

Moral judgment and social theory -- I:choosing among social theoriesI. Review

- (1) The problem of the class system and the division of labor.
  - a) Specific formulation of the issue. The two views to be avoided.
  - b) General formulation of the issue. Dispensing with the conception of immanent laws in history.
- (2) The two conceptions of class and the restatement of my thesis in the language of each of these conceptions.
- (3) The classes in advanced capitalist societies.
- (4) The differences between the class systems of the advanced capitalist and the socialist societies. Despite these differences, there is a significant overlap in the fundamental conditions of the managerial class and the working class.
- (5) The issue of what allows the system to survive: the possibilities of movement and the constraints on action. What we discover: certain sets of beliefs and disbeliefs contribute decisively to the stability of the system. These orientations do not follow necessarily from the objective situation of the different classes.
- (6) The factors on the side of the subordinate classes.
  - a) The resemblances among them, tending to defuse confrontation and conflict.

- b) The enjoyment of rising levels of material benefits combined with the sense that these benefits are incapable of being reconciled with other forms of satisfaction in work and social life.
- c) The partial fulfillment of the need for trust as solidarity combined with the sense that trust as community cannot be effectively reconciled with trust as autonomy.
- d) One might add still another factor: the unavailability to the subordinate classes of a systematic analysis of their situation and of a normative perspective on the criticism of power.

(7) The factors on the side of the managerial class and especially of the political elite. Oscillation between a view that growth ought to be encouraged to avoid conflict and a view that conflict ought to be avoided to encourage growth and national power. Insofar as the latter view prevails, the belief that there are immanent laws of economic change is joined with the idea that these laws require a certain kind of class system and division of labor.

(8) With respect to both the subordinate classes and the managerial class, the conception of the specific social system as a cage and a machine, which underlies the theoretical mythology of objective historical tendencies, reappears at the level of everyday experience and consciousness.

(9) The task of politics:

- a) To expand our sense of possibility.

- b) To politicize everyday life. Specifically, to raise the problem of control of different institutions, attacking the identification of nationality with class domination wherever it presents itself. To establish a connection between elite politics and class conflict.

## II. Introduction

- (1) My emphasis has been on the interplay between the organization of power and the beliefs people hold about what is desirable and what is possible. This leads to the second main focus of controversy in the tradition we have been studying: the relationship between moral judgment and social theory.
- (2) The two kinds of views I have criticized and want to avoid:
- a) The view that history taken as a whole necessarily displays moral truth; in the long run, what happens is good. This may take the form of an identification of the good with the working out of objective tendencies and immanent laws in history. It may as well appear as a belief that whatever is required by a given form of social life is good and that there is no other basis upon which to rest normative judgment.
  - b) The view that all moral judgments are ultimately groundless. One may be able to explain why they arise; but one cannot justify them through reason.
  - c) Both these positions represent abandonments of the moral point of view. This point of view is necessary not only to the guidance of practice but to the advancement of our empirical understanding of society.

(3) My plan. To approach the issue of moral judgment and social theory indirectly through three steps of analyses:

- a) The criteria of choice among social theories. Will lead to the question: In what sense must the social theorist himself make normative judgments as he theorizes?
- b) How the social theorist ought to treat the moral experiences of his subjects. In what sense is he justified in speaking of moral order in history?
- c) I shall begin to illustrate these ideas by suggesting their implications for law and legal thought. Shall continue this line of analysis in the next class.

### III. The choice among social theories

(1) What are the criteria for choice among social theories?

(2) First criterion: Internal consistency. It is not enough to ask what positions a thinker has in fact taken in the several parts of his work. One must also ask what he is entitled to say simultaneously. The desire for a well-rounded plausibility often enters into conflict with the desire for coherence.

