutional arrangements that supposedly embody those ideals in practice. The convergence of this internal line of argument with the inferences that we can draw directly from an ideal of the self or society confirms the parallelism of internal development and visionary insight.

### *Criticizing and Reinventing Democracy*

Modern conceptions of democracy range from the cynical to the idealistic. At the idealistic pole lies the confident notion of popular sovereignty, qualified in its own interest by the requirements of partisan rotation in office and able to survive intact the transition from direct to representative democracy. At the cynical pole stand the variants of the democratic ideal that claim to be satisfied with an ongoing competition among elites, as long as the competitors occasionally need to enlist mass support. All contemporary versions of the democratic ideal, however, share a minimal core: the government must not fall permanently hostage to a faction, however broadly the term faction may be defined so as to include social classes, segments of the work force, parties of opinion, or any other stable collective category.

This minimalist view of political legitimacy would make no sense if the society in which the state existed were organized according to a rigid and pronounced system of social divisions and hierarchies that set the life chances of each individual. Either the dominant groups in this

ranking would turn the state into their relatively passive instrument, or the state, though appearing to enjoy wide law-making powers, would become relatively marginal to the actual organization of society. Thus, the minimalist standard must be extended to incorporate the demand for some significant fragmentation and weakening of this plan of social dominance and division; this extension of the standard remains no less significant for being vague. One way to make the internal argument against the existing versions of democracy is to judge them by the standard of this extended minimalist requirement for state and society.

The argument is familiar enough and usually includes the following three ideas, which emphasize the failure of existing democracies to meet the minimalist requirement. First, the established forms of economic and political organization enable relatively small groups of people to control the basic terms of collective prosperity by making the crucial investment decisions. For reasons to be explored later, the style of constitutional arrangements makes it hard to win governmental power on behalf of any serious transformation, such as a commitment to change the institutional form of the market and the locus of ultimate control over the pace and direction of the accumulation of capital. Moreover, even the most distant threat of reform can be met by the immediate response of disinvestment and capital flight, with their sequel of economic crisis and electoral unpopularity.

A second criticism emphasizes the importance of major areas of organizational life—factories, bureaucracies, and offices; hospitals and schools—in which people exercise and suffer powers that are neither subject to effective democratic accountability nor capable of being fully justified by the two most apparent alternatives to democracy: free contract and technical necessity. To a large extent, such citadels of private power remain insulated from the risks of party-political conflict: everything from the “checks and balances” style of governmental organization to the lack of a credible alternative vision of how markets and democracies might be organized contributes to this insulation. Thus the ordinary experience of social life gives the lie to the promises of citizenship.

A third and narrower criticism points out that from their position of relative insulation such organized interests can corrupt the public

conversation about the future course of society. They can do so, most obviously, through their influence upon the means of communication and the financing of party politics.

The case against the established forms of democracy may rest on another footing, which though less familiar than the criticisms just enumerated preserves the hallmarks of internal argument. Politics in the established democracies are characteristically obsessed with a small number of options for governmental activity. (The same point could of course be made even more strongly for the communist countries of the present day.) Take the broad area of macroeconomic policy as an example.

There come times when left-leaning political parties bent on reform ride to power on a wave of promises to redistribute income and even wealth. If these parties are ambitious and leftist enough, their platforms include plans to change the institutional structure of the state and the economy. Such reform plans, however, usually come to grief before they have been seriously tested. Constitutional guarantees for the effective restraint of governmental power encourage postponement, resistance, and impasse. At the same time, the fear of redistribution and reform provokes economic crisis through disinvestment and capital flight.

From all sides the would-be reformers find their electoral support eroded by difficulties of transition that the institutional structure aggravates, as often by design as by unintended effect. They turn in desperation or disenchantment toward short-term goals of modest redistribution and renewed economic growth and stability. Even these objectives elude them within the given structure of governmental and economic activity. Before having had a chance to leave much of an imprint on enduring institutions, they are thrown out of office.

Another, reactionary party comes to power, promising to help everyone by accelerating economic growth. At its most ambitious, it speaks of establishing or restoring free competition. But, for reasons to be mentioned later, a quantum jump in the degree of economic decentralization cannot be reconciled with economies of scale and other technical considerations without drastic changes to the bases of decentralization—changes furthest from conservative minds. The

program of the reactionary party rapidly comes down to the thesis that you best help everyone by first helping the people with capital to invest.

Investors, however, can never get enough to behave by the rules. They know the fickleness of the democracy. They have, most of them, long ceased to be the innovative, risk-bearing entrepreneurs of fable. Mere handouts will not change them, nor will greed ensure ingenuity. Because it has not seen inequality redeemed by riches, a disoriented and disheartened electorate dismisses the reactionaries and gives the reformers one more chance to fail.

In this dismal, compulsive round of policy alternatives, each side anticipates and internalizes the prospect of failure. The reformers cannot decide whether to argue for reorganization of the economy and the state, or to rest content with building up the welfare system within the established forms of governmental and economic organization. The reactionaries hesitate between taking their free-competition slogans seriously and truckling unabashedly to the rich. Political hopes undergo a cumulative deflation. Politics are lived out as a series of second-best solutions to intractable problems. The purists of each camp can plausibly claim that their ideas have never been tried out. The cynics can advise us to face up to reality by surrendering to the existent.

At first, these limited and limiting options might seem just the inevitable resultant of the vectors represented by the contending political forces. These forces prevent one another from working their will: the dominant policies will be the ones permitted by this mutual resistance. But such an explanation will not suffice. The identities of the competing factions are already shaped by assumptions about the real possibilities that the entrenched institutional order enforces. This same order also helps generate the specific pattern of impediment and frustration that each faction must confront. The would-be reformers need to understand this underlying structure and to concentrate their efforts on its piecemeal reformation.

The repetitious quality of political life stands in clear conflict with the visionary commitment to weaken the contrast between the petty fights within a formative institutional order and the larger struggles around it. A social world dominated by such compulsions is one that

reduces even its most active and informed citizens to the condition of unresisting if not unknowing puppets. The recurrence of the reform cycles also supports an internal line of criticism. This internal argument requires replacing the idea of a state not hostage to a faction with the equally familiar notion of a social order all of whose basic features are directly or indirectly chosen by equal citizens and right holders rather than imposed by irresponsible privilege or blind tradition. No one chose the particular alternatives among which we are in fact made to choose, nor can they be understood in their specific content as a direct result of conflict among people's choices. Here is a society that cannot live up to its essential self-image.

To imagine and establish a state that had more truly ceased to be hostage to a faction, in a society that had more thoroughly rid itself of a background scheme of inadequately vulnerable division and hierarchy, we might need to change every aspect of the existing institutional order. The transformed arrangements might then suggest a revision of the democratic ideal with which we had begun. From the idea of a state not hostage to a faction, existing in a society freed from a rigid and determinate order of division and hierarchy, we might move to the conception of an institutional structure, itself self-revising, that would provide constant occasions to disrupt any fixed structure of power and coordination in social life. Any such emergent structure would be broken up before having a chance to shield itself from the risks of ordinary conflict.

One way to develop this conception of an empowered democracy into a set of more concrete institutional principles is to define the obstacles to its realization in each major domain of institutional change: the arrangements of democratic politics, the institutions of the economy (or of the market), and the regime of rights. This procedure has the advantage of distinguishing the program from a timeless, utopian blueprint. No matter how radical the proposed rearrangements may appear, they represent the adjustment of a unique institutional and ideological settlement in the light of professed social ideals and recognized group interests. The institutional experiments in turn reveal contradictions and ambiguities in how these interests and ideals are understood, and provide opportunities to reinterpret them.

*The Organization of Government*

Consider first the organization of government and of the contest over the mastery and uses of governmental power. The devices for restraining governmental power may also tend to deadlock it; they may establish, by intention and design rather than by logic or necessity, a connection between the liberal commitment to fragment power and the conservative desire to slow politics down. They may establish a rough equivalence between the transformative reach of a political project and the severity of the constitutional obstacles to its execution. A constitutional design of this sort helps form, and reinforces once formed, the interests and preconceptions that crystallize around any stabilized social situation. As a result, the struggles of official politics fail to provide sufficient occasion to disrupt further the background structure of division and hierarchy in social life, and thus give rise to the facts emphasized by the earlier, internal objections to the established versions of democracy. Yet, and this is the heart of the problem, every attempt to revise the institutional arrangements that exercise this structure-preserving influence seems to undermine the restraints upon governmental power that secure freedom. A successful resolution of this dilemma must provide ways to restrain the state without effectively robbing politics of its transformative potential.

Such a resolution might include the following elements. First, the branches of government should be multiplied. To every crucial feature of the social order there should correspond some form and arena of potentially destabilizing and broadly based conflict over the uses of state power. The organization of government and of conflict over governmental power should provide a suitable institutional setting for every major practical or imaginative activity of transformation. (Recall, for example, those more ambitious varieties of injunctive relief afforded by present-day American law that involve large-scale disruptions or reconstructions of existing institutions. Such relief should not fall under a cloud because it fails to fit either the judicial or the legislative contexts in the contemporary state.) Different branches of government might be designed to be accountable to popular sovereignty and party-political rivalry in different ways.



Second, the conflicts among these more numerous branches of government should be settled by principles of priority among branches and of devolution to the electorate. These principles must resolve impasses cleanly and quickly. They should replace the multiple devices of distancing and dispersal (including the traditional focus on “checks and balances”) that seek to restrain power through the deliberate perpetuation of impasse.

Third, the programmatic center of government, the party in office, should have a real chance to try out its programs. That a constitutional concern for decisive innovation need neither leave state power unchecked nor injure the vital rights of the opposition is shown by the experience of many European constitutions since the First World War. The significance of this three-point program of governmental reform becomes clearer when seen against the double background of an economic order that democratizes the market economy and of a regime of rights that strengthens the individual without rigidifying society.

### *The Organization of the Economy*

The prevailing institutional form of the market in the rich Western countries works through the assignment of more or less absolute claims to divisible portions of social capital, claims that can be transmitted in unbroken temporal succession, including inheritance. To a significant degree, particular markets are organized by large-scale business enterprises surrounded by an abundance of smaller ventures. Workers are allowed to unionize. Both the segmentation of the economy into large and small enterprises and the softening of the confrontation between capital and labor through public and private deals have helped fragment the work force. The workers stand divided into groups entrenched in relatively fixed places in the division of labor, widely disparate in their access to the advantages of collective self-organization. This way of maintaining a market order creates for the program of empowered democracy both problems of freedom and problems of economic convenience.

It threatens democratic freedom on both the large and the small scale. It does so on a small scale by giving the occupants of some fixed

social stations the power to reduce the occupants of other social stations to dependence. Individual or collective contract rights cannot fully counterbalance this dependence; practical imperatives of organizational efficiency cannot fully justify it. The established economic order also poses a large-scale threat to democracy. It does so by allowing relatively small groups, in control of investment decisions, to have a decisive say over the conditions of collective prosperity or impoverishment.

At the same time that it jeopardizes freedom, the dominant form of market organization restrains economic progress through a series of superimposed effects. These effects show how the existing market order acts as a deadweight upon practical ingenuity and economic progress, by subordinating the opportunities for innovation to the interest of privilege and by thwarting plasticity, the secret of worldly success.

The first such damaging consequence of the established market system is the constraint that it imposes upon the absolute degree of decentralization in the economy. For one thing, within this institutional version of the market any attempt to break up large-scale enterprises seems to sacrifice indispensable economies of scale. For another thing, a major decentralization of industry would imply a fragmentation of capital resulting in a decisive shift in the relative power of capital and labor. No wonder the program of promoting "free competition" looks like a romantic adventure, invoked more often than not as a cover for favored deals between government and big business.

A second consequence is to discourage economic experimentation: in particular, efforts to recombine and renew not merely factors of production but also the components of the institutional context of production and exchange. The style of market order makes initiatives for the revision of this context depend overwhelmingly upon the factional interests of those who, in the name of the property norm and impersonal technical requirements, take the lead in organizing work and supervising economic accumulation.

A subtle way in which privilege discourages experimentation is the maintenance of a series of institutional conditions that help establish a relatively clear contrast between the way work tends to be organized in the mainstream of industry (as well as of administration and warfare) and in its experimental vanguard. In the mainstream a stark contrast

prevails between task-defining and task-executing activities. Its specific industrial concomitants are rigid production processes, product-specific machines, and mass production, all dependent upon enormous capital outlays and relatively stable product, labor, and financial markets. In the vanguard of industry, administration, and warfare, this contrast gives way to a more continuous interaction between task-defining and task-executing activities in a climate that favors flexibility in the forms, the instruments, and the outcomes of work.

The present form of the market economy may inhibit the dissemination of the most advanced forms of production. It may do so by establishing conditions that enable firms to shelter themselves against market forces. Prominent among these conditions are the devices that enable the inflexible and costly enterprise to protect itself against instability in the financial markets (for example, by generating its own internal investment funds) or in the product and labor markets (for example, by relying upon temporary, less privileged workers or satellite enterprises for the part of production that responds to the unstable margin in demand).

Seen in its social context, the established market system causes yet another harm to the development of productive capabilities: it undermines conditions for growth-oriented macroeconomic policy. A strategy of economic growth can be realized through many different distributions of rewards and burdens, fixed in the form of differential wages, taxes, and direct or concealed subsidies. Any coherent and effective policy requires either broad consensus on one such distribution or the power to make a given distribution stick in the absence of consensus. Macroeconomic policy finds itself repeatedly caught between two standards that it cannot reconcile: the relative ability of different segments of business and labor to control or disrupt production, and the unequal power of groups to exert pressure, outside the economy, by votes, propaganda, or even social unrest. There are two divergent hierarchies of organizational influence. The losers in one theater, either the economic or the political, can strike back in the other. No distributive deal can respect both correlations of forces equally. Any distributive deal can be undermined, economically or politically as the case may be, by its economically powerful or politically influential victims.

An institutional design of the market economy dealing with these multiple dangers to freedom and prosperity must not reduce economic decentralization to the mere assignment of absolute claims to divisible portions of social capital in a context of huge disparities of scale, influence, and advantage. An alternative principle conforming to the aims of empowered democracy, to its constitutional organization and its system of rights, can be represented as either an economic or a legal idea.

The central economic principle would be the establishment of a rotating capital fund. Capital would be made temporarily available to teams of workers or technicians under general conditions fixed by the central agencies of government. Such conditions might, for example, set outer limits to disparities of income or authority within firms, to the accumulation of capital, and to the distribution of profit as income. The rates of interest charged for the use of capital in different sectors of the economy would constitute the basic source of governmental finance, and the differentials among these rates the chief means with which to encourage risk-oriented or socially responsive investment. The fund would be administered to maintain a constant flow of new entrants into markets. Enterprises would not be allowed to consolidate market-organizing positions or to make use of the devices enabling them today to insulate themselves against market instabilities. Rewards to particular individuals and teams would be distinguished from the imperial expansion of the organizations to which they temporarily belong.

Such a system might aim to become both more decentralized and more plastic than the existing market order. The institutional provisions for decentralized production and exchange would be more open to experimental reshaping, initiated either by government or by economic agents, than they are now. However, the aim would not be to substitute one blueprint for another: it would be to fashion a market economy that has ceased to be committed to a single version of itself. Alternative regimes of private and social property—and the approaches to contract that complement them—would begin to coexist experimentally within the same economy.

Economic institutions are now fixed by a system of legal entitlements and de facto power relations that governments seem able to change

only marginally and that common prejudice dogmatically identifies with the inherent nature of a market economy. One of the foreseeable points of contention in the reformed system might be the extent to which the range of permissible variation in the institutional forms of production and exchange should be broadened, in the economy as a whole or in particular sectors of it, for the sake of experiment and innovation.

The legal counterpart to the rotating capital fund is the disaggregation of the unified property right. As any civilian or common lawyer should have known from the start, what we call property is merely a collection of heterogeneous faculties. These powers can be broken up and assigned to different entities. Thus, under the revised market system, some of the powers that now constitute property might be attributed to the democratic agencies that set the terms of capital-taking. Others would be exercised by the capital-takers themselves.

### *The Regime of Rights*

Alongside the organization of government and the economy, the regime of rights constitutes yet another domain for institutional reconstruction. In its present form, this regime causes two main problems for the program of empowered democracy. Individual safeguards rest on two supports: the system of property rights, which threatens to reduce some individuals to direct dependence upon others, and the set of political and civic rights and welfare entitlements, which poses no such threat. Yet any alternative economic order may seem to aggravate the danger to freedom—a problem that can be effectively addressed only by programmatic proposals rich in legal detail. We cannot hope to resolve it through a clash of abstractions bereft of institutional content. That content must exist as law.

The established order of rights presents another, less familiar obstacle to the aims of this institutional program: the absence of legal principles and entitlements capable of informing communal life, understood as the areas of social existence where people stand in a relationship of heightened mutual vulnerability and responsibility toward each other.

For one thing, our dominant conception of right imagines a right as a zone of discretion of the right-holder, a zone whose boundaries are more or less rigidly fixed at the time of the initial definition of the right. The right is a loaded gun that the right-holder may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down. But the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person are incompatible with this view of right and therefore, if this is the only possible view, with any regime of rights.

For another thing, lawyers still believe obligations to arise primarily from either perfected acts of will (such as the fully formalized, bilateral executory contract) or the unilateral imposition of a duty by the state. Although a large and growing body of legal rights and ideas recognizes, under names such as the reliance interest, legally protected relationships that fail to fit these two categories, such relationships remain anomalous from the standpoint of our thinking about the sources of obligation. Most of our recognized moral duties to one another, and especially those that characterize communities, arise from relationships of interdependence that have been only partly articulated by the will and only obliquely influenced by government. Within this ordinary moral experience, the two major sources of legal obligation represent the exceptional, limiting cases.

It may not at first seem self-evident how the issue of rights and community connects with the program of empowered democracy or with the problem of immunity and domination. Remember that these proposals for institutional reconstruction matter not only for their own sake, but also for their encouragement to a shift in the character of direct personal relations and, above all, in the available forms of community. This is the other element in the translation of the social ideal into social practice: the element characterized earlier as the cumulative emancipation of personal relations from the constraints of a background plan of social division and hierarchy. It seeks a recombination of qualities and experiences associated with different social roles. It expresses an ideal of community no longer reduced to representing a counter-image to the quality of social life as it is now experienced.

Such reformed modes of communal experience need to be thought

out in legal categories and protected by legal rights. Not to give these reconstructed forms of solidarity and subjectivity institutional support would be to abandon them to entrenched forms of human connection at war with our ideals. Received ideas about the nature of rights and the sources of obligation cannot readily inform even the existing varieties of communal existence, much less the ones to which we aspire.

The rights and community issue addresses the mere form of rules and entitlements. The immunity and domination problem refers to the social effects of a particular right: unified or consolidated property, the absolute claim to a divisible portion of social capital. How, then, do these two problems relate? In the high classicism of nineteenth-century legal thought, property was the exemplary right. The unified property right had to be a zone of nearly absolute discretion. In this zone the right-holder could avoid any entanglement in claims of responsibility to others.

All rights came to be understood on the model of this conception of property. As the focus of worldly ambition, property had an obvious practical importance within the system of legal categories. Moreover, the commitment to seclude basic economic arrangements from democratic politics made lawyers want to see in this particular brand of property the inherent nature of right, rather than just a special case in need of special defense. The dominant jurisprudence was pressed into support; property seemed to exemplify with matchless clarity the feature of rights that mattered most to the nineteenth-century objectivist: the attempt to infer the content of rights from the conception of a certain type of society, as if each such type had its predetermined institutional architecture. As this version of objectivism lost authority, another, more ambiguous license to extrapolate from property to other rights began to take its place: the discovery of the economic and analytic arbitrariness of any firm distinction between rights over material resources and other rights. Thus, the absence of legal principles and categories suited to communal life turns out to be as much the surprising by-product of the legal shape given to the market as it is the consequence of an inability to assimilate existing varieties of community to the ruling vision of society.