(3) This idea may be exemplified by my discussion of Marx:

- a) The problem of technological determinism. There are parts of Marx's work that might be cited as suggesting a renunciation of all technological determinism, though there are also many texts pointing in the opposite direction. Nonetheless, we know that it is a very basic belief of Marx's that social space is not homogeneous;

Marx is not satisfied with the assertion that everything causes everything else. He wants to insist that certain structures are, on the whole, dominant over others. Why does he want to do this? On one interpretation, a way of avoiding the collapse of causal explanation into an undifferentiated circular causation. Thus, the forces of production prevail in the long run over the relations of production, and the mode of production prevails in the long run over ideology, with the qualifications I have mentioned. But how can one admit the relative dominance of some aspects of social life over others without attributing not only a relative autonomy but a relative autonomous dynamism to the most basic of all levels? That is the sense in which one is not entitled to define the hierarchy of levels of social life as Marx did and at the same time to deny responsibility for any residue of technological determinism.

- b) Another example. How to reconcile the principle that history is contingent and political with the thesis that it has a determinate solution in communism? The need to suppose that the range of possible variation diminishes as one reaches the end. But this assumption may simply highlight the implausibility of the whole scheme.

(4) The lesson to be learned: Theory advances by becoming more inclusive. But one must always be careful to ascertain whether it is true synthesis or the mere juxtaposition of contraries that has been achieved.

(5) Second criterion: Empirical adequacy. What is most faithful to the materials of history? Two qualifications to this way of putting the matter:

- a) Even if a statement is not directly verifiable or falsifiable, it may be capable of generating more concrete hypothesis that are.
- b) Even if a statement is not verifiable or falsifiable, it may be part of a view that, when taken as a whole, is vulnerable to empirical criticism.

Nothing surprising about these qualifications. They would be widely regarded as applying to any science.

(6) But, <sup>even</sup> although when expanded in this way, the empirical test is likely to be inconclusive in social theory. We are unlikely to arrive at any general agreement, even in academic settings, about which of major competing traditions of social theory should be accepted as a starting point for further inquiry. Two different interpretations of why this should be so

- a) Because we just don't happen to know enough yet at an empirical level. Or because we haven't worked out in sufficient detail the implications of different social theories for empirical research.
- b) Because we could never know enough. A comprehensive social theory has an explicit or tacit normative dimension and a bearing on how power ought to be organized. This normative dimension colors the empirical interpretation itself, though we can never be sure how much. The ability that we have within uncertain limits to

recognize inconvenient facts is part of intellectual honesty as well as political lucidity.

(7) A third criterion for choice among social theories is a normative one. Its necessity derives from the fact that any strictly empirical test is likely to be inconclusive if not impossible.

At the most modest level, this normative criterion may be stated as a pragmatic test. A comprehensive social theory is a vision of the world. If you act as if the world were like what the theory says it is like, the world may in fact become more like that. Theories will differ widely in the extent to which they have this transformative power.

But this still doesn't tell you what normative vision -- what conception of what the world should be like -- you ought to prefer.

(8) On one view to the extent that these social theories are normative, they represent mere individual posturings. The premise of this position is that there is no moral order. On another view, one chooses among normative visions -- and therefore among social theories that embody normative visions -- by abstract moral reasoning that is no different from other forms of rational demonstration. The premise of this view is that there does exist an objective moral order. Neither of these models of choice seems to accord with our experience of how social theory progresses or, more generally, I shall soon argue, with the facts of moral history.

(9) A third model of choice: There are normative demands or human needs that reassert themselves in varying historical contexts. A theory becomes more perfect by showing how these demands arise and what obstacles exist to their more complete reconciliation. The most general example of this in my argument: the reconciliation of individuality and sociability and the bearing of the organization of power upon this problem.

(10) Within the confines of this course, I have dealt with these human needs at a second remove -- less as they appear in actual social life than as organizing concerns of the major social theories themselves. The assumption must be that these concerns, far from being mere hobby-horses of the theorists, are grounded in much more pervasive aspirations.

(11) What kinds of assumptions about moral order does the social theorist make when he adopts this model of choice? He assumes that the problem of moral judgment is not merely one of idiosyncrasy. Human beings have access to these demands in part because each system of social practices constitutes an interpretation of these demands, but in part also because they are always capable of transcending the conventions amidst which they live and judging them from slightly outside. Our moral insight is itself capable of developing, and it characteristically develops by being partly freed from the concrete set of beliefs and practices in which it is embedded in any given society.

#### IV. The facts of moral history

(1) Now let me try to reach the same objective through a more direct route. What assumptions should one make about moral order to make sense of the facts of moral history, i.e., the way normative beliefs have developed and interacted with systems of power?

(2) First, take the assumption that there is an unchanging moral order -- instantaneously revealed and thereafter ceasing to grow. This is characteristic not of the major religious traditions as a whole, but only of certain strands within them. It flies in the face of our historical sense: the primary experience of the relativity and contingency of everything in history, including our normative ideas.

(3) Now take the opposite assumption that normative beliefs are simply shaped by social circumstances. The only constant factor in the history of these beliefs is the need of the dominant groups in each society to develop systems of thought that will lend their preeminence the appearance of legitimacy. The main kinds of historical facts that are difficult to square with this assumption.

- a) The radical unpredictability of the acceptance of new normative beliefs and of the degree to which they transform actual power relations. When these beliefs enter into relation with established power, they accommodate to power, while power also accommodates to them. But it is always essentially open -- to political

action -- to determine where the line of accommodation will be drawn.

- b) The extraordinary dynamic of invention and partial convergence in the history of moral ideas. The search for forms of spirituality that seem to do justice to aspirations previously believed to be in irremediable conflict.
- c) The most spectacular example of both sets of facts: the spread and the effects of the major universal religions like Buddhism and Christianity.

(4) Perhaps facts such as these give greater plausibility to the view that people are capable of partly transcending their immediate circumstances and participating in both the discovery and the creation of a more universal moral order. This same postulate of a moral order at once transcendent and incomplete is needed to account for the experiences of subjectivity and freedom.

(5) My earlier argument implies that it is not enough to treat moral ideas as simply empirical givens -- something in which the subjects of history must be involved, but the social theorist himself may not. The theorist must himself appeal to moral criteria in developing theories and in choosing among them. What is true for the theorist theorizing is true for people in general striving and struggling.

(6) Conclusion. I have spoken in earlier classes about the relationship between moral belief and power struggle. Now I have suggested that there exists a connection between moral insight and our empirical understanding of society. We ought not to be afraid

of such bonds and to hide them; we should recognize them and rejoice in them. They are a sign of the unity of our most basic concerns.

V. The situation of legal thought

(1) The situation of legal thought presents the issue of the status of normative discourse in a peculiarly direct and urgent manner.

(2) The centrality of law:

- a) The point at which morals and power confront each other most directly. The law at once the legitimation and the control of established power. Legal doctrine has been at the center of culture -- regarded, together with theology, as the highest form of knowledge in many of history's major civilizations. Its relatively peripheral position in the high culture of contemporary societies is bizarre and must be connected to the disintegration of belief in the very possibility of normative discourse.
- b) Despite its peripheral position in high culture, there are many societies -- liberal, and above all constitutional, democracies -- in which the law is a major aspect of politics. The United States is the most striking example of this -- a society whose national religion is the law and where, as Tocqueville pointed out long ago, every great matter of politics ends up becoming a legal question.

(3) Perhaps the most central issue in jurisprudence is this: What is the nature of legal reasoning? Or, more precisely, given any set of legal rules and doctrines developed by the officially appropriate lawmaking institutions, how ought one to go about applying the rules and doctrines to particular cases? What counts as a good reason for or against a legal decision?

(4) The context in which this question arises in modern liberal democracies is a context shaped by two crucial, interrelated elements:

- a) A power situation -- significant and systematic disparities of power reflected in the kind of class structure I have described. These disparities of power are more or less taken for granted.
- b) A widespread disbelief in the possibility of a set of objective judgments of value. Any imposition of objective normative judgments other than by majoritarian decision would be seen as the imposition of factional interests and ideals falsely pretending to universality.
- c) The two elements are connected:
  - 1) The fact that the power system is relatively unstable, partial, and pluralistic contributes to the awareness that the conventional hierarchies and moral practices are contingent rather than a necessary part of a natural order of things. Practices and beliefs are rendered suspect by their association with past or present power systems.