To deal effectively with these two overlapping concerns, the

problem of immunity and domination and the problem of rights and community, the law might have to distinguish four kinds of rights. The concept of right is subsidiary to that of a regime of rights. A regime of rights describes the relative positions of individuals or groups within a legally defined set of institutional arrangements. Such arrangements must be basic and comprehensive enough to define a social world that encourages certain instrumental or passionate dealings among people and disfavors others.

One type of right gives the individual a zone of unchecked discretionary action that others, whether private citizens or government officials, may not invade. But we must not mistake the species for the genus, nor claim to have stated how we understand even this species of right, until we have made clear the institutional setting of its operation. Fully developed, the regime of rights described and justified here would presuppose and be presupposed by the principles of governmental and economic organization outlined earlier. The four types of right that constitute this regime would carry different senses; the tyranny of unified property over our thinking about entitlements would at last be overthrown. All of these categories of right nevertheless share certain characteristics. Each establishes a distinctive style of human connection that contributes to a scheme of collective self-government and resists the influence of social division and hierarchy.

The first category consists of immunity rights. They establish the nearly absolute claim of the individual to security against the state, other organizations, and other individuals. As much as is compatible with the risks of politics, they constitute the fixed, Archimedean point in this order. As political and civic rights (organization, expression, and participation), as welfare entitlements, and as options to withdraw functionally and even territorially from the established social order, they give the individual the fundamental sense of safety enabling him to accept a broadened practice of collective conflict without danger to his vital security. Immunity rights in the empowered democracy differ from current individual safeguards by the greater scope of the endowments and protections that they grant. They differ as well by the avoidance of guarantees of security that, like consolidated property, help defend power orders against democratic politics. As a way



of giving people assurance, such an immunity right stands in the same relation to the property right as the property right stands in relation to the caste system.

Destabilization rights compose a second class of entitlements. They represent claims to disrupt established institutions and forms of social practice that have become insulated against challenge and encouraged the entrenchment of social hierarchy and division. I later discuss them in detail as the most novel and puzzling piece of an alternative regime of rights.

Market rights constitute a third species of entitlement. They provide for conditional and provisional claims to divisible portions of social capital. The market economy would no longer be fastened to a single version of itself. Economic agents would be able to transact under different regimes of contract and property, some better suited to particular uses and sectors than others, but none entrenched as the exclusive legal expression of the market economy. Conditional, temporary, and fragmentary forms of property—derivatives of the unified property right—would cease to be treated as marginal anomalies. Unified property would no longer be the model of rights. Not fully articulated bargains, in the context of continuing relations, would acquire the importance to which even present economic and social reality already entitles them. The fully articulated bilateral executor promise would accordingly lose the central role that it continues to occupy in contract law and doctrine. More generally, the architecture of market rights would be faithful to the ideal of a market economy organized to facilitate the permanent reinvention of its own arrangements—from the bottom up, by the initiatives of economic and social agents, as well as from the top down, by democratic law-making and debate.

Solidarity rights make up a fourth category: the legal entitlements of communal life. Solidarity rights give legal force to many of the expectations that arise from the relations of mutual reliance and vulnerability that have been neither fully articulated by the will nor unilaterally constructed by the state. Each solidarity right has a two-stage career. The initial moment of the right is an incomplete definition that incorporates standards of good-faith loyalty or responsibility. The second

moment is the completing definition through which the right-holders themselves (or the judges, if the right-holders fail) set in context the concrete boundaries to the exercise of the right according to the actual effect that the mooted exercise seems likely to have upon the parties to the relationship.

### *Transformative Ideals and Political Realism*

It would be a mistake to suppose that we need carry out this program for government, the economy, and the regime of rights either in its entirety or not at all. Although its several parts presuppose and reinforce one another, they can also all be realized in small, cumulative steps so long as advances in one area of institutional reconstruction gain sustenance from parallel moves in other areas. Such steps can begin with seemingly modest readjustments of established arrangements. The proposed regime of rights can serve to orient the development of concrete bodies of rule and doctrine in every area of law characterized by ambiguity, controversy, and growth: it can become part of the guiding element in our practice of deviationist doctrine.

This program of institutional reconstruction represents among other things an attempt to break the stranglehold of a false antithesis that has dominated political thought since the late eighteenth century: the opposition between a theorized picture, either idealized or deprecatory, of existing democracies and a counter-image of republican community. In a typical and famous version of the contrast, Benjamin Constant distinguished the ancient from the modern republic. In the ancient republic, the entire citizenry had an active experience of self-rule, devotion to the common good, and life on the historical stage, but correspondingly few opportunities for private enjoyment or the development of subjectivity. In the modern republic, subjectivity and enjoyment flourish, at the cost of shrinking the public space.

The opposition is a sham. The picture presented in contrast with the existing democracies, whether or not fit to describe any real society of the past, is their inverted self-image, the receptacle of everything that seems missing in contemporary social life, and a confession of practical and imaginative failure. Because the idealized communal republic

cannot emerge from present political arrangements as the outcome of any plausible sequence of practical reforms and conceptual adjustments, it confirms the power of the established order in the act of pretending to deny it.

The program that I have described is neither just another variant of the mythic, illiberal republic nor much less some preposterous synthesis of the established democracies with their imaginary opposite. Instead, it amounts to a superliberalism. It pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a large ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs, and put other rules and other constructs in their place.

A less contentious way to define the superliberalism of the program is to say that it represents an effort to make social life more closely resemble what politics (narrowly and traditionally defined) are already largely like in the liberal democracies: a series of conflicts and deals among more or less transitory and fragmentary groups. These groups constitute parties of opinion, by which I mean not only political parties in the narrow sense, but also whoever may coalesce around the defense of an interest or a cause that he wants to see advanced by the assertion or withdrawal of governmental power. Such an experience stands in contrast to a mode of social organization that pegs people at fixed stations in a rigid and hierarchical division of labor. To remake social life in the image of liberal politics it is necessary, among other things, to change the liberal conception and practice of politics. One of the tasks of a progressive program is to show how this change can be effected.



*Two Models of Doctrine***From an Institutional Program to a Doctrinal Example:  
Equal Protection and Destabilization Rights**

**M**y argument now turns to a particular area of the institutional program: destabilization rights and their limited counterparts in current theory and doctrine. This focus allows me to develop in greater illustrative detail the most obscure and original part of the proposed regime of rights and the one that best reveals the ruling intentions of the entire program. The analysis also serves as the first of two examples of deviationist doctrine at work. In particular, it suggests how a conception of a regime of rights in a drastically transformed and more ideal society might help guide the development of doctrine in existing societies. The changed doctrinal practice that I propose maintains the threshold features of doctrine: the claim to justified influence upon the exercise of state power and the willingness to develop a legal system, step by step, from a position initially compatible with its authoritative materials, its institutional context, and even its received canons of argument. To exhibit this relation between an ideal vision and the conduct of legal analysis in the here and now is to go some way toward fulfilling the claim that deviationist doctrine

relativizes the contrast between legal reasoning and ideological controversy. It preserves the valid element in the received idea of doctrine by broadening our sense of what doctrinal argument can and should look like.

The problems to be addressed are those that contemporary Western legal systems usually deal with through equal protection doctrine and several other related bodies of law and legal ideas. My approach is first to criticize the received ways of thinking about these problems, then to show how they might be resolved within the institutional and theoretical framework outlined earlier, and finally to suggest how such a resolution might guide thought in a present-day legal order.

### *The Uses of Equal Protection*

The equal-protection principle in the constitutional law of the United States and other Western democracies has been made to do two quite different jobs. Its narrowest mission has been to impose a requirement of legal generality on behalf of a limited ideal of individual freedom: to impede the unprincipled and discriminatory mobilization of governmental power against individuals or small groups. This might be called the generality-requiring task. Thus stated, the equal protection guarantee represents little more than the universalization of the bar on bills of attainder and the restatement of the difference between legislation and administration. The modest requirement that it imposes can be fulfilled by any credible generality in the categories used by the laws.

The second job that equal protection and its counterparts have been expected to perform is far more ambitious and controversial. It is to serve as a constraint upon the generalizing categories that the law may employ: a generality-correcting task. Sympathetically viewed, generality correction aims to prevent government from establishing or reinforcing through the laws collective disadvantages inconsistent with the principle that in a democracy each person should count as one. Unlike the generality-requiring function, the generality-correcting mission seems to demand from those responsible for administering the legal system a comprehensive view of the proper role of the constitution and the law in society. This second variant of equal protection typically employs

two crucial conceptual devices that shape and limit its operation. The analysis of these intellectual maneuvers helps disclose the conception of law and society that sustains generality-correcting equal protection.

The primary device, the one that stands at the foreground of thought, is the commitment to destroy the anomalous state-created or state-reinforced varieties of collective disadvantage that pose the greatest dangers to the constitutional order. On one interpretation such instances of disadvantage would be the kinds of collective inferiority that cannot be remedied by the practices of political rivalry and decision for which the Constitution provides. Unless such instances of group disadvantage were rare, equal protection would require a drastic reconstructive intervention in the social order. Such an intervention might justify legal categories and practical results radically different from those that distinguish present equal-protection doctrine. It would also appear to impose upon the branch of government most directly responsible, the judiciary, a burden incompatible with the constitutional organization of the state. Thus, if such collective dependencies turned out to be pervasive rather than exceptional, the constitutional plan would prove internally inconsistent.

The other crucial device is the idea known in American law as the state-action requirement. The point is to limit the constitutional constraint upon legislative freedom to instances of disadvantage that governmental rather than private power helps uphold. The execution of this task provides a second chance to ward off the danger that equal protection review might be used to turn society upside down and to disrupt the institutional logic of the constitution. But though this second chance may offer a useful hedge against thoughtless or subversive enthusiasm, it ought to be largely unnecessary. The restraint formerly imposed by the state-action requirement might instead be provided by a direct analysis of the actual or intended effect of the laws upon collective disadvantage.

More significantly, a major objection to the constitutional plan would be presented if there existed many instances of collective disadvantage that could not be corrected by the normal processes of politics and yet remained free from any other constitutional check because government could not be faulted for them. The state would then resemble

all too closely those pre-revolutionary governments nestled within a highly defined social order that they were powerless to change. But the state that modern constitutional and legal theory addresses is supposed to be one that effectively subjects the basic arrangements of society, and especially those that establish power relationships, to the wills of equal citizens and right-holders.

*The Hidden Theory of Equal Protection*

The two conceptual devices—the commitment to correct otherwise irremediable collective disadvantages, and the state-action standard—make sense only in the context of a distinctive conception of government and society. The prescriptive and descriptive aspects of this conception are so closely bound together that the two cannot always be distinguished. Let me call it for short the underlying view. I state the underlying view with deliberate vagueness, the better to avoid unnecessarily restrictive assumptions and unjustifiably biased imputations. The view imagines both a certain kind of society and a particular sort of politics. The two images are supposed to be both reciprocally reinforcing and analogous in structure. Together, they amount to a more developed version of the minimalist conception of democracy described in the institutional program outlined earlier.

The Constitution establishes a procedure to organize conflict over the uses of governmental power. This procedure prevents any one segment of society from bringing first the state and then social life itself permanently under the heel of its own interests and opinions. The antidote to political perversion results partly from the system of individual safeguards (including contract and property rights), partly from the institutional devices for restraining any one power in the state and for guaranteeing the electoral replacement of officeholders, and partly from the nature of the society in which such a state can subsist and which, in turn, this state helps to maintain and improve.

In such a society, individuals and the groups that they voluntarily form can pursue divergent aims and experiment with different productive economic relationships and forms of communal life. Life chances are not overwhelmingly determined by relative positions in a plan of social



division and hierarchy. To a significant extent, people move around in civil society and band together in much the same way in which, as citizens, they participate in the partisan contests of the republic. Without a society that at least approaches this condition, the state earlier described could not exist: it would be either overthrown or reduced to impotence. (How such a state could ever have appeared in the first place is a problem that, for the purpose at hand, we can put to one side.)

Government, the underlying view acknowledges, must nevertheless constantly intervene in the arrangements of this social world. The precise relation between state and society is one of the issues at stake in democratic politics. Each group attempts to advance its interests and ideas by arranging this relationship in a slightly different way. Furthermore, a plausible argument claims that as a matter of both right and prudence everyone should be provided material and cultural conditions enabling him to develop his plans as a private person and to make his weight felt as a citizen. He should have access to these means no matter how he may have fared in the free collisions and alliances supposedly marking social life. The character of democratic society usually ensures, the underlying view assumes, that through their own efforts individuals can escape confinement to a disadvantaged group. The character of democratic government usually guarantees groups the ability to fight back, through political action, against disadvantage, particularly against the burdens that have arisen from some previous pattern of state action.

Occasionally, however, group disadvantage takes such deep root that it cannot be avoided or corrected by the standard means. Social oppression contributes to political isolation and defeat, which in turn reinforces oppression. A segment of the population then finds itself denied the substance of citizenship and right-holding. This deprivation jeopardizes the legitimacy of the entire constitutional and social order.

Here generality-correcting equal protection intervenes by prohibiting legislation that threatens to destroy the social foundations of the constitutional order. Such legislation aggravates a group disadvantage, incorrigible by the normal devices of electoral politics, through the use of legal categories mapping the distinctions of a hierarchical order in society.

The underlying view might be given any number of different emphases. If they were too different, however, the view could no longer make sense of the techniques that shape generality-correcting equal protection: first, the commitment to cure or alleviate exceptional and irremediable collective disadvantages; and second, the deployment of a doctrine that prohibits the state from being party to the reinforcement of the system of hierarchies and divisions generating such inequality.

To make the underlying view explicit is already to go a long way toward discrediting it. No wonder so much ingenuity has been devoted to saying as little about it as possible. Consider first some general objections to this view as a conception of what society and the state could and should be like. I enumerate some of the arguments and underline their common theme; their elaboration would require a comprehensive social theory.

First, the view assumes that there is a way of shaping the legally defined institutional arrangements of society so that they approach a pure structure of reciprocity and coordination. Such a framework would allow people to deal and to combine with one another and regularly to change social stations, all within the broad limits established by the extremes of capacious moral tolerance. Once the framework had been set up, the individual would find himself free to change social stations. The state would need merely to correct occasional breakdowns or imperfections in the operation of the established order. But this futile search for the natural, pre-political form of human interaction and the all too facile identification of this form with the established version of democracy will prevent such a democracy from facing some of the challenges that might bring it closer to its professed aims.

Second, the view of politics, narrowly defined as institutionalized conflict over the mastery and uses of governmental power, fails for the same reasons. Its aim is to create a political process that can serve as an impartial device for summing up the wills of individuals about the proper role of the state in the kind of society already described. The system of representative government charged with this task is carefully designed to prevent manipulation by transitory and inflamed majorities who, misguided by demagogues or fools, might wreck the underlying pure structure of power and coordination. However,

because government cannot easily disrupt the social order, it becomes both victim and protector of this order. Such an arrangement turns into a pervasively biased method of collective choice. The search for the neutral method for summing up the opinions of the citizenry diverts us from a more realistic endeavor: to create a polity that would in fact be more open to self-revision and more capable of dismantling any established or emergent structure of entrenched social roles and ranks.

A third objection addresses the relation between the social world that the underlying view portrays and the controlling image of personality (or of relations among people) that justifies this world and that its institutions in turn exhibit and secure. It is a world meant to be neutral among different ways of life and ideals of personality, at least among those requiring no exercise of subjugation. Yet it cannot reach this goal, for the very reason that its proposed form of social organization cannot be the pure structure of human interaction nor its favored mode of politics an unbiased method for the summation of opinion. The search for a social world indifferent to the choice of images of personality gets in the way of building a society whose institutions in fact display and encourage a more inclusive and defensible ideal of personality.

All these objections present variations on a single theme. They dramatize the dangerous futility of the quest for a perpetual-motion machine of social and political life: an attempt to escape the burden of judging and revising specific, contestable forms of social life, the institutional arrangements that define them, and the visions of human selfhood and association that they enact. Such a quest serves only an apologetic purpose. It has formed a major element in the various sorts of latter-day objectivism described earlier. It continues to distract us from developing conceptions and arrangements that are less biased and more corrigible.

The underlying view deserves to be attacked, more directly, as a false picture of what society already is or approximates rather than as a flawed account of what it can and should become. All the considerations mentioned earlier in the course of the internal argument against the established versions of democracy become relevant again here. Although their confirmation would require extended empirical study, they do not for the most part depend upon counterintuitive or even

especially controversial ideas. The underlying view seems strangely to conflict with widespread opinions about what society is actually like, not just with the empirical beliefs of leftists and other malcontents.

In equal-protection theory, the disparity between assumptions about social reality and the ordinary experience of social life comes to a head on a single point: the conflict between the need to make empirical premises about society more realistic and the pressure not to disrupt the institutional arrangements of government. If it turned out that the irremediable disadvantages triggering the application of generality-correcting equal protection were widespread, one of two disturbing conclusions would follow. The judiciary would have to assume ever greater responsibilities to revise the results of legislation and to change, through such review, the structure of power in society. Though "the least representative branch," it would quickly find itself involved in a vast, censorial superpolitics that would eviscerate the ordinary partisan and legislative politics that the constitution and constitutional practice have established. Alternatively—and far more plausibly, given the constraints upon judicial power—judges might simply refuse to acknowledge or to correct the irremediable disadvantages. These disadvantages would then accumulate or rigidify. They would produce a long sequel of subversive effects upon the claims both of the established order to allegiance and of the underlying conception to credibility. As the recent experience of the United States at the zenith of "liberal" judicial ambition and power shows, the two outcomes may even occur simultaneously: judges strain the institutional scheme while social life nevertheless continues to confound the empirical assumptions of dominant theory.

### *The American Doctrine of Equal Protection*

The preceding remarks about equal protection and its presuppositions might be applied, with variations, to any Western liberal constitutional democracy. The same notions even reappear in altered form among the dominant legal and political ideas of countries that lack constitutional review and accept legislative sovereignty. Consider the structure of equal protection doctrine in the United States since the Second

World War. The analysis focuses on the doctrinal ideas central to the core device of generality-correcting equal protection: the identification of the groups meriting special concern and of the legislative categories deserving special scrutiny.

The detailed structure of contemporary American equal-protection doctrine cannot be derived from either the Constitution or all the general conceptions and commitments analyzed in the preceding pages. No one who had mastered this intellectual tradition, together with the constitutional history of the United States and all relevant features of American society and culture, could have foreseen that equal protection doctrine would have assumed its present form. This difficulty reflects more than the functional underdetermination that so pervasively marks all social life: the power to perform the same practical or conceptual tasks by different means. It also expresses, in a matter heightened by the sketchiness of the Constitution, the makeshift quality of conventional legal analysis. This quality is a direct consequence of the troubled and stunted relation of doctrine to its own theoretical assumptions.

Three connected sets of ideas enter into current equal-protection doctrine. The first is a taxonomy of legislative classifications and of the social groups to which they refer, a taxonomy constructed for the purpose of determining the suitability of judicial review in particular instances. The doctrine contrasts suspect and permissible classifications, a contrast sometimes stretched to include the intermediate sensitive classification.

The point of these distinctions is to express a highly contentious view of American society and politics in as uncontentious a fashion as possible, and thereby to meet the requirements of the underlying view. Thus, blacks and certain other ethnic groups afterward analogized to them are singled out as the prime instance of those irremediably and exceptionally disadvantaged segments of the population that generality-correcting equal protection is mainly designed to protect. The proponents of the "intermediate classification" category have considered women the proper beneficiaries of a judicial scrutiny that is more vigilant than what ordinary legislative classifications call for, though less demanding than what suspect distinctions justify.

What about all of those legislative differences of treatment that, directly or indirectly, mention or reinforce entrenched positions in the social division of labor and systematic, discontinuous differentials of access to wealth, power, and culture? Such inequalities can certainly not be said to be exceptional. Yet their existence and their tenacity in the face of political attack are matters of common observation and staples of analysis and commentary in historiography and social science. To defend the thesis that racial and sexual advantages count most because they are more severe than other forms of social division and hierarchy would involve the established doctrine in controversies that it could not easily win. To single them out because they have a physical basis would be to claim that physical difference has intrinsic significance apart from its social representation and its legal treatment. In this circumstance the dogmatic and arbitrary assertion of implausible distinctions may seem wiser, if it can be got away with, than the attempt to support such assertion by fact and theory.

The remaining components of contemporary equal-protection doctrine represent a throwback to the objectivism of nineteenth-century constitutional theory. The second element of the doctrine is the reference to fundamental interests that serve as functional surrogates for suspect classifications in eliciting heightened judicial vigilance. A well-worked-out system of fundamental interests entrusted to judicial protection in the kind of state that the American Constitution sets up would have to be a neutral framework of democratic politics. It would mark the constitutive elements in a set of social relations and of links between state and society inhering in the project of a constitutional democracy. It could not represent the judges' own vision of the proper limits to democratic politics. A fragmentary system of fundamental interests could be nothing but a foreshadowing of such a framework. Moreover, to do the specific work of generality-correcting equal protection, it needs to mark the differences between permissible and impermissible ways in which the state may sustain group disadvantages. Thus the second element of the equal-protection doctrine presupposes the underlying view even more dogmatically, though less directly, than does the first.

The third constituent of the doctrine is a hierarchy of governmental

goals correlated with the hierarchy of classifications or fundamental interests. Only a “compelling” state purpose justifies the violation of a fundamental interest or the use of a suspect classification. A legitimate state purpose suffices to override an ordinary interest or to authorize an ordinary classification. Unless this hierarchy of governmental purposes expresses a dangerously ad hoc judgment of political necessity or expediency, it must invoke a systematic conception of the proper relation between state and society. Such a conception must once again resemble the underlying view if it is to support an approach to the distribution of collective disadvantage similar to the one that current equal protection doctrine in fact enshrines.

This brief analysis of contemporary American equal-protection doctrine shows how the underlying view can become concrete in a specific set of doctrinal ideas. It also demonstrates, through an example, how and why modern legal analysis assumes its characteristically mutilated and trumped-up form: although the doctrinal ideas are neither justifiable nor even fully intelligible apart from the normative and empirical account of state and society that they take for granted, they are typically formulated, applied, and developed without clear reference to this account. To make the reference explicit would be to engage legal argument in open-ended empirical and normative controversies that would expose the underlying view to broadly based attack and destroy the treasured contrast between legal analysis and ideological conflict. But to keep the reference tacit is to reduce doctrine to a series of seemingly dogmatic assumptions and arbitrary distinctions.

### *Equal Protection Reconceived and Reconstructed*

The closest counterpart to equal protection in the institutional and conceptual system of empowered democracy is the law and doctrine of destabilization rights. Destabilization rights imply the replacement of the underlying view by the conception of state, society, and personality sketched earlier in this book. We can develop such a conception through the internal criticism and rearrangement of established ideals and institutions. In the course of this internal development, however, we would need to abandon once and for all the search for

a perpetual-motion machine of politics. The revised view focuses, instead, upon the attempt to establish a form of social life exhibiting a more defensible conception of selfhood and association while maximizing the corrigibility of social institutions. Legal analysis can now be made to stand in unashamed communion with its underlying theoretical assumptions. The statement of these assumptions does not undermine doctrine; if the ideas remain contestable, the contestability lies on the surface rather than more dangerously in concealment.

Destabilization rights provide a claim upon governmental power obliging government to disrupt those forms of division and hierarchy that survive only by insulating themselves against transformative challenge and conflict. They would do the work undertaken by both generality-requiring and generality-correcting equal protection, but without the capricious distinctions and confining premises of established doctrine. The safeguard against the discriminatory persecution of the individual, the concern of the generality requirement, would expand into a guarantee against whatever might threaten his richly defined position of immunity. The correction of irremediable collective disadvantages through checks upon legislative classification, the theme of generality correction, would broaden in two ways. It would free itself from its arbitrarily selective focus upon some sorts of group inferiority (such as race and gender in American law) to the exclusion of others (such as class). Rather than just correct specific collective disadvantages within the circumscribed area of state action, it would also seek to break up entire areas of institutional life and social practice that run contrary to the plan of the new-modeled constitution.

The idea of destabilization rights, like the larger program to which it belongs, results from the interaction between a social ideal and beliefs about the workings of a society. Prominent among these beliefs is the thesis that insulation from broadly based conflicts, whether at the heights of state authority or in the daily incidents of practical life, constitutes a necessary condition for the entrenchment of privilege and disadvantage.

The expansive character of destabilization rights threatens to aggravate a tension already besetting equal-protection law. The attempt to see how this tension might be resolved will supply the occasion to outline



the system of destabilization rights. Not to expand equal protection in the ways indicated would be to leave the reformed institutional order defenseless against the major threat to its integrity: the emergence of new varieties of collective subjugation through the use of governmental power to turn temporary advantage into permanent privilege. The openness of society to the results of collective conflict and deliberation might even make this emergent form of prerogative, when successful, all the more penetrating and perilous.

The further equal-protection doctrine moves in the directions suggested, however, the greater become the constraints it imposes upon the capacity of the party in office to try out new initiatives of social and economic organization. The constraints are all the more damaging to a constitution that wants to multiply the opportunities for the transformation of social life through collective conflict and deliberation. There can be no happy solution to this problem: it arises ultimately from a conflict of objectives. The tension might nevertheless be moderated by a distinction between two ways in which the destabilization right could operate. Each of these two modes of operation would specify a distinct class of destabilization entitlement. Each would be triggered by a characteristic circumstance. Each would obey a separate guiding criterion.

Sometimes a destabilization right might work through a direct invalidation of established law. To minimize restraints on opportunities to innovate, such review should be reserved to situations in which the entrenchment of privilege is serious. Invalidation would then be the recourse in instances in which the law directly or indirectly threatened the immunity of the individual. This threat might come from the reinforcement of disadvantages that groups of similarly situated individuals cannot easily override. Thus conceived, destabilization rights represent the shield of immunity rights, the complex series of political, civic, and economic entitlements that protect the basic security of the individual from all of the powers of the social world and that enable him to accept an enlarged field of social conflict with the assurance that such experimentalism will not jeopardize his vital interests. The principles to govern this subcategory of destabilization rights would develop a view of the minimal social and institutional conditions of the immunity position.

The destabilization right might also operate in another, more limited way. It would act not to invalidate laws directly but to disrupt power orders in particular institutions or localized areas of social practice. The power orders to be disrupted would be those that, in violation of the principles governing social and economic organization, had become effectively invulnerable to the disturbances of democratic conflict. As a result, they would threaten to eviscerate the force of democratic processes in just the way that citadels of private power do in the existing democracies. Such a localized form of conflict-proof social practice may be the outcome of many legislative acts over time rather than of a single law. On the other hand, any given precept may produce the most serious effects of power entrenchment in only a few of its many contexts of application. The guiding criteria for the development of this branch of the law would be found in the principles informing social and economic organization in the empowered democracy.

The two kinds of destabilization rights might well be enforced by different parts of the state. The narrower mode of invalidation, directed as it is to the protection of individuals, could be defended by an institution similar to the contemporary judiciary. The elaboration and enforcement of the second type of destabilization right, however, might require the attention of a public agency, even a distinct branch of government, that had greater resources at its disposal and was subject to more direct and broadly based accountability.

The full-fledged development of destabilization rights presupposes far-reaching changes in the institutional organization of the state and society and in the character of ruling political and legal ideas. It could not be simply grafted onto existing law all at once, and certainly not just by piecemeal and partial doctrinal moves. But this seemingly daring scheme might nevertheless serve to guide the criticism and development of corresponding bodies of rule, principle, and conception in extant law. The basis for this relevance is a real though loose continuity. Just as the entire institutional program of which it forms part constitutes a superliberalism, so this particular set of doctrines, no matter how radical its implications, represents a recognizable extension of present law and legal thought.

The first category of destabilization entitlements would serve as

an organizing and generative principle for generality-requiring equal protection, much of generality correction, and many areas of political and civic rights that now barely seem related to equal-protection law. The other category of destabilization rights would absorb some of the generality-correcting style of equal protection while avoiding the outright invalidation of laws. It would show how the bold forms of injunctive relief recently developed by American courts could gain a conceptual foundation and direction in an expanded view of equal protection.

Such a view would be all the more attractive because it would not need to confront head-on the institutional logic of the existing system of government. Of course, the institutional set-up, the gradualistic bias of doctrine, and the correlation of forces in contemporary politics and culture all impose constraints upon the recasting of equal-protection law in the image of the two varieties of destabilization rights. These constraints, however, neither involve high-flown principles nor generate clear-cut boundaries. They have little to do with the chimerical derivation of substantive principles of right from theories of institutional role in which so much of contemporary legal analysis continues to indulge.

### *Authority and Realism in Doctrine*

This entire discussion has proceeded on the basis of two limiting assumptions that should now be made explicit. The first assumption is a suspension of disbelief in the possibility of normative argument. When placed in the context of the critical and constructive ideas presented earlier, the revised approach to equal protection as a system of destabilization rights is a way of arguing normatively. It is a mode of normative discourse that can hope to be more than the thinly veiled assertion of power and preconception.

The choice of underlying conceptions, the view of state and society, the scheme of possible and desirable forms of human association, may be a small part of legal argument, but once we move beyond the most limited disputes it becomes a crucial part. It has only the uncertain authority of either the method of internal development that it uses or

the visionary ideal that may occasionally provide its point of departure. At each crucial juncture in the advance toward more concrete levels of analysis, different conclusions might reasonably be drawn. At every point the foundations remain contestable and the implications loose. To some this view may seem perilously close to skepticism. You can say, however, of normative argument what has been said of comedy: that it is a narrow escape not from truth but from despair. The emphasis falls on the narrowness of the escape; you cannot even be sure in the end whether you have made it. The only practice of normative argument with a future may be one that approaches skepticism without being engulfed by it. Better this view than the familiar alternation between boastful moral dogmatism and barely disguised moral agnosticism.

The other assumption qualifying this and all other versions of deviationist doctrine is that the particular results for which I have argued could never be made to triumph through a doctrinal putsch. Even with judicial support, these ideas could flourish only if backed by the transformation of dominant views of state and society, by the experimental remaking of particular institutional settings in the light of the changed ideas, and by winning parcels of governmental power outside the judiciary. Without this sustenance and echo, developments in legal doctrine within or outside a judicial context can do no more than create transitory and limited practical opportunities while giving persuasive specificity to an insufficiently discriminate ideal.

This second assumption has a corollary that may be stated in the form of an answer to an objection. To draw doctrinal argument and ideological or social theoretical controversy openly and closely together, in the manner illustrated by the preceding discussion, is to run high risks. The defenders of a radically different vision might carry the day, in fact if not by right. It might be useful, so the objection goes, to stop them in the name of a revamped version of formalist and objectivist doctrine.

This objection mistakes the relation of reason to democracy. The appeal to a spurious conceptual necessity may prove tactically expedient. In the end, however, it always represents a defeat for our cause, no matter who may be the temporary victors in the broadened doctrinal debate. For such an appeal invariably attributes to particular

institutional arrangements and imaginative assumptions an authority that they lack. It thereby helps arrest people within a social world whose defenses against disturbance are the reverse side of its hierarchies of advantage and its practices of subjugation. Every strike against this misunderstanding of social life delivers a blow in favor of the program to which we have committed ourselves.

### **From an Institutional Program to a Doctrinal Example: Contract, Market, and Solidarity**

Another example of deviationist doctrine serves two purposes. Together with the first example, it gives some sense of the wide variety of forms that expanded doctrine can take, while highlighting what these forms have in common. It also develops in detail the conception of solidarity rights and market rights put forward in the earlier institutional program. Set side by side, the two examples provide the outline of a systematic vision of public and private law, a vision of current as well as transformed law. Now, as before, it is important not to confuse a model of doctrinal practice with the material to which it is applied: the same model might be brought to bear on any branch of law. Some variants of deviationist doctrine, however, work better in certain areas of law than in others. The relation of model to material implies a judgment of suitability. The material used here comes from contemporary American law, but with marginal adjustments it might have been taken from almost any common law or civilian jurisdiction.

#### *Contract Theory Disintegrated*

The problems to be discussed include all those that present-day legal thought treats as issues of contract. The argument, however, reaches far beyond the scope of our still-reigning contract theory. For the applicability of this theory has been subject over time to several qualifications. First, there are the exclusions: whole areas of law, such as family law, labor law, antitrust, corporate law, and even international law, which were once regarded as branches of unified contract theory but

gradually came to be seen as requiring categories unassimilable to that theory. Then there are the exceptions: bodies of law and social practice such as fiduciary relationships that come under an anomalous set of principles within the central area of contract. Finally, there are the repressions: problems such as those of long-term contractual dealings that, though resistant to the solutions provided by a theory oriented primarily toward the one-shot, arm's-length, and low-trust transaction, are nevertheless more often dealt with by ad hoc deviations from the dominant rules and ideas than by clearly distinct norms.

When you add up the exclusions, the exceptions, and the repressions, you begin to wonder in just what sense traditional contract theory dominates at all. It seems like an empire whose claimed or perceived authority vastly outreaches its actual power. Yet this theory continues to rule in at least one important sense: it compels all other modes of thought to define themselves negatively, by contrast to it. This intellectual dominance turns out to have important practical consequences.

A major objective of the following argument is to show how a single, cohesive set of ideas can embrace this whole field of problems. The main concern of the argument, however, is to contribute to the development of a prescriptive vision—conceptual instruments with which to understand contract and related fields more clearly and coherently. It wants to replace the contrast between the overbearing theory and the runaway exclusions, exceptions, and repressions with a view that can explain or justify distinct solutions to different practical problems within a unified approach. If it can execute this task, the proposed account will have beaten the received theory at its own game of persuasive generalization. As might be expected in the case of legal doctrine, new explanations come hand in hand with new evaluations: the same ideas that can effectively reunify and reorganize the entire realm of contract problems also help discredit the normative commitments of established thought.

Classical contract theory has always proved seductive to jurists in search of a legal calculus that could claim to generate neutral rules of free human interaction. For the same reason, it offers the most valuable challenge to a conception of doctrine that emphasizes the continuity of legal analysis with ideological conflict. The cost of the attempt

to penetrate the inner defenses of a seemingly apolitical technique is greater complexity. The equal-protection example dealt with an aspect of the gross institutional structure of society. The following discussion must address a portion of the fine texture of social life and strive for the delicacy that the legal scrutiny of this texture demands.

My analysis advances in five steps. First, it enumerates the two dominant pairs of principles and counterprinciples that inform this entire body of law. Next, it examines points of controversy in the law that bring into focus an ambiguity in the relation between the principles and the counterprinciples. Although the counterprinciples may be seen as mere restraints upon the principles, they may also serve as points of departure for a different organizing conception of this whole area of law. Third, the analysis generalizes this alternative conception by discussing the theory of the sources of obligation and the approach to entitlements that it implies. The fourth step tests and refines this alternative by applying it to problems other than the points of controversy that provided the setting for its original formulation. The fifth and last stage is, in a sense, the first; it offers retrospectively a more complete argument for the direction in which all the steps of the analysis move. But to understand internal development is to see why justification can be achieved little by little, through cumulative explication, generalization, and revision, rather than by deduction from already developed commitments. Taken as a whole, this exercise in critical doctrine exemplifies the most characteristic recourse of the subversive mind: to transform the deviant into the dominant for the sake of a vision that becomes clearer in the course of the transformation itself. Such a vision ends up redefining the interests and ideals that it began by promoting.

*Principle and Counterprinciple: Freedom to Contract and Community*

The better part of contract law and doctrine can be understood as an expression of a small number of opposing ideas: principles and counterprinciples. These ideas connect the more concrete legal rules and standards to a set of background assumptions about how people can and should deal with one another in different areas of social life. The principles and counterprinciples are more than artifacts of theoretical

curiosity. They provisionally settle what would otherwise remain pervasive ambiguities in the law. But they themselves can be grasped and justified only as a summary statement of background schemes of possible and desirable human association. For only this deeper context can offer guidance about the relative reach and the distinctive content of the opposing principles and counterprinciples. Because the conventional methods of legal analysis are committed to the contrast between doctrine and ideology or philosophy, they almost invariably prefer to leave implicit the reference to the larger imaginative foundations of rules and principles. They gain a semblance of higher certainty at the cost of an arbitrary dogmatism.

Why should the controlling ideas come in the form of antagonistic principles and counterprinciples? Such an opposition can alone generate a body of law and legal thought that applies different models of human association to distinct areas of social life. At a minimum the counterprinciples keep the principles in place and prevent them from extending, imperialistically, to all social life. Once the crucial role of counterprinciples has been recognized, the appeal to a larger vision of the possible and desirable images of human connection becomes inevitable. Because conventional analysis wants to avoid, if not the reality, at least the appearance of such an appeal, it also systematically downplays the counterprinciples.

The structure of reigning ideas about contract and its adjacent fields can be stated in the form of two pairs of principles and counterprinciples. If we were concerned with a particular contract problem, we might need many intermediate levels of reasoning to complete the argument.

The first principle is that of the freedom to enter or to refuse to enter into contracts. More specifically, it is the faculty of choosing your contract partners. Call it, for short, freedom to contract. The qualifications that the law of assignment imposes upon the doctrine of privity show that the principle of freedom to contract is marked by a certain complexity of meaning even when we take the now dominant forms of market organization for granted. In a system that treats the consolidated property right as the exemplary form of right itself, and that conceives of property in part as that which can be freely bought



and sold in an impersonal market, restraints upon assignability must be limited. The law must treat contractual relations as if they were powerless to imprint a permanent character upon the tangible or intangible things (including the labor of other people) that these relations concern. Considered from any perspective—whether that of the common meaning of freedom to contract, or the practical demands of the existing kinds of markets, or the actual behavior and motivations of economic agents—the confrontation between the ideals of personality and impersonality, manifest respectively in doctrines of privity and assignability, represents less a conflict between the first principle and a counterprinciple than a disharmony within that principle itself. This disharmony can be resolved by any number of practical compromises.

Other areas of law and doctrine, however, do circumscribe the principle of freedom to contract on behalf of an entirely different idea. They embody a counterprinciple: that the freedom to choose the contract partner will not be allowed to work in ways that subvert the communal aspects of social life.

One instance of this counterprinciple occurs in the area of compulsory contracts and of legal situations analogous to them. Voluntary entrance into a course of dealing with another party may make a party liable for violating certain expectations to which the dealing gave rise (instances of precontractual liability or *culpa in contrahendo*). Or the occupancy of a status or the exercise of a profession (such as medicine) may bring special responsibilities and justify special expectations. Whether liability in these cases is portrayed as contractual or delictual, it results from role-based interactions rather than from either a fully articulated bargain or an exercise of direct governmental regulation.

A second example of the counterprinciple appears in bodies of rule and doctrine that affirm an obligation to answer for another's justified reliance on one's own promises (promissory estoppel) and to make restitution for "unjust enrichment" (quasi-contract). The protection of the reliance interest applies on its face to situations that a worked-out bilateral agreement cannot reach. Much of the law of restitution has the same character of compensating for violations of trust in a context of close dealing or exceptional defenselessness. Thus, both reliance and restitution rules may operate to prevent the principle of freedom to

contract from tracing the limits of liability so rigidly and narrowly that the fine texture of reciprocities is left entirely unprotected.