- 2) On the other hand, the same dynamic deprives one of a secure normative perspective from which to criticize established power.

(5) In this context, it becomes important to tame, though not to undermine, power by impersonal rules. But, once the rules exist, they have to be uniformly or impersonally applied. That is the task of legal doctrine and legal institutions. But what is the proper character of this law-applying procedure?

(6) The classic answer: legal formalism. The law conceived as a deductive system of rules. Legal analysis as a deductive technique by which you derive from the rules the single correct solution to every legal problem.

This conception of legal analysis has been very generally abandoned. (I shall have more to say about this in the next class.) It is recognized that in applying a rule one must be attentive to a judgment about how best to advance in the concrete instance the purposes one attributes to the rule. This usually cannot be determined simply by a reference to the intention of the lawmaker. One imagines different policies the rule might promote or principles it might instantiate and one chooses among them. The interpretation of the rule is necessarily shaped by this choice. It is commonly said that the application of rules cannot itself be fully determined by rules. But what is the status of these principles and policies to which one must appeal? Two main answers in modern jurisprudence.

(7) There is a debunking jurisprudence that asserts the choice among these policies and principles is ultimately arbitrary. The choice among them will simply reflect the balance of power among competing interests in society. Legal doctrine is a sham though a convenient one -- to give a patina of legitimacy to power in liberal democracies. This view corresponds to the postulate of no moral order.

(8) Then there is a consensualist jurisprudence that says the policies and principles that ought to prevail in the interpretation of the law are those that reflect the society's dominant consensus. But this view offers us no way to deal with the conflicts among the values and interests of different groups. More seriously, it fails to do justice to one of the crucial elements in the situation that makes law so important as a constraint on power: the belief that all values and interests are necessarily both factional rather than universal and groundless rather than rationally demonstrable.

The consensualist view corresponds to the attempt wholly to identify moral order with a system of dominant beliefs and practices in a social group.

(9) The standoff brought about by the conflict between debunking and consensualist jurisprudence is deadly serious because:

- a) law is the major form of legitimation in liberal democracies;
- b) the situation of legal thought is representative of that of normative discourse more generally.

(11) We have to take a position with respect to this dilemma one way or another. We may not know the answer to the philosophical problem of moral judgment. But it will be answered every day in the law courts and in all the institutions where power is exercised and suffered, and where struggle among people takes place. The real question for one thrown into these conflicts -- as all of us are -- is not whether his moral judgment can achieve total clarity but rather whether it can escape utter blindness.

Moral judgment and social theory -- II:  
beyond liberal legal doctrine

I. Review

(1) The problem of moral judgment and social theory: the two views to avoid:

- a) that the good is identical to historical development or established consensus;
- b) that there is no good about which anything can be said in rational terms.

(2) The first way in which I approached the issue: the criteria by which one chooses among social theories:

- a) the criterion of internal consistency;
- b) the criterion of empirical adequacy;
- c) the criterion of normative adequacy.

(3) The criterion of normative adequacy necessary because the empirical test is likely to be inconclusive, which is in turn a result of the fact that these theories have an implicit normative dimension. What is the character of this normative choice? Does the theory help us identify recurrent human needs or normative demands and understand the sense and the extent to which these needs are capable of reconciliation?

(4) The premise: Each system of social practices constitutes an interpretation of these needs. Yet our moral insight can develop by freeing itself, however partially, from the concrete set of beliefs and arrangements in which it is embedded in any given society.

(5) In the second stage of my remarks, I asked what assumptions one must accept to make sense of the facts of moral history.

- a) Insufficient to presuppose an unchanging moral order -- conflicts with our experience of relativity and contingency.
- b) Insufficient to presuppose that normative beliefs are more or less directly shaped by objective social circumstances:
  - 1) the unpredictability of their acceptance and the transformative power of normative ideas;
  - 2) the extraordinary counterpoint of revolutionary invention of new traditions and convergence among traditions.
- c) Suggestion that people are capable of partly transcending their immediate circumstances to participate in the discovery and creation of a more universal moral order.

(6) In the third part of my remarks, I suggested that in legal thought one confronts the same dilemma and requires the same kind of alternative position.

(7) The importance of law: the point at which morals and power confront each other and accommodate to each other most directly. The situation of legal thought as a model of the more general situation of normative discourse.

(8) The central issue of jurisprudence: Given a set of rules and doctrines, what counts as a good reason for a decision under the rules and doctrines?

(9) Context in which this issue arises has two interrelated elements:

- a) A system of disparate power.
- b) A widespread disbelief in the possibility of objective judgments of value.

(10) The laws must render power impersonal without undermining it. To this end, they must be uniformly applied.

(11) Legal formalism as the easiest way to achieve this. Fails because the application of rules depends on judgments of principle or policy. What is the status of these principles or policies?

(12) A dilemma for legal thought:

- a) A debunking jurisprudence that refuses to sanctify society -- it insists that the result can only reflect the triumph of the interests of dominant groups. Hence, it renounces the normative perspective as inherently illusory and conservative.
- b) A consensualist jurisprudence that preserves the normative perspective, but does so at the cost of sanctifying the consensus of the dominant groups and their dominant culture.

(13) Debunking jurisprudence corresponds to the denial of moral order; consensualist jurisprudence, to the identification of moral order with a system of dominant beliefs and practices in a social group.

(14) How can we be critical and normative or doctrinal at the same time? How can we fashion a style of legal doctrine that is critical?

(15) Plan:

- a) How does one start to move beyond consensualist legal theory?
- b) In the second part of my remarks, I shall turn from legal theory to the implicit model that infuses legal doctrine, i.e., practical legal thought. Just as I have begun to ask how one starts to move beyond consensualist legal theory, so too I shall ask how one starts to move beyond this model of legal doctrine.

## II. Beyond consensualism

- (1) The critique of consensualist jurisprudence must begin with an attack in the fundamental weapons of consensualist legal theory:
  - a) The reification of policies. One speaks about abstract purposes of legal rules without asking what are the actual consequences of different possible interpretations of the rules.
  - b) The denial of conflict among the ideals of different social groups and between these ideals and social reality.
- (2) Attack on the reification of policies. Look to actual social interests. Example: We ought to abandon the abstract identification between a policy of certainty and predictability and a commitment to rigid rules. What actually promotes predictability in

law is the congruence between legal doctrine and everyday moral discourse, which is largely non-rule bound.

(3) Attack on the suppression of conflict. We ought to look upon validating consensus as something that is not simply given, but has to be constructed. It implies the resolution of conflicts among the ideals of different groups and between ideals and realities. Therefore, it requires us to deal with the power situations that give rise to these conflicts.

(4) What this means in legal argument: willingness to orient legal doctrine toward the suppression of power differentials and to take into account the ideals of dominated as well as dominant groups. The authority of every form of community, even if it is only a consensus about normative ideas, depends on the communal ideal not being used to mask a state of domination.

(5) What this means for the conception of the judicial role. The traditional conception of the judicial role obsessed with a dilemma. Either the judge applies impersonal rules or he is simply using his office to impose his own values on the populace. But once one rejects formalism, there is no alternative to moral discourse in law. The difference between legislation and adjudication no longer a difference between the arbitrary making of rules and their mechanical application, but between the conflict of interests on a mass scale and the hammering out of moral order in specific instances.

(6) By means such as these, one turns the weapons of consensualist jurisprudence against consensualism itself. The consensualists dream their rosy dreams of social harmony -- with their pistols at their bedsides. We tiptoe into their rooms, pick up their pistols, and murder them in their sleep.

### III. The classical system of law

(1) I turn now to the model infusing actual legal doctrine. A classical model only now in the process of disintegration. Moreover, this disintegration proceeds more or less simultaneously in a broad range of liberal democracies.

(2) I shall examine this classical system from three aspects, suggesting the limitations of each:

- a) the model of substantive legal doctrine;
- b) the model of the limits of law; the conception of the areas of social life to which that kind of substantive doctrine should or should not apply.
- c) the model of institutions: the means by which individuals are supposed to defend their rights.

#### The model of substantive doctrine

(1) The ideal of individualism.