The most instructive application of the counterprinciple lies, however, in a third area: the rules of contract law that discourage contract in noncommercial settings. These rules express a reluctance to allow contract law to intrude upon family and friendship, lest by doing so it destroy their peculiar, communal quality. Let us approach the issue indirectly, through the norms that govern the interpretation of the intent to contract. These norms elucidate more clearly than any others the boundaries of the principle of freedom to contract and the vision of life in society, within and outside commerce, that these boundaries imply.

The general first-level rule in contemporary Anglo-American contract law is that a declaration of intent to be legally bound may be unnecessary, although a declaration of intent not to be held at law may be effective. Those who devote themselves to self-interest in the harsh business world are presumed to want all the help they can get to avoid being misled and harmed by those with whom they negotiate contracts.

A second-level rule guides and qualifies the interpretation of the first-level one. Whenever possible a court construes intention in a manner that protects justified reliance and reads the parties out of a situation in which they stand at each other's mercy. Thus, if the bargain is one for separate deliveries over a long period and a party has seriously relied upon continued supply, the court may lean over backward to interpret the exclusion of liability as narrowly as possible.

A third-level rule limits the scope of both the first-level and second-level ones. As a qualification to the second-level rule, it affirms that the impulse to interpret intent so as to avoid delivering one party into another's hands will be suppressed in noncommercial contexts. As a limitation upon the first-level rule, it reverses in family life or friendship the presumption of intent to be legally bound; an explicit assertion of intent will be required. "Social arrangements," it is said, either are rarely intended to have legal consequences or ought not to have such consequences. Intent should be construed accordingly.

In one sense this third-level criterion is prior to the other two, for

it determines the scope of their application. Its apparent justification lies in the attempt to defend private community against the disruptive intervention of the law and of the regime of rigidly defined rights and duties that law would bring in its wake. Just why private community needs this defense is something that we can explain only after making explicit the vision that underlies the interplay between the principle of freedom to contract and its counterprinciple.

Note that, while the law disfavors family bargains, it may encourage family gifts. Thus, common-law consideration doctrine is riddled with exceptions, like the doctrine of meritorious consideration, designed to facilitate bounties within the family. The hostility toward donative transactions suspected of undermining family duties (such as a married man's gift to his mistress) contrasts with the solicitude shown toward intrafamilial donations (such as a parent's gift to a child) when there are no competing inheritance or creditors' rights to protect. Just as classical contract theory depicts the bargain as the beneficial creature of anti-communal self-interest, it sees the gift as an instrument of either community-preserving generosity or community-destroying circumvention of the law.

The relation of principle and counterprinciple in contract law can be interpreted as an expression of two different views of how people can and should interact in the areas of social life touched by contract law: one crude and easy to criticize, the other more subtle and justifiable. The crude view is the one displayed most clearly by the rules that try to keep contract out of the realm of "social arrangements." It contrasts an ideal of private community, meant to be realized chiefly in the setting of family and friendship, to the ideal of contractual freedom, addressed to the world of self-interested commerce. The social realm is pictured as rich in precisely the attributes that are thought to be almost wholly absent from the economic sphere. The communal forms in which it abounds, islands of reciprocal loyalty and support, neither need much law nor are capable of tolerating it. For law in this conception is the regime of rigidly defined rights that demarcate areas for discretionary action.

The idea that there is a field of experience outside the serious world of work, in which communal relations flourish, can be made to justify the

devolution of practical life to the harshest self-interest. The premises to this devolution recall the contrast between Venice and Belmont in *The Merchant of Venice*. In Venice people make contracts; in Belmont they exchange wedding rings. In Venice they are held together by combinations of interest, in Belmont by mutual affection. The wealth and power of Venice depend upon the willingness of its courts to hold men to their contracts. The charm of Belmont is to provide its inhabitants with a community in which contracts remain for the most part superfluous. Venice is tolerable because its citizens can flee occasionally to Belmont and appeal from Venetian justice to Belmontine mercy. But the very existence of Belmont presupposes the prosperity of Venice, from which the denizens of Belmont gain their livelihood. This is the form of life classical contract theory claims to describe and seeks to define, an existence separated into a sphere of trade supervised by the state and an area of private family and friendship largely though not wholly beyond the reach of contract. Each half of this life both denies the other and depends upon it. Each is at once the other's partner and its enemy.

The larger imaginative background to this contrast is a vision of social life that distinguishes among regimes of human connection. These regimes are meant to be realized in separate areas of social life: democracy for the state and citizenship, private community for family and friendship, and an amalgam of contract and impersonal technical hierarchy for the everyday world of work and exchange. The most remarkable feature of this vision is its exclusion of the more morally ambitious images of human connection from the prosaic activities and institutions that absorb most people most of the time.

These excluded models are democracy and private community. Their moral ambition consists in their promise of a partial reconciliation between the competing claims of self-assertion and attachment to other people: a reconciliation, in fact, between two competing sides of the experience of self-assertion itself. According to the logic of the vision, any attempt to extend these ideals beyond their proper realm of application into everyday life will meet with disaster. Not only will the extension fail, but the practical and psychological conditions enabling the higher ideals to flourish on their own ground may also be destroyed in the course of the attempt.

A closer look at the contrast of contract law to private community shows how this opposition depends upon empirical and normative assumptions that cannot be justified even in the light of ruling social ideals and present understandings of social fact. The prime instance of the ideal of private community is the family. Classical contract theory has trouble with the family for two reasons, one of them explicit, the other tacit though equally important. Like most well-established ideological preconceptions, these reasons combine insight and illusion.

First, the family is supposed to depend upon a union of sentiments and a flexible give-and-take that contract law, with its fixed allocations of right and duty under rigid rules, would disrupt. The very process by which the members of a family cast their relationships in the language of formal entitlement would confirm and hasten the dissolution of the family. Communal life needs to maintain the lines of right and duty fluid in attention to an untrammelled trust. It must subordinate the jealous defense of individual prerogative to the promotion of shared purpose and the reinforcement of mutual involvement.

The other reason for separating the family, as the paradigmatic core of private community, from contract, as the denial of community, is generally left implicit. It does, however, prevent this conception of law and the family from being merely sentimental. The nineteenth-century bourgeois family (or its diluted successor) constitutes a certain structure of power. Like all structures of power, it calls upon its members to accept the legitimacy of gross inequalities in the distribution of trust. In the most pristine versions, the husband had to be allowed wide powers of supervision and control over wife and children, as if discretion in their hands would endanger the family group. The fluidity of entitlements seems consistent with the maintenance and prosperity of the family only because there is an authority at the head capable of giving direction to the team.

Classical contract theory was born fighting against such a frankly personal and unequal exercise of power. Family law may remain penetrated by notions of status and attentive to hierarchic distinctions among relatives. But the modern law of contract was built as the culminating expression of abstract universalism. It is hostile to personal authority as a source of order; it preaches equality in distrust. The

mechanisms of egalitarian, self-interested bargaining and adjudication cannot be made to jibe with the illiberal blend of power and allegiance.

When combined, these two elements of the dominant conception of family and law suggest a view of the family as a structure of power, ennobled by sentiment. Both as sentiment and as power, it repudiates the rule of law. Were the family mere sentiment, it would disintegrate, for according to this outlook sentiment is precarious and formless. Were the family brute power, unsoftened by sentiment, it might not merit preservation. The redemptive union of authority and affection provides the alternative to legal or at least to contractual ordering. It supplies the master key to an understanding of what Belmont is supposed, or admitted, to be like in a world in which it can never pretend to be more than a satellite to Venice.

Note that the whole view of family beyond contract depends upon the partnership between an impoverished conception of community and a narrow view of law in general and of contract in particular. The conception of community defines communal life largely negatively, as the absence of conflict. The view of law exhibits the prudence of distrust. It insists upon clear-cut zones of discretionary entitlement within which the right-holder may be free to exercise his right as he wants and beyond which he has no claim to protection. The practical result of the polemical opposition of contract to community is to leave inadequately supported the subtle interdependencies of social life that flourish outside the narrow zone of recognized community. The practical result for private community itself is to renew the identification of the communal ideal with the personal authority and dependence often marking family life. This result explains why mutual responsibility may do better, legally and factually, in the pitiless world of deals than in the supposedly communal haven of family life.

The dangerous opposition between contract and community fails to exhaust the social vision expressed by the coexistence between the first principle and its counterprinciple. This coexistence also suggests a conception of obligations arising from social interdependencies that cannot be reconciled with the simple opposition of contract and community. If this alternative imaginative strand could be disentangled from that opposition, it might provide a better basis for contract theory.

*Principle and Counterprinciple: Freedom of Contract and Fairness*

Now consider a second principle and counterprinciple. The principle states that the parties must be free to choose the terms of their agreement. Except in special cases, they will not be second-guessed by a court, at least as long as they stay within the ground rules that define a regime of free contract. (Just how much conceptual trouble this qualification covers soon becomes apparent.) Call this principle freedom of contract, as distinguished from freedom to contract. Its boundaries are traced by the counterprinciple that unfair bargains should not be enforced. Before probing the limits and manifestations of this counterprinciple, it may help to understand the central problem that this second pair of legal ideas must solve.

A regime of contract is just another legal name for a market. It ceases to exist when inequalities of power and knowledge accumulate to the point of turning contractual relations into the outward form of a power order. The ability of the contracting parties to bargain on their own initiative and for their own account must be real. On the other hand, a commitment to cancel out every inequality of power or knowledge as soon as it arises would also undermine a regime of contract. Real markets are never just machines for instantaneous transactions among economic agents equally knowledgeable and equally able to await the next offer or to withdraw from current courses of dealing. Continued success in market transactions shows partly in the build-up of advantages of power or knowledge that enable their beneficiaries to do that much better in the next round of transactions. If everyone were quickly restored to a situation of equality within the market order, the method responsible for this restoration would become the real system of resource allocation. Such a method would empty market transactions of much of their significance.

At first these two boundaries—allowing inequalities to accumulate unrestrictedly and correcting them as soon as they emerge—may seem to leave so large an intermediate space of solution that they hardly constrain the organization of a contract regime. There are any number of points within them at which the compromise between correction and allowance might be struck. We cannot derive the decision to draw the

line at one place rather than another from the abstract idea of a market. But when the analysis of this tension combines with the thesis that the market lacks any inherent institutional structure, the joint result begins to look far more consequential.

The distance between the boundaries does not remain constant as the institutional character of the market changes. Some market regimes, taken in their actual political and social settings, may regularly generate or incorporate so much inequality that the minimum of correction needed to prevent them from degenerating into power orders amounts to more than the maximum correction compatible with the autonomy of decentralized market decisions. (Note the resemblance to the earlier argument about inequality and equal protection.)

The solution is then to change the institutional arrangements of both the market economy and democratic politics, democratizing the market and deepening democracy along lines like those that I earlier outlined. In the absence of such a revision, we can attempt to undertake initiatives foreshadowing this direction. Such initiatives may single out the most serious problems for special treatment (the example of labor law as a way to supplement the general law of contract in addressing inequality in the employment relation). Alternatively, they may prefer vague, suggestive standards and slogans (such as good faith or unconscionability) that, once elaborated in context, may support ad hoc adjustments of the contractual terms whenever inequality threatens to eviscerate contract. Both these responses can limit the subversive impact of correction upon the central though shrinking and porous body of contract law.

There are several complementary ways to tell whether and how much a particular economic order suffers from this problem. The most important, the empirical study of market relations, lies beyond the ambitions of this analysis. Its mention here provides one of several occasions to remember that empirical social description and explanation represent an integral part of deviationist doctrine. A second way to tell, the definition of the specific institutional character of the market economy in question, formed part of my earlier programmatic discussion. The following pages explore a third way: the interpretation of the special solutions that serve as surrogates for institutional reconstruction.



Consider the forms taken by the counterprinciple of fairness in two of the obvious areas of its application: the law governing discharge for changed circumstances and mistake about basic assumptions, and the law of duress, whose problems extend into labor law. In each of these settings the idea of fairness takes on a different sense. Its inclusive meaning is the sum of these and other loosely linked connotations.

One or both parties may attribute to something that they exchange a quality that it fails to possess. Conversely, they may ignore a quality that it does have. An event subsequent to the making of an executory contract may change, even radically, the relative value of the performances. In either case a discrepancy may emerge between the actual and the expected or imagined value. At what point does the distortion produced by the mistake about the present or the future justify a revision of the contract? To let the losses lie where they fell or ought to have fallen at the moment of discharge might produce an outcome at least as arbitrary as the strict enforcement of the original agreement. Hence, if a revision is to take place at all, the real issue becomes whether and how to find an alternative distribution of profits and losses. Against correction you may argue that all contracts are guesses by which parties imagine how much things are likely to be worth to them in the future. The outer limit to this argument, however, lies in the presuppositions made about the risks that the parties intended to assume.

The problem regularly arises from an ambiguity in the expectancies that contract law is supposed to protect: the expectancy may be an interest either in a certain performance or in the exchange value that this performance embodies. Even when the performance consists in a payment of money, the ambiguity does not disappear. Money itself matters for its value in exchange, and this value may suffer radical and unexpected dislocations.

The issue could be settled if the law saw the parties in every ordinary transaction as high-risk gamblers and abided relentlessly by the logic that things are worth only the values that parties place on them in particular transactions. The law refuses to do so. To the objection that this refusal merely construes party intent rather than imposing an independent idea of fairness, there are two answers. First, given the

impossibility of spelling out all the presuppositions of a transaction, intentions never could be enough. Second, in rejecting the extreme gambling idea, the law commits itself to the search for minimalist standards of equivalence transcending the terms of particular bargains. We need such standards both to tell when things have gone wrong and to set them right.

The tenacity with which the law conducts the search for such standards is all the more remarkable because it betrays a willingness to imagine how an alternatively organized market would have operated. The legal objectivist as naive economic theorist may claim that we are thus merely required to picture the workings of a market cleansed of imperfections. The critic of objectivism knows that more decentralized markets can be decentralized in different ways and with different effects. He recognizes that the selection of corrective standards already involves an implicit choice of one among an indefinite number of conceivable more perfect markets, each with its distinctive institutional presuppositions. This imaginary market will then provide the criteria for completing, reforming, or replacing transactions in existing markets.

The counterprinciple of fairness reappears in the rules and doctrines that police the bargaining process. An agreement will be enforced only if it results from an indispensable minimum of free and considered decision by all parties concerned. The obvious attraction of this tactic is that it seems to dispense with the need to second-guess the equivalence of the performances. It therefore minimizes the market-subverting effects of interventionist correction. Besides, it merely extends into contract law the same quest for neutral process that characterizes the traditional liberal case for established institutions and the ruling methods of liberal political philosophy.

Here as elsewhere this search runs into trouble. The heart of the trouble lies in what must be done to reconcile the idealized bargaining picture with the existing institutional forms of the market economy. The attempted reconciliation ends up requiring, however sporadically and indirectly, the very policing of contract terms that the emphasis on bargaining procedures is meant to avoid. No branch of contract law presents these themes more clearly than the law of duress.

The Anglo-American doctrine of duress crosses each of the three frontiers that surround its traditional territory. It has developed on the border between aberrational and structural inequality, the case of the drowning man and the case of the poor one. It has shown a greater willingness to impose a standard of good faith upon the exercise of formal rights. It has demonstrated a more or less explicit concern with the rough equivalence of the performances, though it often treats the gross failure of equivalence as a mere trigger for stricter scrutiny of the bargaining process.

The most characteristic result of this multiple expansion has been the doctrine of economic duress, with its key concept of bargaining power. According to this doctrine, a contract may be voidable for economic duress whenever a significant inequality of bargaining power exists between the parties. Gross inequalities of bargaining power, however, are all too common in the existing market economies, a fact shown not only by the dealings between individual consumers and large corporate enterprises, but also by the huge disparities of scale and market influence among enterprises themselves. Thus, the doctrine of economic duress must serve as a roving commission to correct the most egregious and overt forms of an omnipresent type of disparity.

The unproven assumption of the doctrine is that the amount of corrective intervention needed to keep a contractual regime from becoming a power order will not be so great that it destroys the vitality of decentralized decision-making through contract. If this assumption proved false, no compromise between correction and abstention could achieve its intended effect. The only solution would be the one that every such compromise is designed to avoid: the remaking of the institutional arrangements defining a market economy.

The doctrinal manifestation of this problem is the vagueness of the concept of economic duress. The cost of preventing the revised doctrine of duress from running wild and from correcting almost everything is to draw unstable, unjustified, and unjustifiable lines between contracts that are voidable and those that are not. In the event, the law draws these lines by a strategy of studied indefiniteness, though it might just as well have done so, as it so often does elsewhere, by means of precise but makeshift distinctions.

In at least one area of social life, however, the equivocations of economic duress will not do: the relations between capital and labor. There the contractual form risks becoming a sham concealing the reality of undisciplined power. If labor were not allowed to organize and to bargain collectively, the disparity between the contract model and economic reality would remain immense and unmistakable in a central aspect of social life. It would then be clear that the only correction capable of distinguishing contract from subjugation would be one that effectively abolished contract, by policing all of the terms or correcting all of the outcomes. The solution has been to exclude labor relations from the central body of contract law and to enlist the method of "countervailing power": once workers are allowed to organize, they can face employers on equal terms. The institutionalized collective bargaining of labor and management can then reestablish the validity of the contract model. It can do so without threatening any deeper disruption and without even making it appear that the rest of the economic order is also an artifact of institutional invention and social warfare. But the limited solution faces two connected conundrums, which together describe the crux of labor-law doctrine.

The first conundrum is a paradox of procedural justice. Its characteristic doctrinal expression in American labor law is the problem of the duty to bargain in good faith and of the relation of this duty to the administrative and judicial scrutiny of the substantive proposals made in the course of collective bargaining. The special, reconstructed market of capital and labor will not work unless both parties remain committed to it, accepting it as the institutional framework of their relations to each other. Unlike the general market and the general polity, it might be circumvented because it is only a localized part of that surrounding order, shaped according to distinctive rules. The more powerful party, usually though not always the employer, will have the incentive to move outside it. The duty to bargain in good faith is the duty to take the special framework as the one that counts.

How is the performance of this duty to be assessed? If the court or administrative agency rests content with a show of compliance, a willingness to go through the motions of bargaining, the duty loses its force. The parties can then trust only to their power and guile. On the

other hand, any more ambitious test of compliance seems to require that the National Labor Relations Board or the court pass judgment on the fairness of the proposals and counterproposals that the parties make to each other in the course of their negotiations. This requirement would involve the supervisory body in something perilously close to the substantive regulation of labor relations that the whole machinery of countervailing power is designed to avoid. Thus, Congress amended the National Labor Relations Act to overturn a line of administrative and judicial decisions that took the duty to bargain in good faith as a mandate to evaluate the content of party offers and counter-offers. Yet even after this view was repudiated by the legislature, the National Labor Relations Board found more circumspect ways to reassert it. The paradox of procedural justice suggests why: as the institution most immediately responsible for supervising the integrity of the collective bargaining system as a corrective institutional framework, the Board had good reason not to give up.

The second, related problem plaguing the technique of countervailing power is a paradox of managerial discretion. Its most familiar doctrinal referent in American law is the issue of retained rights. Are the rights and obligations left unspecified in a collective bargaining agreement grievances subject to arbitration, or are they matters within the scope of managerial authority? To treat them all as issues for continued bargaining and settlement is to imply that the entire internal life of the organization must be subject to a regime of fixed rules and rights.

Such an approach would jeopardize the requirement of discretion and flexibility—the ability, which any productive or practical institution needs, to change the organization of work in accordance with emergent practical opportunities and constraints. To accept the alternative, retained-rights approach, however, is to undermine the credibility of countervailing power as a route to the restoration of contractual dealings between capital and labor. For there then appears to be a basic imbalance in the relations of the two parties.

The discretionary authority that collective bargaining cannot reach might be justified as a dictate of impersonal technical necessity. Any such justification, however, becomes vulnerable to arguments and experiments that show how similar practical results can be achieved

by alternative ways of organizing work, within the same or different economic systems. The root of the difficulty lies in the impossibility of fully contractualizing power in the internal life of the firm and in the pressure for an alternative mode of legitimation and accountability. The reorganization of the workplace and the economy would have to do what collective bargaining and alleged technical imperatives cannot, but must pretend, to accomplish.

The problems of retained rights and good-faith bargaining are directly related: we translate one into the other whenever we ask which rights fall under the good-faith duty. The paradoxes of managerial discretion and procedural justice underlying these doctrinal issues are even more tightly connected, in ways that the convergent effect of these paradoxes makes clear.

These antinomies show that on its own terms and its own terrain the countervailing-power mechanism cannot achieve enough correction to distinguish contract from power without imposing so much correction that contract falls victim to a higher-level method of resource allocation and income distribution. They suggest more unequivocally what an analysis of the doctrine of economic duress merely insinuates: that any adequate solution would require a broader institutional reshaping of the economy and its governmental and social setting. The attempt to defend the heartland of contract theory by dispensing special treatment to the intractable problems of the employment relation turns against itself. It ends up casting a critical light on the core zone of contract that it had been expected to seal off from further attack.

In the contexts of its application that have just been discussed, the counterprinciple of fairness acquires several meanings. Fairness means not treating the parties, and not allowing them to treat each other, as pure gamblers unless they see themselves this way and have the measure of equality enabling each to look out for himself. The parties must normally be deemed to act in a situation of limited and discriminate risks, and to transact on presuppositions that can never be fully spelled out and whose relevant terms may be explicable only after the fact. The participants must insure each other against the mistakes and misfortunes that fall outside these boundaries. To this extent the second counterprinciple intersects the first.

Fairness also means that inequality between the parties renders a contract suspect and, beyond a certain measure of disparity in power, invalid. In particular, unequal parties will not easily be read into a situation of mere gambling. When the limit of accepted and acceptable risks is reached or when the inequalities in the contractual relation begin to weaken the force of the contract model, the law will try to restore or invent a rough equivalence of performances or of participation in gains and losses. It may do so confusedly and covertly, but as long as the counterprinciple remains alive it will do so nevertheless. Thus the fairness idea turns out to connect a concern for rough equivalence in outcomes with a broader view of the conditions under which contract turns into a facade for control.

An analysis of the reciprocal reckoning between the second principle and counterprinciple rings the changes on a central problem. The fairness correction must be focused and sporadic rather than pervasive if the regime of contract is not to be superseded by an overriding method of allocation. Yet in its limited and contract-preserving form, the correction becomes arbitrarily selective: for every situation corrected, there seems to exist another similar to it that is left untouched.

It is the same lesson taught by the analysis of generality-correcting equal protection: unjustifiable distinctions appear to be the alternative to an overbearing and comprehensive intervention. There, in equal protection, this intervention would frustrate the constitutional plan by concentrating all real power in the hands of judges or other operators of doctrine. Here, in contract, it would liquidate the contractual regime while preserving its outward forms. Here, as there, the real solution is the transformation, including the transformation through doctrine, of the institutional framework of economic and political action.

We can represent the relation of the two counterprinciples to the two principles in two ways. The dominant view treats the existing institutional structure as given. It regards the imaginative scheme of models of possible and desirable human association, including the contrast of contract to community, as rigidly defined. According to this view the counterprinciples are anomalies. They prevent the principles from doing injustice in unusual, if not extreme, cases. The separation of equity and common law in Anglo-American legal history lent

institutional support to this approach. If, however, we begin with the premise that the underlying institutional and imaginative order can and should be changed, the counterprinciples lose any stable, natural, and contained relation to the principles. They may even serve as points of departure for a regime of law and doctrine that reverses the traditional relationship and reduces the principles to a specialized role. The next step in the analysis makes good on this possibility.

*The Countervision Tested: Instances of Exemplary Difficulty*

The second task in this model of deviationist doctrine is to analyze areas of more intense legal controversy that require and illuminate the choice between these two views of the relation of principles and counterprinciples. These instances of exemplary difficulty provide some of the materials with which to develop the second, more controversial view into a general theory of the nature of entitlements and the sources of obligation. They are exemplary because, though seemingly unimportant and contrived, they lay bare the fundamental disputes in an entire field of law.

Such instances have two defining characteristics. First, they are circumstances in which case law and doctrine divide. Because no one view prevails, the coherence of the doctrinal system seems to break down, and the decisions of judges appear unpredictable. Second, the peculiar disintegration involved brings to the fore the rivalry of comprehensive conceptions in legal thought: in particular, the conflict between alternative conceptions of the interplay between principle and counterprinciple in that area of law. The analysis of these zones of heightened argument prepares the way for turning the countervision into a general theory of the sources of obligation and the nature of rights, a theory capable of guiding the reconstruction of contract doctrine.

I have chosen as instances of exemplary difficulty a series of related problems in the contemporary American law of mistake, presented in the form of three typical, recurrent situations as well as of the differences in case law and doctrine that these circumstances elicit. Just as contract has been widely regarded as the branch of law most suitable for "pure," apolitical analysis and technique, so the rules and doctrines



of mistake within contract are often taken to represent the high point of this technical purity. In this branch of law, the existence of clear solutions is often said to be more important than their content. Thus, it will be especially pleasing to rediscover here the traces of a larger conflict of vision.

Take first the standard situation of contracts concluded by correspondence or by other means requiring a substantial lapse of time between offer and acceptance. Insofar as the law of offer and acceptance is meant to repress the offeree's speculation as well as to protect his reliance, it makes a basic assumption about the possibilities of moral judgment. The assumption is that it would be too dangerous to attempt distinctions between cases of wrongful and innocent revocation. Wrongful revocations would be those by which an offeror seeks to revoke an offer already received, or an offeree tries to revoke an acceptance already dispatched but not yet received, because of afterthoughts about the profitability of the deal or changes in market conditions supervening upon the dispatch of the acceptance. Innocent revocations would occur in circumstances in which the offeror or the offeree revokes to correct a mistake that does not concern business judgment.

The offeror may, for example, be placing a bid that results from faulty calculations or from a misapprehension of what he has agreed to do. The law of mistake fails to cover his unilateral error. The other party may not have been harmed, either because he has not yet relied or because, as the addressee of an acceptance dispatched but not yet received, he could not have relied.

Classical contract theory would regulate wrongful and innocent revocations in the same way. It would assert that such distinctions in the moral quality of conduct are too fine and fragile to serve as useful bases for rules of offer and acceptance. Either the wicked must be discharged to protect the good, or the good must be sacrificed lest the wicked be excused.

An alternative approach would distinguish between innocent and wrongful revocations. It would, for example, prohibit the revocation of an already dispatched acceptance when the purpose of the revocation is merely to shift a significant unexpected loss to the offeror. It might,

however, allow an innocent revocation to take effect, depending on the relative blamelessness of the offeree's miscalculations and the seriousness of the offeror's prospective loss.

The overwhelming weight of judicial opinion and doctrinal understanding in current American contract law falls on the side of the traditional, morally agnostic view. Telling exceptions can nevertheless be found. Most of these aberrant decisions were rendered in a special adjudicative setting that encouraged innovation, if only by cordoning the innovation off from the general body of contract law: when, for example, the Court of Claims was ruling upon a private contractor's attempted innocent revocation of an offer to supply the government with goods or services. Many of these judicial opinions fail to articulate the crucial distinction between wrongful and innocent situations. Instead, they reach the same practical result by emphasizing factors previously regarded as irrelevant, such as a change in postal regulations that allows the sender to withdraw correspondence from the mails.

The factual circumstance of the contract-by-correspondence problem provides the overall conditions most favorable to the classical view: a contract fully commercial in context, in which all of the normal contract-making procedures (which for this purpose may be called the formalities) have been completed. The next two instances present circumstances in which this last assumption is progressively relaxed. As the relaxation takes place, the alternative approach strengthens its presence in current law and gains in both clarity and complexity.

The mistake in calculations constitutes a second recurrent factual situation. The contract is made in person between parties. One party commits an error, innocent save for negligence, in the calculations that immediately precede the integration or writing down of the contract. He seeks to correct the mistake after the contract has been made but before the other party has acted in reliance upon it.

The law in force gives clear solutions when the writing misstates the agreement or a party has misjudged the market. Trouble comes with a mistake in the mechanical calculations that produced the memorandum. There are two situations to distinguish. If the offeree knows or has reason to know of the offeror's mistake, he does not prevail. If he relies upon the offer, his reliance must be dismissed as unjustified.

If the offeree neither knows nor has reason to know of the offeror's mistake in the mechanical calculations underlying the memorandum, there are two further cases to distinguish.

The offeree may rely upon the offer—justifiably in this case. In such an event, most present-day American courts and jurists would probably hold the offeror to the contract. A law of contract more fully informed by the alternative vision that this analysis is beginning to clarify might dictate that in such a circumstance the losses ought to be divided between the offeror and the offeree, according to the degree of the offeror's negligence and even the comparative ability of the parties to bear the loss.

Suppose, however, that the offeree, without reason to know of the offeror's mistake, has not yet acted upon the contract when advised of the mistake. This is the point at which authoritative opinion in contemporary American law comes close to a standstill. The factors at issue are clear. On one side weigh the completed formalities of a bilateral executory contract, which has not yet, however, matured into reliance. On the other side lie a mistake and a misfortune. The mistake results from some negligence—it might have been avoided by more careful conduct—but hardly from a willful attempt to get out of a bad business deal. Though more serious and less deserving of relief than a mere slip in writing, it is worthier of aid than a foolish decision by a businessman about the conduct of his business.

You can already begin to discern in this division of authority the elements of a fundamental controversy, even though the judicial decisions and other doctrinal authorities often manipulate the law of mistake in a way that obscures the issues. Those who will not allow the offeror to be discharged adhere to a view of the rules of contract formation that refuses to distinguish the wrongful from the innocent, and sees the law of mistake as one more place to confirm the primacy of the principles and the anomalous character of the counterprinciples. On this view, nearly completed formalities and commercial context suffice to trigger the traditional norms of contractual liability. The alternative approach pits the quality of the promisor's desire for discharge against the quality of the offeree's reliance. The exchange of promises is not irrelevant to this analysis; it is just not the whole story. This countervision seems

to imply a very different role for the counterprinciples than the one assigned to them by the classical view. To test the limits of this contrast of conceptions, consider a third, still more complicated situation.

This problem often occurs in dealings between general contractors and subcontractors. It provides a staple of American contracts casebooks. A general contractor considers entering a bid for a job that will require him to pay a subcontractor for goods or services. To determine the amount of his own bid, he solicits bids from subcontractors. Relying upon the lowest sub's estimate, the general puts in a bid, which is accepted. Before the general can accept the sub's offer, the sub advises him that he, the sub, has made a mistake in his own calculations as a result of adding up figures erroneously or of misunderstanding the nature of the job. Can the general hold the sub to his bid?

Classical contract theory would deny that the sub is bound. Since his "offer" had not been accepted before it was revoked, no contract has been formed. Some famous cases have explicitly rejected the appropriateness of promissory estoppel in this circumstance. Here as elsewhere the effort to confine promissory estoppel to a donative context is motivated by the fear that it may be used to turn contract law on its head, in effect making offers binding that are revocable by the rules governing formation.

It is clear in these situations that, if the general has reason to know of the sub's mistake, he cannot hold the sub liable. If on the contrary the general fails to use the sub's bid, he, the general, has no claim. But what if he does use the bid? The greater the loss that the sub's refusal to perform causes the general because of the difference between the sub's bid and the next lowest actual offer, the greater is the likelihood that the general may have had reason to suspect something amiss. If the harm is great but the general nevertheless had no basis for the presentiment of an error, the sub may well be held to his bid. The difficult, borderline cases in the present state of American law usually occur where the general's reliance is real yet tenuous. Though he has used the sub's bid, discharge of the sub might cause the general only slight or uncertain harm.

Why should this be a hard case, if the mistake-in-calculations problem becomes a close one only when the offeree has not yet acted

at all upon the mistaken offer? In that case the least reliance by the innocent offeree may be enough to dissipate all doubt and to give him a tranquil right against the mistaken offeror. The difference is the existence in the earlier situation of a commercial offer that has been fully accepted. A contract or something close to it has come into being, born under the cloud of an error in the steps just prior to integration. In the general-contractor and subcontractor case, however, there is no acceptance, hence no contract, unless you either adopt the implausible unilateral-contract analysis, according to which use of the bid was itself the acceptance sought, or apply promissory estoppel doctrine and view the estoppel as a mere "substitute for consideration."

These three situations show a progressive decrease in the perfection of the formalities, in the completeness of the steps that lead to a standard bilateral executory contract. In the first case, the promisee needs no reliance to make a persuasive claim, because he already has the finished process of offer and acceptance. In the second case, the promisee's position gains strength to the extent that the gap opened up by the missing acceptance is filled by reasonable reliance, reasonable partly because the applicable law is unclear or divided. Weighing on the other side in both cases is the promisor's mistake and misfortune, the impulse to relieve him of the burdensome consequences of what may have been a small, ordinary measure of imprudence.

The introduction of the reliance element complicates the tug between the classical vision and the countervision. In the mistake-in-calculations circumstance, the classical vision favors the promisee; the countervision, the promisor. In the general and subcontractor situation, the classical vision, without promissory estoppel, clearly favors the promisor (the sub). But on whose side is the countervision here? Both the promisor's relatively innocent mistake and the promisee's justified reliance must be taken into account. The losses might be split according to the degree of the promisor's culpability, the extent of the promisee's reliance, and, in the ultimate development of the doctrine, the relative ability of the parties to bear the loss.

This last instance of exemplary difficulty lends further support to the sense that in all these focal points of perplexity we confront not merely a choice among competing concerns within a shared

conceptual framework, but a struggle between conceptual frameworks. The outcome of this struggle matters for the resolution of tangible legal problems. That the center of controversy falls in one place rather than another in a given jurisdiction at a given time is a consequence of the particular content and relative influence of the rival approaches. Because the classical vision defines its field of operation so largely in terms of commercial context and completed formalities, the strength of the countervision might be measured by its capacity to render controversial even situations that come increasingly close to the limiting case of an extreme commercial setting and fully completed formalities.

That there is a coherent countervision at work here, and that it implies an alternative view of how the counterprinciples relate to the principles, are propositions that have not yet been fully established. To do so is the task of a third stage of this model of deviationist doctrine. It makes the countervision perspicuous by explicating and generalizing its key assumptions about the sources of obligations and the nature of rights.

*The Countervision Generalized: The Sources of Obligations and the Nature of Rights*

I abbreviate this third stage of the analysis because I have anticipated its main points. The dominant approach to contract problems assumes that obligations have two main sources: the unilateral imposition of a duty by the state (as in many forms of tort liability) and the articulated bargain in full conformity to the established procedures for contracting. Contract theory treats any additional source, including relations of interdependence, as either an uncertain penumbra of the express agreement or an equitable qualification to the basic principles of the law. The theory of rights that fits this view of the sources of obligation is one that sees an entitlement as designing a zone of discretionary action whose limits are set at the moment of the initial definition of the entitlement. The boundary lines may be subject to dispute in a given context of actual or threatened exercise of the right, but not to major extension or retracing. A concern with the effects of the exercise upon

another party would turn relations of interdependence into sources of obligations that could complete or even supersede agreed-upon terms.

The countervision depends upon very different premises. It implies that obligations do arise primarily from relationships of mutual dependence that have been only incompletely shaped by government-imposed duties or explicit and perfected bargains. The situations in which either of these shaping factors operates alone to generate obligations are, on this alternative view, merely the extremes of a spectrum. Toward the center of this spectrum, deliberate agreement and state-made or state-recognized duties become less important, though they never disappear entirely. The closer a situation is to the center, the more clearly do rights acquire a two-staged definition: the initial, tentative definition of any entitlement must now be completed. Here the boundaries are drawn and redrawn in context, according to judgments of both the expectations generated by interdependence and the impact that a particular exercise of a right might have upon other parties to the relation or upon the relation itself.

Within this view of the sources of obligations and the nature of rights, the countervision of contract has a secure place. In each of the instances of exemplary difficulty just discussed, the countervision lends force to obligations of interdependence that cannot be adequately understood as a matter of narrow exceptions or vague dilutions. It incorporates the analysis of explicit statements or promises into a more comprehensive framework that also takes into account the merit and measure of the promisee's reliance and the moral quality of the promisor's claim to discharge. This framework develops the first counterprinciple and relates it to the principle of freedom to contract in ways that emphasize the intersection of contract and community.

Instances of exemplary difficulty might also have been drawn from areas such as good-faith bargaining, retained rights in labor law, or economic duress in general contract. They would then have focused the analysis upon the problem of distinguishing a contract regime from a power order. The countervision thus generated would start by emphasizing the impossibility of adequately distinguishing contract from domination without either changing the institutional structure

of economic activity or, at least, adopting a range of second-best alternatives to such institutional reconstruction.

One such imperfect alternative might be the relentless insistence upon the features of present law that are designed to prevent the confusion of contract with subjugation. The stubborn attempts of the National Labor Relations Board to resist the evisceration of the duty to bargain in good faith offer a modest example.

A contract theory capable of giving a secure place to this version of the countervision would incorporate the thesis that regimes of contract law and contract doctrine differ crucially in the degree to which they can avoid correcting bargains to death without allowing them to become a disguise for subjugation. The view would also recognize that the institutional organization of the economy, as defined by the law, determines these differences among market systems. Such a contract theory would imply a basic shift in the relation of the counterprinciple of fairness to the principle of freedom of contract.

Thus, the initial content of the countervision depends in part upon the instances of exemplary difficulty with which you begin. A more inclusive version would emerge from the probing of many such instances in different areas of the law. A successful theoretical conception would be one that made intelligible each of these partial countervisions, while helping resolve conflicts among them. For the range of problems discussed here, it would combine the view of contract and power just described with the revised theory of rights and of the sources of obligations. The aim is not closure and completeness but continued criticism and self-revision; not finality but corrigibility.

### *The Countervision Extended and Restricted*

The fourth stage of this model of doctrine develops the countervision described in the second stage and generalized in the third, extending it to legal problems that fail to generate instances of exemplary difficulty in current law. Consider for this purpose the law of fiduciary relations and the question of its place within the main corpus of contract law.

One of the more remarkable features of classical contract theory is its oscillation between an ideal of strict altruism in a confined range



of situations and a tolerance for unrestrained self-interest in the great majority of contracts. Thus, in fiduciary relations one party may be required to confer upon the other party's interests a weight greater than upon his own (or, in any event, at least equal to his own). In the ordinary commercial contract, however, the other party's interests can be treated as of no account so long as the right-holder remains within his zone of discretionary action. (Qualifications to this standard, such as the rules governing mitigation of damages, are relatively unimportant.) This license merely restates the approach to the nature of rights and to the sources of obligations characterizing mainstream contract theory.

The higher standard of solidarity, the one that gives primacy to the other party's interests, is necessarily exceptional. Any attempt to insist upon it in the generality of dealings would depart so radically from the standards by which people ordinarily deal with each other that it would merely encourage massive circumvention and hypocrisy, coupled with a stifling despotism of virtue. It does not follow, however, that ordinary contracts and human encounters should be surrendered to the notion that one may treat other people's interests as if they were nonexistent. In fact, the parties to continuing or recurrent contractual relations, and often even to one-time transactions, seem generally to adhere to a far stricter standard.

The countervision refuses to acquiesce in the stark opposition of community as selfless devotion and contract as unsentimental money-making. The theoretical ideas about the quality of entitlements and the sources of obligation that assign a leading role to the counterprinciples imply a subtle and continuous shading of contract and community. Informed by those ideas, doctrine might develop a series of distinguishing criteria to characterize situations suitable for the application of a more limited solidarity constraint, one that requires each party to give some force to the other's interests, though less than to his own.

The need and the justification for such an intermediate standard have already been anticipated by the two-tiered theory of rights that the countervision presupposes. The circumstances suitable for its application might be selected on the basis of features that would include expressed intent, induced or even unwarranted trust in fact, disparity

of power manifest in one party's greater vulnerability to harm, and the continuing character of the contractual relationship.

The mention of such criteria already suggests a change in the technique by which different contractual situations are subject to distinct standards of constraint upon self-interest. The law of fiduciary relations consists largely of a list of special circumstances, often defined by signs that have only an oblique connection with the facts engendering trust or justifying self-restraint. Consider, for example, the joint venture, an agreement that imposes fiduciary duties upon the joint venturers. It may be defined simply as an informal partnership of limited scope and duration that provides for a sharing of gains and losses by all the venturers.

A contractual arrangement, however, may involve a close, difficult, and long-term collaboration that calls for the exercise of prudent discretion without being directed toward an uncertain profit. Such an undertaking may well be viewed by its participants as one demanding from each of them the most scrupulous regard to mutual loyalty. Conversely, a contract that looks to an undefined reward rather than to an exchange of predetermined performances may require, and be understood to require, only a minimum of actual cooperation.

We have been frequently reminded of the need to choose between a ready but crude generality and a subtle but painstaking and uncertain particularism, with its potentially invasive probing of the springs of conduct and the nuances of moral discrimination. Often, however, the statement of this dilemma serves to justify a refusal to search for less arbitrary generalizing criteria of selection. This refusal usually carries a specific ideological weight. In the case of the joint venture, its point is to confine to a narrow range of situations the idea of the contract as a common enterprise animated by mutual loyalty.

The fourth stage of this model of doctrine extends the countervision to problems that may not already be targets of controversy. It therefore raises the question of how far into related fields of law we should extend the view of the nature of entitlements and the sources of obligation that the countervision presupposes. The approach to contract described here does not represent a universally applicable theory of rights.

We need not follow the nineteenth-century jurists and their

disciples in taking unified property and its counterparts in contract as the model for all rights. This caution applies as much to the countervision as to the view it seeks to replace. What the earlier program describes as immunity rights and their more limited counterparts in established law may best be understood and protected by a bright-line or one-tier theory of entitlements. Such a theory may also suit the many circumstances in which the factual assumptions of the two-tier theory are weakened. For it must be remembered that the countervision describes a spectrum of circumstances. It continues to recognize the classical form of contract rights as a special case.

Just when does this special case occur? One way of telling is to ask when the factors justifying higher expectations of trust and standards of self-restraint are present. Another way is to ask when alternatives to the traditional unified property right are useful. In many areas of economic life, dealings may continue to be gambles. As gambles, undertaken among those who are competent to gamble, they may remain beyond the reach of the counterprinciples. Democratizing the market economy would not abolish the reasons for distinguishing areas of economic life suitable to the principles or to the counterprinciples of contract. It would, however, prompt us to draw the line in a different place. Moreover, the line would have a different meaning and a different consequence.

### *The Countervision Justified*

The fifth stage of this model of deviationist doctrine might just as well come first, for it describes the normative and empirical beliefs guiding the entire argument. The advantage of placing it last is to suggest that these beliefs may gain a systematic and explicit form slowly, as deviationist doctrine moves forward. No radical break separates the arguments that justify them from the controversies of legal analysis. The development of these animating ideas can be described in several ways, some easier than others to reconcile with the fragmentary and gradualistic bias of doctrine. Whatever the preferred method, however, the normative and empirical aspects of the guiding conceptions depend so closely upon each other that the two can hardly be distinguished.

The controlling themes may be internal to doctrinal argument. They may grow out of a continuing comparison between the ideal projects for human coexistence that give sense and authority to established doctrine, and the actual reality of the social practices that current law and legal ideas help reenact. Two such themes have played an especially prominent role in the preceding discussion.

One of these themes has been the criticism of the stark contrast between contract and community. The starting points of this contrast are a conception of community as an idyllic haven of harmony, and of contract as a realm of unadulterated self-interest and pure calculation. The actual effect of the contrast, however, is often to accept and to foster the confusion of mutual loyalty with acquiescence in a regime of personal power while depriving of appropriate legal help the elements of trust and interdependence in business life. The arrangements and ideas capable of correcting these effects begin by effacing the sharpness of the opposition between contract and community. They end by suggesting a view of contract that can more readily accommodate both a broad range of different sorts of rights or obligations and a conception of community, as a zone of heightened mutual vulnerability. Such a conception offers a more satisfactory account of what attracts us to the communal ideal in the first place.

The other major theme of moral vision in my discussion of contract theory has been the search for the conditions under which a regime of contract can avoid becoming the disguise of a power order without being constantly overridden by correction. As the argument progresses, the apparently empty commitment to contract turns out to have surprising implications. It invites a transformation of the institutional basis of economic life and a variety of subversive, though ultimately inadequate, surrogates for such a change.

The two internal critical themes stand by synecdoche for the two chief traditions of criticism of modern society that antedate the rise of modernist literature and philosophy. One of these traditions objects to the denial of solidarity and to the absence of varieties of communal life that could mediate between the isolated individual and the large-scale organizations of the social world. The other tradition emphasizes the continuity of group domination under forms of practice and thought

that both conceal and reproduce it. The deviationist doctrinal argument shows how the two traditions can merge into a more comprehensive and satisfactory line of criticism once analysis gains institutional detail. The practical and theoretical solutions to the problem of overcorrecting and undercorrecting contract converge with the implications of the attempt to soften the antagonism between contract and community.

Of course, the inspiration for the doctrinal argument might come from the comprehensive institutional program presented earlier and from the normative and empirical arguments on which that program relies. These arguments may also be internal, internal to the justification and development of our received ideals—conceived in the broadest sense—rather than to the controversies of legal analysis. The first model of deviationist doctrine has shown that such programmatic ideas might nevertheless be successfully related to these debates about law.

Now that the second model has been fully worked out, it is possible to answer two related questions about the sense of its claim to be doctrine. The first question is: are the guiding conceptions that determine the entire course of the analysis somehow intrinsic to the law, or are they imposed upon the law from outside? The available legal materials fail to support unequivocally these or any other fundamental conceptions. However, the dispute over such ideas does not come to a halt when people practice legal analysis; it continues in other forms, with the opportunities and the constraints specific to the medium. The discussion of instances of exemplary difficulty as well as of alternative ways to understand them shows the invasion of legal analysis by prescriptive conceptions of society more clearly than does any other part of this model of doctrine.

Given that the conflict over these alternative schemes of human association can be silenced only at the cost of making legal analysis arbitrary and dogmatic, the question remains: how far can and should legal doctrine, especially when operating in an adjudicative context, alter established legal understandings and the social practices and institutional arrangements that these understandings reinforce? The issue is posed most forcefully by the extension of the countervision to areas of the law in which the dominant approach seems largely uncontested in

received doctrine. The answer to this second query is not determined, though it may be powerfully influenced, by the response to the first one.

Within a view that denies any higher authority to the present institutional arrangements of government and therefore deflates arguments from institutional propriety, deciding what to do differs only modestly and uncertainly from understanding what can be done. Doctrinal breakthroughs will not produce revolutions in social life. They will not do so even when they influence our insight into existing institutions and reigning ideas, the course of ideological debate, and the exercise of judicial authority. When my argument later turns to the critical legal studies movement as a form of political action, it will argue that expanded doctrine has a practical task to accomplish both in society at large and in the narrow, subsidiary arena of adjudication.

### *The Two Models Compared*

The first model of deviationist doctrine begins by analyzing the major thematic commitments of a particular branch of law and legal doctrine as well as the specific categories that serve these commitments. It then makes explicit the assumptions about social fact and the social ideal on which those categories rest, and subjects them to criticism by the light of more or less widely accepted ideals and understandings. The concealment of these assumptions is vital to the persuasive authority of the dominant legal ideas; seemingly uncontroversial technical conceptions commonly depend upon highly controversial, nontechnical premises. At this point the first model of deviationist doctrine switches to a different and independently justified view of how the area of social life with which it deals should be ordered. This view implies the institutional reconstruction of major aspects of present society. Finally, the model shows how this programmatic conception can serve as a regulative ideal for the development of current doctrine.

The second model of deviationist doctrine starts by conceiving a broad field of law as the expression of a system of principles and counterprinciples whose actual or proper relation to each other can be represented in clashing ways. It then shows how these rival approaches appear in a series of instances of exemplary difficulty. The

countervision worked out through the analysis of these focal points of controversy brings a changed understanding of the proper relation between counterprinciples and principles. This understanding can be clarified through generalization into a more comprehensive legal theory. Once generalized it may be applied, and revised through its application, to other related branches of law. Finally, the larger justifications and implications of the suggested developments can be made explicit.

Both models of doctrine begin from the same view of the relations among the three levels of law and legal analysis: authoritative rules and precedents expressed today mainly by statutes and judicial decisions, organizing principles and counterprinciples, and imaginative schemes of social life that assign distinct models of human association to different sectors of social practice. The attempt to reassert and reexamine a set of legal norms and ideas in the face of fresh problems highlights two sources of permanent though often latent uncertainty and conflict, and thus demonstrates once again how the effort to reproduce a practical or imaginative order in society supplies instruments and occasions for the demolition of that order.

The interpretation of large bodies of rules and precedents must rely tacitly if not explicitly upon principles and counterprinciples, and the understanding of principles and counterprinciples must in turn presuppose conceptions of what the dealings among people can and should be like in each sphere of social life, even if these conceptions are said to be somehow embodied in the law rather than imported into it from outside. Each time a deeper level is exposed, the exposure produces a twofold destabilizing effect. The more superficial level (the rules and precedents in relation to the principles and counterprinciples, the principles and counterprinciples in relation to the models of possible and desirable association) proves to be but a flawed realization of the deeper one, while the empirical and normative beliefs that constitute this deeper level are made controversial if not implausible in the very process of being exposed. Alongside these vertical tensions between levels of legal analysis, the reconsideration of law in untried contexts generates horizontal conflicts within each level. For each is revealed as the stage for a contest among professed ideals and recognized

interests, a contest that becomes fiercer as we move down the sequence of levels.

Conventional legal doctrine, and the legal theories that propose to refine it the better to support it, try to suppress or minimize both the horizontal and the vertical conflicts. Deviationist doctrine, on the contrary, wants to bring these instabilities to the surface: first, because such is the form that subversion takes in the domain of legal ideas, and, second, because if insight and justification can be achieved at all in legal doctrine or any other field of normative argument, they can be achieved only through the repeated practice of such subversion, under its double aspect of internal development and visionary thought.

Although the two kinds of instability implicate and reinforce each other, one of them may temporarily predominate. The first style of doctrine emphasizes the vertical conflicts; the second style, the horizontal ones. We can observe and combine the two emphases in many ways. In any of these ways they convey a message of hope: to the impression of impassable constraint and brute contingency, there succeeds insight into our powers of understanding and transformation.



## SEVEN

### *Underlying Conceptions and Broader Implications*

#### **Beyond Internal Development: Social Understanding and Normative Commitment**

**T**his entire constructive argument—the institutional program and the practice of deviationist doctrine—amounts to an exercise in imagining internal development. For the sake of guidance, the exercise projects the results of a reciprocal movement between practices and ideals that must in fact be driven forward by social conflicts and made actual in collective experiments. For the sake of specificity, the exercise pursues this reciprocal movement into the realm of legal doctrine, a realm from which prophets and plain people are banned so that power may be wielded in a hush.

If it manages to avoid the resulting dangers of idealism and elitism, the attempt to imagine internal development remains open to two related objections. It seems just an accident that we happen to start in a tradition in which the practice of internal development leads in the direction charted here. As agents who can transcend and criticize the cultures into which we were born, we want to know whether and why we should give weight to this accident. Moreover, any tradition is so

rich in ambiguity that persuasive arguments can be offered for developing it in alternative directions.

These objections show why, over the long run, internal development needs visionary thought, that other mode of normative practice, as a complement and a corrective. When visionary thought works as theory rather than as prophetic intuition, it characteristically takes the form of a systematic conception of society and personality (each implied by the other) for which it claims normative authority. By stating dogmatically the rudiments of a speculative social theory and then arguing for its normative force, the following pages sketch a response to the two criticisms just mentioned. For these ideas about society, personality, and normativity elucidate and support the route taken by the programmatic and doctrinal arguments of this manifesto.

In every society we can distinguish the repetitious activities and conflicts that absorb much of people's effort from the formative institutional and imaginative order that usually remains undisturbed by these routines and gives them their shape. The routines include the habitual limits to the uses of governmental power, the available ways for combining labor and capital, and the accepted styles and criteria of normative argument.

In the contemporary North Atlantic countries, the formative institutional context incorporates an ordering of work that obsessively contrasts task-defining and task-executing activities; a contract and property system that uses the allocation of absolute claims to portions of capital as the means for creating markets; and an approach to governmental and party organization that deadlocks government and demobilizes society by the same devices with which it proposes to guard citizens against oppression. The legal rules and rights that, together with customary power relations, define these institutional arrangements are made intelligible and acceptable by a background plan of possible and desirable forms of human association. Such a plan presents each sector of society as the natural domain for the realization of a specific social ideal, be it private community, liberal democracy, or a mixture of technical hierarchy with contractual agreement.

Formative contexts such as this one amount to frozen politics: they arise and subsist through the interruption and containment of

fighting over the basic terms of collective life. Having emerged, they gain a second-order reality. They serve as premises of people's ideas about interests, loyalties, and possibilities. They embody a constraint to which organizational and technological methods adapt. They offer the example of worldly and spiritual progress that the more successful countries present to the more backward ones.

Nevertheless, such regimes are not cohesive systems that must stand or fall as a piece. The elements that compose them can be recombined with the elements of other such regimes. It follows that concepts such as capitalism must be spurious whenever they are meant to designate a stage of world-historical evolution or one of a finite list of possible types of society. There are no historical laws that might justify a theory of compulsive stages or limited varieties of social organization.

Because a formative institutional and imaginative context defines itself by its resistance to all attempts to change the routines that it supports, it also makes some lines of context revision easier than others. Alongside this short-term sequential influence, a second, long-term force also counts in history. This force is the cumulative effect of the advantages that individuals, groups, and entire societies can gain by weakening the restrictive power of a formative order. To understand this source of change it is important to appreciate a striking quality of such regimes.

They do not exist as facts open to straightforward observation, like the atomic structure of a natural object. Nor does their existence depend entirely upon illusions that a correct understanding might dispel. Rather, they subsist and become entrenched by gaining immunity to challenge and revision in the course of ordinary social activity. The stronger this immunity becomes, the sharper is the contrast between routine disputes within the context and revolutionary struggles about the context.

Negative capability is the practical and spiritual, individual and collective empowerment made possible by the disentanglement of formative structures. Disentanglement implies not permanent instability, but rather the making of structures that turn the occasions for their reproduction into opportunities for their correction. It is the creation of structures of social life that facilitate their own revision.

Movement toward disentanglement promises to liberate societies from their blind lurching between protracted stagnation and rare and risky revolution. The reward of disentanglement is negative capability. The formative contexts of the present day impose unnecessary and unjustifiable constraints upon the growth of negative capability.

Negative capability, based upon disentanglement, increases our power to produce more and better by experimenting with both nature and cooperation and by freeing ourselves to recombine people, resources, and machines uninhibited by any preset scheme for their combination. Disentanglement, resulting in negative capability, allows us to lower the price of loss of autonomy that we must pay for every connection with other people. It consequently moderates a conflict between the requirements for making a self: that we connect with others without losing ourselves to them. Disentanglement and negative capability enable us to engage in a social world without surrendering to it. The disentangled structure narrows the distance between the moves that we make within it and the moves by which we change it. As a result, it respects the most important truth about us: that we exceed the regimes of society and of thought that we build and inhabit. Negative capability is transcendence made real. Disentanglement is its condition.

The thesis of negative capability presupposes that over the long run the practical, moral, and cognitive advantages to be won by disentangling formative contexts outweigh in the strength and universality of their appeal the benefits to be gained by entrenching such contexts further. People usually pursue those particular advantages rather than the general program of empowerment through disentanglement. To succeed in this pursuit, however, they must have a latent or intuitive grasp of the truth made explicit by the thesis of negative capability. They must know how to draw out of the recombination of what seemed incapable of being combined and out of the loosening of what appeared inexorable the empowerment that they desire. Thus, the making of structure-revising structures in history often overrides the simple contrast between intentional and unknowing action.

The development of negative capability is too reversible in its course and too indeterminate in its applications to generate any unilinear

evolution of types of society. It nonetheless works together with the short-term sequential effects of formative contexts as a major source of historical change. The formative orders that embody higher levels of negative capability are not so much weaker structures as they are structures with particular qualities. To discover the arrangements that these qualities require at a particular time and place ranks among the main tasks of programmatic thought and political striving.

The commitment to develop negative capability cannot alone define a social ideal, if only because the practical aspects of negative capability may be promoted by an extreme despotism as well as by a stronger freedom. The vision from which this commitment arises does, however, set the terms of a social ideal with a claim to authority. It describes the circumstances that permit an existence increasingly free from deprivation and drudgery, from the choice between isolation from other people and submission to them, and from the idolatrous identification of established order with practical or moral necessity. It teaches the person to move within contexts with the dignity of a context-transcending agent. It gives a historical twist to the injunction that he should be in the world without being entirely of it.

Somebody might object that even if he accepted the social theory just outlined, he need not give normative weight to its conclusions. It can show, he may argue, the conditions for the development of negative capability, but it cannot tell him whether this development is a good to be pursued, much less whether it can figure prominently in a well-defined and well-founded social ideal. Any attempt to base prescriptive judgments upon factual claims, he may observe, disregards a gap that can never be bridged, at least not without subscribing to indefensible metaphysical assumptions. To determine the weight of this argument is to distinguish the legitimate use of the distinction between *is* and *ought* from the illegitimate ones. Consider the different ways the critic may intend his objection to be taken.

He may mean that a social theory like the one just outlined states the conditions for realizing a particular value to which he prefers another value. Such a theory cannot dissuade him, so the argument continues, from an opposing preference; it can only explore the implications of that preference for the arrangements of society. This objection misconceives

the nature of controversies about the social ideal. We cannot commit ourselves to a particular value without committing ourselves to the form of social life that gives this value its specific meaning and to the conditions that enable this form of life to emerge or develop in conformity to the ideal that defines it. This is a thesis about the character of normative ideas.

Moreover, we do not commit ourselves to such a scheme of social existence, and act by anticipation according to its norms, unless we believe that it offers us a world in which we can more fully reconcile our efforts at self-assertion, expressed in the vicissitudes of desire and encounter, with our deepest identity. This is a thesis about the most durable role that normative practice plays in our lives, outlasting the apology for existing arrangements and the defense of conventional morality. The thesis remains true even if, by a favorite paradox of modernist thought, we human beings turn out to be that which is nothing in particular.

In making and rejecting such commitments, we take a stand on the facts about personality and society. To be sure, these facts are many-sided and susceptible to being changed by our view of them. As a result, the choice among views will always be contestable and will always be influenced by normative precommitments. These two qualifications show the inconclusiveness of normative practice, rather than its arbitrariness.

Alternatively, the critic who recalls the distinction between the factual and the prescriptive may be emphasizing the inadequacy of a secular basis for normative judgment. Whatever merit this argument may have, it cannot serve in the defense of the traditional distinction between facts and values. For the most striking shared characteristic of the historical varieties of religious thought is to present an imperative of life as built into a vision of ultimate reality. Without this prior relation between vision and imperative, even the simple idea that divine commands should be obeyed would be groundless.

Religion reinterprets (and, the believer would say, deepens) rather than replaces the secular conflict over the proper structure of society. Is social life sanctified by embracing a particular system of division and hierarchy that assigns to each person well-defined roles and

responsibilities? Or is it made more godly and open to love by encouraging and expressing the iconoclastic refusal to assign absolute value to particular structures?

Finally, the critic may mean that nothing in heaven or on earth has a claim to guide our actions. Often this view is couched in the deceptively harmless form of the idea that one normative postulate must rest upon another, a view, however, that quickly leads to the conclusion that all must rest upon unsupported assertion once the chain of normative postulates runs out. If the critic then insists that nothing else could have prescriptive force, we cannot refute him. But neither can he offer us a reason to stop giving normative weight to our basic conceptions of personality, society, or ultimate reality.

No understanding of the world can tell us, one way or another, whether to attach a certain force to some of our understandings. In particular it cannot do so when the practice it attempts to overrule represents at least as intimate a part of our individual and collective history as does any other mode of inquiry or invention. The valid sense of the contrast between factual and prescriptive claims is the sense in which a thoroughgoing skepticism is irrefutable. The ordinary skeptic, the skeptic who brandishes the standard form of the fact-value distinction, wants to avoid this terminal skepticism without accepting the normative implications of disputes over the nature of personality and society. He cannot do so.

This counterargument to ordinary skepticism becomes more cogent once you consider the general approach to skeptical claims that it exemplifies. In the evaluation of claims to knowledge about external reality, many of what seem to be debates about skepticism turn out to be disagreements over whether and how far one mode of discourse (such as social study, the humanities) can justifiably diverge from standards of argument prevailing in another area of thought (such as natural science). Such quarrels are actually over what the world is like and how the mind may best apprehend it. The only true skepticism about knowledge is the radical one, as irrefutable as it is empty. Radical skepticism denies that controversies over particular truths could ever reveal anything about the world, other than the stratagems of our self-deception, or that they could even allow us to pursue our practical

interests more successfully. It does no good to answer the radical skeptic by protesting that no form of knowledge familiar to us could ever possess the unconditional self-validation that he requires for knowledge. He will merely answer, "That is just the point."

So, too, most of what passes for normative skepticism represents an attack upon one form of normative argument by the proponents of another. Behind such attacks we are likely to find disagreements over what personality and society are really like and how we may live in society as who we really are. When, for example, the modernist or leftist radical criticizes one of the many diluted versions of the idea that society has a natural order, he is commonly misunderstood to be rejecting the possibility of prescriptive judgment. One of my aims here is to show that he may in fact be working toward a different view of our claims upon one another and of our hopes for ourselves. The only true normative skeptic is the maximalist one, who denies that the result of this or any other dispute should guide our actions.

We cannot exclude the possible existence of a defect in knowledge that can be neither translated into a disagreement about the nature of the world beyond the mind, nor reduced to a relentless and unanswerable disbelief in the possibility of knowledge. Similarly, we lack a certain basis for discounting the possibility that a new approach to the assessment and remaking of ideals might change the character of normative practice, and change us in the process, without falling into radical skepticism. This element of pure givenness and contingency in the argument suits a style of speculative thought that insists upon the empirical status of even its boldest claims, and refuses to equate explanation with the vindication of necessity.

If the critical and constructive program worked out in this book did not ultimately require a defense beyond the limits of internal development, its implications would still reach into every field of social thought and reproduce in each of them many of the problems with which the last few pages have been concerned. The following sections describe these implications in four areas: the terms of ideological controversy, the method of political philosophy, the modernist view of freedom and constraint, and the agenda of social theory.



## **The Broader Implications**

### *The Terms of Ideological Controversy*

The leading conclusion about ideological controversy to be drawn from the work of the critical legal studies movement follows directly from the critique of objectivism. It is our refutation of the tacit identification of abstract institutional endeavors, such as democracy or the market, with the concrete institutional forms that these endeavors happen to take in the contemporary world. We have taught ourselves not to see the major governmental and economic orders that now compete for world mastery as the exhaustive options among which mankind must choose.

The critique of objectivism and its constructive sequel have a more tangible bearing on the defense of the institutional arrangements established in the North Atlantic countries. Consider once again the existing regime of contract and property rights and the kind of relatively decentralized economy that they establish. There are still some conservative publicists who see this regime as directly allied to the cause of freedom, and even as part of the necessary definition of freedom itself. But most thoughtful and sensible defenders of the established private order willingly acknowledge several facts that cast doubt on this alliance.

First, it seems clear that these property rights, involving as they do largely unlimited control of divisible portions of social capital (unlimited in temporal succession as well as in range of use), create in some people, or in the more or less stable positions that these people occupy, a power to reduce other people to dependence. The system of private rights thereby forges a strong and seemingly unbreakable link between safeguards against oppression and devices of subjugation.

Second, together with the appeal to imperatives of technical necessity, the regime of private rights provides a mandate to exercise forms of disciplinary power that rigid assignments of right and duty cannot effectively govern. The mandate holds most clearly for the internal life of large-scale organizations and for the relations within them between superiors and subordinates. In fact, the private-rights order that we now often take as defining a liberal society has always operated in conjunction with a far different set of practices and ideas that fail to conform

to the liberal formula. At first this illiberal complement was provided by the arrangements of a corporatist and étatiste society. Such arrangements have remained important even in societies that seem, like the United States, to have been born full-blown into the age of liberalism. Later, the forms of control and command in large-scale organizations supplied an indispensable additional element. Thus, at every point in their history, private rights have coexisted with styles of organization that largely negate their overt social meaning.

There is yet a third fact that challenges any simple identification between the cause of freedom and the present regime of contract and property. It is the availability within present democracies of entitlements that depend upon no proprietary privilege and that therefore supply no instruments of subjugation. They cannot serve as the basis for extralegal forms of control. The most important examples are political or civic rights and welfare rights.

Why should the existing scheme of contract and property appear defensible even to those who acknowledge the truth of these three facts? The answer has to do with the apparent absence of feasible and appealing alternatives: the alternatives to it seem to be tyrannical, inefficient, or both. The only alternatives consonant with the circumstances and responsibilities of a contemporary state seem to require the transfer of undivided economic sovereignty—the unified property right—over productive assets either to a central government or to the workers who happen to work in a particular enterprise at the time of transfer.

Criticism of the underlying assumptions about property and contract and the development of programmatic alternatives have allowed us to assail this negative prejudice: a market economy can be organized in different ways, on the basis of alternative regimes of control and property. Our received conception of what a market economy can and should look like largely depends on the prejudice that no such alternatives exist.

### *The Method of Political Philosophy*

In the English-speaking countries today, most political philosophy conforms to a single style whose unity remains partly hidden by a

series of superficial contrasts. The most notorious of these contrasts is the conflict between utilitarian and social-contract theories. These superficially contrasting views share a notion of a choosing self whose concerns can be defined in abstraction from the concrete social worlds to which it belongs. These worlds count either as part of what the particular philosophical method will want to change once it has been allowed to operate, or as a partial determinant of the chooser's desires and beliefs. In no significant sense does history itself become a source of moral insight.

A practical result of the method is to show that, though certain features of existing society may be unjust or inexpedient, the basic social order deserves explicit or implicit acceptance. (The same could not be said of Bentham's program: a radical plan for social reconstruction, linked to a view of personality and of social politics.)

The relation of mild reformism to the methods of this political philosophy is not accidental, though it may be loose. This relation becomes clear once you understand the trouble with this philosophical approach: its difficulty of offering guidance, unless supported by extraneous ideas and commitments. There are two major ways to escape the danger of indeterminacy within this tradition. The description of the forms that these modes of avoidance take in both utilitarian and social-contract theory shows how our work threatens this approach to political philosophy.

One way to achieve the required determinacy of implication is to define the wants or intuitions that constitute the primary data of the method restrictively. They must be defined so restrictively that all of the important conclusions are already included in the characterization of the starting points.

The definition of the wants that serve as the raw material of the utilitarian calculus must be subject to several restrictions in order to provide the calculator with sufficiently precise information. For one thing, complexity, especially in the form of ambivalent or conflicting desires, must be kept under control. For another thing, the authority of existing desires must be taken as a given, despite both the large part that established institutional structures may have played in causing them and the relation of an individual's wants to what he imagines possible.

The two restrictive simplifications overlap. One of the most striking sources of complexity and ambivalence in desires is the experience of simultaneously entertaining desires that take a given institutional structure for granted and other, more obscure longings that presuppose either an escape from this structure or its transformation. Thus, in the rich North Atlantic countries of today, the individual indulges, through the promises of high and popular culture, fantasies of adventure and empowerment that his ordinary life denies.

Nothing prevents a sufficiently agnostic and formal version of utilitarian theory from taking the structure-denying desires as its givens. Such desires, however, are likely to be disregarded for three reasons. First, they are too fluid in scope and content to figure easily in a utilitarian calculus. Second, desires of different individuals for alternative sets of social relations are far more likely to contradict one another than are wants for benefits within a single set. The result is to worsen the difficulties of aggregation (how to sum up the wants of different individuals) that occupy so large a place in the traditional critique of utilitarianism. Third, those engaged in criticizing a social regime and in proposing its reformation are unlikely to find so unhistorical a way of thinking useful to their purposes.

A similar technique of restriction may enable social-contract theory to escape the indeterminacy into which it would otherwise fall, though there the device may assume more subtle forms. The heart of the modern contractarian view is the conception of an ideal situation of choice. Any decision about the principles of distributive justice and social organization made in such a circumstance will be right, because the circumstance is designed to avoid the partiality of people to their own interests or even to their own visions of the good. According to the tradition, this partiality constitutes the chief threat to justice.

The chief obstacle to the working out of a contractarian view is, again, its indeterminacy. Either the situation of ideal choice fails to yield definite results, or it fails to be neutral among conceptions of the good and principles of social organization. It achieves the power to guide only by sacrificing the constraint of neutrality.

The subtle contractarian frankly admits that he cannot infer content from empty form. He defends the features imposed upon the ideal

choice situation as the justified result of an earlier interaction between our existing moral intuitions and critical reflection about them. We should, he advises us, bring out the general principles implicit in these intuitions and then discard or correct the beliefs that seem, once we have thought things through, to be out of line with the main body of our moral beliefs. The grounds for decision that we allow people in the situation of ideal choice, the knowledge and the concerns with which we credit them, can be validated as expressions of the results of this earlier moral self-examination. The contractarian machinery is then demoted to spinning out the implications of choices that have an independent basis.

The definition of the moral intuitions that constitute the data of moral reflection presents the same difficulty as does the definition of wants in utility theory. For the moral-learning process to work and reach determinate conclusions, the contract theorist must define moral intuitions as restrictively as the utilitarian defines wants, in the same ways and for the same reasons. He must do at the prior stage of analysis what he would otherwise have to do at the subsequent one: anticipate his conclusions in his starting points while claiming for the latter an authority that this anticipation undermines.

There remains another route by which the philosophical approach that utilitarian and social-contract theory share may seek to avoid the dangers of indeterminacy. It is to identify the ideal method, whether utilitarian calculus or contractarian choice, with the existing institutional arrangements of democracy or the market. These arrangements become the procedure on the march for defining the dictates of the right as well as the content of particular rights: whatever decisions they generate will be fair by definition.

The earlier response to the problem of underdetermination, the restrictive definition of wants or intuitions, already contains implicitly an element of this tactic: a disregard for the moral consequences of the truth that wants and intuitions may either result from established social practices or vary with assumptions about the transformability of these practices. Nevertheless, stated as a distinctive and self-sufficient solution, this second device has attractions. It seems to increase the experimental and popular quality of the method. It appears to avoid

the dogmatism and elitism inherent in the appeal to a technique that claims to determine what is right independently of what democracy or the market decide.

Our work has helped close this second line of escape. It has done so by bringing out the institutional specificity of the established forms of markets and democracies. The design of these institutional arrangements, we have shown, cannot be inferred from abstract ideas of economic decentralization or popular sovereignty. Moreover, taken in their entirety, they are systematically biased toward certain directions of social change and particular constellations of interests. This bias helps a particular plan of social division and hierarchy to become less open to the risks of ordinary conflict and the exercise of collective choice. The existing forms of the market and the democracy thus cease to be credible embodiments of the ideal method.

As a result, the entire weight of the prevailing approach to the problems of political philosophy is forced upon the other, even more overt and direct stratagem of containment: the restrictive initial definition of wants and intuitions. This restrictive definition in turn loses some of its persuasive force as the influence of the flawed regimes of society and thought under which we form such intuitions and wants becomes clearer. No philosophical sleight of hand exempts us from the need to understand, to confront, and to change the real structure of society.

### *Freedom and Structure in Modernist Experience*

To understand fully the constructive significance of the ideas of this book for political and moral philosophy, consider their bearing upon one of the central issues of modernist experience and thought. By modernism I mean the movement in art and theory that, from the early decades of the twentieth century, attacked hierarchies of value and constraints upon personal and collective experience. It sought to weaken all structures of practice or belief that remain impervious to criticism and reconstruction in the course of ordinary social life.

According to the modernists, freedom requires, indeed represents, a struggle against arbitrary compulsion. Yet if the central tradition of modernism is to be believed, nothing lies beyond blind constraint,

beyond the repetitious and obsessional element in both personal and collective experience other than a confrontation with the empty and anguishing sense of freedom. Every escape from this sense is an escape into the freedom-destroying embrace of an unjustifiably limiting style of personal and social existence, the prostration of the personality to an idol that it mistakes for its own indefinite or even infinite self.

Our work suggests how freedom can have a content: how it can exist in and through an institutionally defined form of social life without being identified with an arbitrarily confined version of humanity. Thus stated, the proposed solution may seem a contradiction in terms or a play on words. Once the key conceptions have been specified and developed, however, they can be shown to express a clear though controversial argument.

The embarrassing question for modernism is: where does the struggle against blind compulsion lead? There are two available answers. Both turn out to be unsatisfactory.

The first answer might be called Aristotelian, a category in which I include many ideas uncommitted or even opposed to Aristotle's metaphysic. The Aristotelian response sees the purpose of the struggle against arbitrary constraints as the realization of an objective ideal of social or personal life that lies on the further side of the unjustifiable limits, waiting to be made actual. The main trouble with this solution is its failure to reckon seriously with the experiences, more than mere theoretical assumptions though less than uncontested discoveries, that have given rise to the modernist predicament.

The Aristotelian solution confers on a particular vision of society and personality—projections of a unique social world—a universal authority that it lacks. Short of an otherworldly reality, the only thing to which the personality can give final authority is itself, unless it grants that authority to its society or culture. But no particular society or culture has the last word on the longings or capabilities of this self.

The Aristotelian solution also reduces history to a morally insignificant background to our experience. In history, however, we discover the extent of our freedom. Our trials of constraint and transformation enable us to revise our assumptions about the relation of the self to the social or mental worlds that we build and inhabit.

The other available answer to the question, what lies on the other side of arbitrary constraint, might be called existentialist. This is the answer that modernists themselves often give and that, lacking any other alternative to the Aristotelian view, they must give. It sees nothing on the other side but the negative experience of freedom itself. The goal becomes to assert the self as freedom and to live freedom as rebellion against whatever is partial and factitious in the established social or mental structures. The existentialist position appears unsatisfactory for reasons of its own. It fails to acknowledge that enduring social and mental orders may differ from one another in the extent to which they display the truth about human freedom. Consequently, it is also powerless to deal adequately with a basic objection: freedom, to be real, must result in lasting social practices and institutions; it cannot remain content with ephemeral acts of context-smashing.

The point at issue has decisive consequences for both political and personal life. The existentialist thesis shows in a leftism that exhausts itself in acts of frenzied destruction because it has no real alternative to the governmental and economic arrangements that it opposes. It manifests itself as well in the belief that instituted social forms and authentic human relations must wage war against each other. This belief contributes decisively to the most common perversion of cultural-revolutionary practice: the sacrifice of larger solidarities to a desperate self-concern on the part of people unable to connect their personal experiments in subjectivity and association with a remaking of their society.

The view implicit in the redefinition of the social ideal and the constructive program that I have outlined comes closer to the existentialist position than to the Aristotelian one. It takes modernist experience and thought as one of its points of departure. However, it qualifies the existentialist thesis so fundamentally that it alters the underlying modernist conception of freedom and constraint.

Consider how the approach defended here differs from the Aristotelian conception. The proposed social ideal and its programmatic development do not amount merely to a choice of one among several personal or social ideals of the same kind, the same at least with respect to the constraints they impose. A crucial premise of the constructive ideas developed earlier in this argument is that social and



mental worlds differ, among other ways, in the manner and the extent to which they enable the self to experience in ordinary life its true freedom. The dimensions of this freedom are the ones singled out by the equivalent definitions of the social ideal described in my earlier discussion of the constructive outcome of our critique of objectivism. They include the success with which a regime makes available, in the course of ordinary politics and existence, the instruments of its own revision. By making them available such a regime overcomes the contrast between activities within its structure (the reproduction of society) and activities about its structure (the transformation of society).

The content of such an ideal is neither just a view of how freedom should be limited nor even a proposal about how to reconcile freedom with other ends. It is an analysis of the conditions of life that both make freedom possible and help shape its content. Thus, it leads into the search for the initiatives of institutional reconstruction and cultural-revolutionary practice that can make the end of freedom more real. If this is an affirmative view, it nevertheless begins in the relentlessly negative conception of a self that discovers the divergence between its own transcending capabilities and the limitations of the society and the culture in which it lives. Such a self then struggles by every means at its disposal to narrow this gap. If this vision seems incompatible with the premise of the irreconcilability of freedom and structure, so much the worse for that premise. It was never believable from the start. The problem had always been to reject it without falling back by default into the Aristotelian conception.

### *The Agenda of Social Theory*

The major traditions of comprehensive social theory inherited from the nineteenth and early twentieth centuries employ one or another variation on two sets of ideas. One of these sets included the conception of a sequence of well-defined social worlds, modes of production, systems of class conflict, forms of social solidarity, and phases of rationalization. Everything important that happens in history can be understood either as an outcome of the regularities that distinguish each of these fundamental stages of historical life or as an incident in the

conflict-ridden transition from one to the other. This is the conception that has proved most central to Marxism and to many of the other, less influential social theories that have provided the left with its theoretical instruments. The other set of ideas, more prominent in certain aspects of economic and organizational theory, has been the notion of a list of possible social worlds, each of which becomes actual under certain subsidiary conditions.

Both sets of ideas share the view that history has an arc of coherent and continuous narrative and that society conforms to a deep and hidden logic of inescapable imperatives. These greater powers speak in the voice of fate. In one case, the higher-order narrative or the deeper script governs the evolution of the types of society. In the other case, it determines the limits and identities of the types that are possible and describes the terms on which each of them becomes actual.

This tradition of social thought mixes unjustifiably two distinct ideas. One is the recognition that history and social life are in some fundamental sense structured and discontinuous. At any given time, related sets of preconceptions and institutional arrangements shape a large part of routine practical and conceptual activities while remaining themselves unaffected by the ordinary disturbances that these activities produce. Because of these formative contexts, societies differ in significant ways.

History is discontinuous: changes of a formative structure contrast sharply to shifts within it. The recognition of this shaped quality of social life stands in opposition to the perspective of naive historiography, which simply sees one event happening after another and unavoidably trivializes both the stakes in social conflict and the distinctions among historical circumstances. However, this tradition of social theory conflates the plausible if indeterminate thesis of structure and discontinuity with another, false claim: the invocation of a higher-order structure that governs the lower-order ones and establishes their identities beforehand. Resort to this bolder hypothesis can be explained, though not justified, by the fear that without it there would be no way to understand how and why the structures change. There would be no basis for the unity among the constituent elements of each of them, and, more generally, no foundation for a "science" of history or society.

As a result, the way would be open for a return to the standpoint of naive historiography.

Contemporary social theory and social science are often said to have already rejected the meta-structural idea: the belief in the higher narrative or the deeper logic. In fact, however, the most ambitious forms of social thought continue to live in a demi-monde of inconclusive rebellion against that idea. One proof of this hesitation is the loaded use of concepts such as capitalism or the market economy as if they designated a well-defined social world, structure, or system, all of whose elements presuppose one another and stand or fall together. Such concepts make no sense apart from a larger view that presents each of these supposedly integrated social regimes as a stage in a sequence or as an option in a denumerable list of possible societies. Another sign that contemporary social thought continues to live off diluted versions of this intellectual tradition is its failure to recognize clearly as its own central problem the riddle to which the more thoroughgoing rejection of the meta-structural assumption leads.

Our critique of objectivism and the constructive sequel to this critique attack at its root the conception of institutional types, which relies upon social-theoretical assumptions from which its exponents claim to be free. Put together with parallel ideas in other branches of social thought, the implications of our work suggest a more basic reformulation of the premises of social theory. These parallel ideas in historical sociology and sociological history discredit the thesis that the division of labor in society has an autonomous dynamic. The same levels of technological capability appear in sharply different organizational settings. Similar styles of organization flourish against a wide range of social and governmental backgrounds.

Thus, for example, the development of industrialized economies in Europe and around the world, rather than having presented a tidy set of stages or alternatives, exhibited an open list of variations. Deviant styles repeatedly emerged. Dominant forms achieved their primacy through victories in power politics and culture. We cannot explain such triumphs on the basis of any system of determinant and unfolding constraints, including the constraints of material life.

When these social-theoretical discoveries converge with the critical

and constructive implications of our work, the joint effect is a broadly based and explicit assault upon the way of thinking about society and history that has appeared up to now to be the sole coherent alternative to naive historiography. We have placed at the top of the agenda of social theory the following problem. On the one hand, there are practical and imaginative structures that help shape ordinary political and economic activity while remaining stable in the midst of the normal disturbances that this activity causes. On the other hand, however, no higher-level order governs the history of these structures or determines their possible identities and limits. To say that there is no denumerable list or set sequence of forms of social organization is to acknowledge that the constitutive elements of each of these forms need not stand or fall together. The relation of these two sets of ideas—the recognition of the shaped character of social life and the denial of a meta-structure—has now become the axis around which the most basic controversies of social theory must revolve.

This shift in the starting points of social theory may seem to be an act of intellectual self-destruction. After all, the major theoretical traditions that have served the left until now, such as Marxism and structuralism, have leaned heavily on the idea of laws of history in either its compulsive-sequence or its possible-worlds variant. Nevertheless, this apparent intellectual suicide allows the basic intention and method of critical social thought to triumph over ideas that only imperfectly apply the method and express the intention.

From the beginning the intention has been to understand society as made and imagined, rather than as merely given in a self-generating process that would unfold independently of the will and the imagination and that would condemn people constantly to reenact a drama they were unable to stop or even to understand. The method of critical social thought mirrors this intention. It is a method that, interpreting the formative institutional and imaginative contexts of social life as frozen politics, traces each of their elements to the particular history and measure of constraint upon transformative conflict that the element represents. Such a method must wage perpetual war against the tendency to take the workings of a particular social world as if they defined the limits of the real and the possible in social life.

## EIGHT

### *Another Politics*

**T**he critical legal studies movement exemplifies a form of transformative action. It offers an original response to an experience of constraint and disappointment that has become ever more common. To clarify and support this claim, I suggest the different settings and senses in which we have embarked upon a course of transformative action, identify the restraining features of the historical situation to which our movement represents a practical as well as a theoretical response, and describe, in the light of this understanding of the situation, the mode of politics that our response exemplifies. This analysis illuminates the relationship between the movement as theory and the movement as practice. It shows how we have gone beyond the loose and sporadic connection between theory (as the critique of formalism and objectivism) and practice (as the merely instrumental use of law and legal thought for leftist ends) that has marked progressive movements in law.

#### **The Settings of Political Action**

The first area of our transformative activity is the contribution of our substantive ideas to the democratic remaking of social life. The critique

of objectivism and its constructive development contest the established terms of ideological controversy. They disrupt the tacit connection between the available set of institutional alternatives and any underlying scheme of practical or moral imperatives. They broaden the sense of collective possibility and make more controversial and more precise the ideal conceptions that ordinarily serve as the starting points of normative argument.

At the same time, struggle over the form of social life, through deviationist doctrine, creates opportunities for institutional innovations in the direction of the ideals that we defend. Our ideas imply that we may replace the elements of a formative institutional or imaginative structure piecemeal rather than only all at once. Between conservative reform and revolution (with its implied combination of popular insurrection and total transformation) lies the expedient of revolutionary reform, defined as the substitution of one of the constituent elements of a formative context.

Only an actual change in the recurrent forms of routine activities, of production and exchange, or of the conflict over the uses and mastery of governmental power, can show whether a replacement of some component of the formative context has in fact taken place. By reshaping the exercise of governmental power, programmatically inspired deviationist doctrine can provide opportunities for collective mobilization. The transformative effect of such efforts may be direct or indirect: direct if they inform institutional change; indirect if they help inspire and inform counterimages to the established arrangements. Such opportunities can favor, directly or indirectly, to radical reform: the piecemeal but cumulative revision of the institutional and ideological settlement.

The opportunities opened up by expanded doctrine may fail to be perceived. If they are perceived, the attempts to take advantage of them may come to nothing. We would fall into an error that we criticize in our adversaries if we imagined our conceptual activities as a substitute, even a substitute source of insight, for practical conflict and invention. Whatever is achieved, however, in thought as well as in practice, may serve to inspire another future.

Another, parallel setting of transformative activity is our conception and exercise of professional technique. The received view presents the

practice of law as the defense of individual or group interests within an institutional and imaginative framework that, at least for the purposes of this defense, must be taken as a given. The sole apparent alternative appeals to an idea of the collective good, or of the public interest, that lacks any precise content and appears to be the mere denial of service to private interests. The theoretical significance of this alternative is to affirm, by its hollowness and negativity, the order that it pretends to escape. Its practical meaning is to justify less mercenary forms of legal practice as an exculpatory afterthought—in the activities of the bar, if not in the careers of individual lawyers—to the routines of mainline lawyering.

For us, law practice should be, and to some extent always is, the legal defense of individual or group interests by methods that reveal the specificity of the underlying institutional and imaginative regime, that subject it to a series of petty disturbances capable of escalating at any moment, and that suggest alternative ways of defining collective interests, collective identities, and assumptions about the possible. The same points could be made, with appropriate adaptations, about all forms of professional expertise. More generally still, the devices for reproducing society always contain within themselves the tools of social disruption. These ideas inform a distinctive approach to law practice. It is the view of practice as oriented to the relation between deviationist doctrine and social destabilization that I earlier presented.

As legal analysis approached deviationist doctrine and society came to execute the institutional program described earlier, the character of professional expertise in law would change. The contrast between lawyers and laymen would wane. If legal doctrine is acknowledged to be continuous with other modes of normative argument, if the institutional plan decreeing the existence of a distinct judiciary alongside only one or two other branches of government is reconstructed, and if long before such reconstruction the belief in a logic of inherent institutional roles is abandoned, legal expertise can survive only as a loose collection of different types of insight and responsibility. Each type would combine elements of current legal professionalism with allegedly non-legal forms of special knowledge and experience, as well as with varieties of political representation. This disintegration of the bar

might serve as a model for what would happen, in a more democratic and less superstitious society, to all claims to monopolize an instrument of power in the name of expert knowledge.

The most immediate setting of our transformative activity is also on its face the most modest: law schools. The nature of our task in the legal academy is best shown by our response to our students; their situation reveals even more unequivocally and immediately than our own or that of our colleagues the moral quality of the circumstance that we share. The conjunction of a biographical approach and an intellectual disappointment define for this purpose the predicament of the serious law student.

For him, coming to law school often means putting aside in the name of reality an adolescent fantasy of social reconstruction or intellectual creation. He does not want merely to have a job. He accepts the spiritual authority of that characteristically modern and even modernist ideal: you affirm your worth, in part, by attempting to change some aspect of the established structure of society and culture. You create your identity by asserting in a tangible way your ability to stand apart from any particular station within that structure. Yet you must also assume a position in society, both to find a realistic version of the transformative commitment and to hedge against its failure.

With each move forward, however, the opportunities for deviation seem narrower and the risks greater. In exchange for the equation of realism with surrender, the social order promises an endless series of rewards. Nothing seems to justify a refusal of these prizes: the realistic alternatives appear uninspiring, and the inspiring ones unrealistic.

An individual who has traveled such a spiritual itinerary cannot easily regain the faith in a world in which justification comes from the good-faith performance of well-defined roles. Such a system of roles may serve as the outward manifestation of an authoritative moral and social order. Without either that faith or its successful replacement by the idea of a transformative vocation, work appears as a mere practical necessity, robbed of higher significance or effect. Apart from the pleasures of technical intricacy and puzzle-solving, it becomes no more than a means to material comfort and an incident, if you are lucky, to domestic felicity or personal diversion.



In the law schools, the students hear that they will be taught a forceful method of analysis. This method is meant to be applied to a body of law presented, to a limited but significant degree, as a repository of intelligible purposes, policies, and principles rather than as a collection of shaky settlements in an unending war for the favors of government. Yet the real message of the curriculum is to discredit this pretense, a message made explicit in our critique of formalism and objectivism. This implicit lesson differs from our explicit one by its cynical negativity. It teaches that a mixture of low-level skills and high-grade sophistic techniques of argumentative manipulation is all there is, and all there can be, to legal analysis. By implication it is all there can be to the many methods by which professional expertise influences the exercise of state power.

The biographical approach and the intellectual insinuation have the same moral effect upon students and teachers alike. They flatter vanity the better to injure self-respect, and pump up their victims only to render them more pliable. Their shared lesson is that the established regime of thought or of society is contingent and yet for all practical purposes impossible to change. They preach an inward distance from a reality whose yoke they despair of breaking. They distract people by enticing them into the absurd attempt to arrange themselves into a hierarchy of smart-alecks.

The psychological insight that provides the beginning of our response is awareness that the sense of living in history serves as an indispensable prelude to every generous impulse capable of extending beyond the closest personal attachments. To live in history means, among other things, to be an active and conscious participant in the conflict over the terms of collective life, with the knowledge that this conflict continues in the midst of the technical and the everyday. We teach this truth by pushing the negative lessons to the extreme point at which they begin to become constructive insights. We hold up the image of a form of conceptual and practical activity that exemplifies a way of living in civil society without capitulating to it.

Ours may seem a narrow terrain on which to develop and defend so important a teaching. However, part of the point to the lesson is that no ideal of conduct or form of insight counts until it has

penetrated specialized fields of conduct and thought. Once penetrated, the separate areas turn out to present significant analogies. Thus, the response has a pertinence outreaching the small, privileged domain of professional practice and academic life with which it closely deals. It has broader application in a world of broken dreams and paper-pushing, of abstractions that have long ceased to be living theory. Once routinized and mutilated, such abstractions turn into the guiding principles or the empty slogans of forms of social practice to which they lend the spurious semblance of sense, authority, or necessity.

### **Reimagining Transformative Politics**

The transformative activity carried out in these different settings may be understood as a distinctive and even exemplary reaction to a particular historical circumstance. To grasp what the reaction exemplifies, we need to recall the elements of the situation.

One such element is the disruption of the imagined mechanism, and the disappearance of the real occasions, of revolutionary transformation. The conventional concept of revolution combines the notion of basic if not total change in the formative context of routine social life with the idea of widespread engagement in the remaking of a social order that the state has temporarily ceased to control. In the ruling traditions of historical and critical social theory and in the vulgar beliefs that these traditions have inspired, revolution appears as the best hope of real social change: the only clear alternative to the endless reproduction of society through reformist tinkering. In this inherited picture, the core mechanism of revolution is the alliance of a dissident elite with an oppressed mass.

In the Western industrial democracies, however, with their forms of mass-party politics, their extreme segmentation of the workforce, and their more or less shared language of a culture that combines attributes of the high and the popular, the simple hierarchical contrasts that this mechanism presupposes have been irremediably confused. Moreover, the textbook cases of modern revolution almost invariably

have depended upon the occurrence of a narrow range of enabling conditions. One of these favorable circumstances was the paralysis of the repressive and coordinating apparatus of the state in the wake of war and occupation. Another was the influence of the transformative commitments of those who seized government in the course of a national struggle against a brutal tyranny. But wars in our own historical circumstance must be either too limited or too terrible to have this enabling effect, and brutal tyrannies do not exist in the industrialized West. As the mechanisms and occasions of revolution disappear, we seem to be left with nothing but the petty squabbles of routine politics.

A second feature of the larger situation is the strange coexistence, in the rich North Atlantic countries, of constant revolution in the sphere of personal relations with repetition and drift in the struggle over the uses of governmental power and the institutional structure of society. I suggested earlier a view of the meanings and intentions of this cultural-revolutionary practice. Its aim is to free the practical and passionate relations among people from the constraining effect of any background plan of social division and hierarchy, and to recombine the experiences and opportunities associated with different social or gender categories. To the extent that it becomes cut off from the practical or imaginative contest over institutional structure, as it has in the advanced Western societies, the cultural-revolutionary practice undergoes a perversion: the unhappy search for gratification and self-fulfillment takes precedence over all other forms of subjectivity or solidarity.

A third characteristic of our historical circumstance is the gap between the homogeneous social space of citizens and proprietors depicted by classical liberal theory, and the actual organization of social life. The whole of society appears as a vast array of overlapping but nevertheless discrepant sets of prerogatives. These prerogatives, only partly set by the law, establish a system of social stations. Each place in the system is defined simultaneously by its relation to all the other places and by the degree and character of its access to governmental favor. Such favors include both the direct or indirect distribution of material resources and the making of legal rules that turn transitory

advantages into vested rights. Each place in the scheme of social stations serves as a haven within which a distinctive form of life can flourish.

Politics, narrowly understood as the contest over the control of the state, may be practiced as a struggle among more or less fragmentary interest groups. This process, however, fails to express the underlying character of society. Instead it helps explain why society, as a relatively quiescent division of labor, should be so different from politics. Here is a new *ancien régime*. Its accomplishment is to have extended to the masses of ordinary working men and women the experience of right-holding, or at least of holding rights that are not just steps in a chain of personal dependence. Its most striking defect is to have fallen short: not to have developed right-holding into active empowerment over the terms of social life. It has failed to overcome the disparity between the organization of politics, as a contest among fragmentary, crisscrossing interest groups and parties of opinion, and the organization of society, as a system of fixed divisions and hierarchies. Such a system leaves the individual captive to a more or less rigidly defined station within a more or less stabilized division of labor.

A movement able to act transformatively in the circumstance I have described must reject the false dilemmas of conservative reform or textbook revolution. It must find ways to override the contrast between the politics of personal relations and the politics of the large-scale institutional structure. It must take advantage of the highly segmented character of social life, its fragmentation into hierarchically ordered citadels of prerogative, the better to experiment with forms of social life capable of overcoming the oppositions—between right-holding and empowerment, or between the quality of grand politics and the reality of practical social experience—that this segmentation helps strengthen. Our movement exemplifies, incipiently and imperfectly, one such activity. It does so with the distinguishing opportunities and constraints that come from working through and on the medium of legal thought and practice.

A group acts in one of the institutional havens or social stations of the system of prerogatives. In its corner of the social world, it pioneers counter-models to the dominant scheme of social life. Appropriately

revised, such counter-models can be extended to other aspects of society. At the same time, it uses the material and conceptual resources at its disposal in ways that help shake up these other areas and open them to conflict over the forms of power and coordination. A special feature of our own intended version of this transformative practice is that its immediate subject, the definition of rights, helps shape every area of social practice.

A group that works in the manner just described strikes at the boundary between the politics of personal relations and the politics of the great powers of society. It deals with detailed fragments of the institutional regime that set the terms on which people can make claims on one another. It alters these relations, collectively and deliberately, in ways prefiguring or encouraging a partial change of the institutional order. By its very nature, the definition of rights spans the gap between the macrostructure and microstructure of social life.

This transformative effort cannot establish its own aims. It requires guidance: the guidance supplied by an exercise of internal development or visionary insight. The method is nevertheless intimately connected with the goal: the programmatic vision sketched earlier has as one of its aims to make social life permanently more hospitable to a transformative activity that, like the one now described, also represents a mode of empowerment. The realization of this aim would carry out part of the program of making each crucial feature of the social order effectively visible and vulnerable to controversy, conflict, and revision.

Our ideas inform an approach to the step-by-step but far-reaching reconstruction of society. If this approach is gradual and fragmentary, it can nevertheless be revolutionary in its outcome. The ideas provide the opportunity for a practice of rights definition that constantly raises anew the central problems of what the relations among people should be like in the different spheres of social existence. More specifically, the opportunity is the struggle that takes place over the legal categories and entitlements that define the institutional forms of the market and the democracy. The ideas supply the method: the contentious internal development of a received system of ideals and arrangements that deviationist doctrine illustrates. The ideas generate the animating vision of a society that has effaced the contrast between revolutionary

struggles over the established order and routine deals within it. As a result, such a society has more fully liberated exchange, production, and personal attachments from the vitiating force of dominance and dependence and from the compulsions of an unexamined sense of possibility.

## CONCLUSION

### *The Lessons of Incongruity*

**T**he chief objection to this view of the critical legal studies movement may be the formidable gap that it suggests between the reach of our intellectual and political commitments and the many severe constraints upon our situation. We must decide what to make of this gap.

First, there is the disproportion between our transformative goals and the established social peace. We have not sought, in the deceptions of a social and legal theory that claims to trump politics, consolation for our political disappointments. Surrounded by people who implicitly deny the transformability of arrangements whose contingency they also assert, we have refused to mistake the ramshackle settlements of this postwar age for the dispensations of moral providence or historical fate.

Then we face the contrast between the scope of our theoretical concerns and the relatively limited domain in which we pursue them. Every radical movement, radical both as leftist and as deep-cutting, must reject the antithesis of the technical and the philosophical. It must insist upon seeing its theoretical program realized in particular disciplines and practices if that program is to be realized at all.

Finally, there is the disparity between our intentions and the archaic

social form that they assume: a joint endeavor undertaken by discontented, factious intellectuals in the high style of nineteenth-century bourgeois radicalism. For all who participate in such an undertaking, the disharmony between intent and presence must be a cause of disquiet. We neither suppress this disquiet nor allow it the last word, because we refuse to give the last word to the historical world that we inhabit. We build with what we have and willingly pay the price for the inconformity of vision to circumstance.

The legal academy that we entered dallied in one more variant of the perennial effort to restate power and preconception as right. In and outside the law schools, most jurists looked with indifference and even disdain upon the legal theorists who, like the rights and principles or the law and economics schools, had volunteered to salvage and recreate the traditions of objectivism and formalism. These same untroubled skeptics, however, also rejected any alternative to the formalist and objectivist view.

Having failed to persuade themselves of all but the most equivocal versions of the inherited creed, they nevertheless clung to its implications and brazenly advertised their failure as the triumph of worldly wisdom over intellectual and political enthusiasm. The study of history they degraded into the retrospective rationalization of events. Philosophy they abased into a compendium of excuses for the truncation of legal analysis. The social sciences they perverted into the source of argumentative ploys with which to give arbitrary though stylized policy discussions the blessing of a specious authority.

When we came, they were a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. We turned away from those altars, and found the mind's opportunity in the heart's revenge.



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