- a) Individual autonomy has primacy over all other values that the legal system might uphold. The protected interests of the individual are identified with rights acquired under, or conferred by, clearcut rules.

- b) The right as a domain of absolute discretion. Within the sphere of his rights, the individual may do as he pleases no matter what effect the exercise of the right would have on others. Each right like a loaded gun that one is absolutely privileged to shoot or not to shoot. Either one has the right or one doesn't. If one does, the fact that its exercise in a particular instance may prove harmful or even disastrous to somebody else is irrelevant.
- c) But as soon as the individual goes beyond the sphere of his formal rights he loses all claim to protection of his interests. He may have a moral claim, but he has no legal one. He will be turned down in the name of the collective interest in preserving a formal, predictable system of law.
- d) The true spirit of the system is not so much individualism as an oscillation between a radical individualism and an equally extreme collectivism. Corresponds to the conception of right as a sphere of absolute discretion, to the strict contrast of moral and legal obligations, and to a theory of obligations that sees obligations as arising from two main sources: private acts of will and the imposition of duties by the state.
- e) But one can imagine a system concerned with the logic of trust and the reconciliation of individuality and sociability. In such system, the right is never absolute; its exercise is subject to standards that restrict one's ability to impose harms on others through the

the exercise of acquired rights. In such a system, there would be no stark distinction between moral and legal obligations, because legal obligations would be seen as arising primarily from the relationships of interdependence and mutual reliance, and only secondarily from private acts of will or state imposition.

- (2) The separation of exchange justice and distributive justice.
  - a) Distributive justice governs the distribution of the divisible benefits of social life. Exchange justice governs relationships between individuals and groups situated in a relatively coordinate position.
  - b) Distributive justice believed to be political or arbitrary: handed over to the legislature or automatically resolved by the market. The specific province of law is an impersonal justice of exchange. Such a justice would be distributively blind. Social rank would be disregarded.
  - c) The resulting difficulties illustrated by the duress doctrine in contract law. The legitimacy of exchange presupposes free will. Contracts under coercion are invalid. But, given disparities of power, and, specifically, the class structure, it might seem that all other contracts between members of different classes -- and especially labor contracts -- would be voidable for duress. Thus, the need to hold to an inherently fuzzy line between aberrational and structural inequality.

- d) In an alternative system, the sharp distinction between exchange and distributive justice and between aberrational and structural inequality would be rejected. Recognized that the definition of the parties' rights vis-à-vis each other must always depend upon a judgment of their relative power position and their relative ability to bear losses.

(3) Formalism. The third general feature of this model of substantive doctrine: formalism as a method for the justification of legal decisions.

- a) The meaning of formalism.
- b) Formalism presupposed by legal individualism and the absolutist conception of private rights. Sharp distinction between the areas of entitlement and non-entitlement.
- c) Formalism presupposed by the sharp contrast of distributive and exchange justice. An impersonal justice of reciprocity is one that can be governed by formal rules that are neutral among substantive social interests in their applications as well as in their formulation.
- d) A model of law that would attack the absolutist conception of rights and the sharp distinction between exchange and distributive justice would also have to play up the role in law of principles, policies, and standards, irreducible to rules.

- (4) The underlying spirit of the classical model of law:
- a) The two elements of a structure of power that is taken for granted combined with a disbelief in the possibility of rational choice among values.
  - b) Hence, the logic of distrust. The most that one can hope for is to minimize the degree of interference of people with each other. Property is the tangible form of absolute private entitlement: a license not to participate in communal life.
  - c) The task of breaking through this model of law is the same as that of progressing toward a higher logic of trust -- of mutual vulnerability -- in social life.

The limits of law: commercial and non-commercial

- (1) The model of distrust is viewed as tolerable because it applies to only a limited area of social life. There is a range of noncommercial life -- of friendship and family -- that is defined as lying largely beyond distrust and beyond law, which is the code of distrust.
- (2) Why does the law, according to this classical model, adopt a policy of abstention toward the internal life of the family and of communal groups in general?
- a) The family is seen as being based upon love and affection. Law defines rigid areas of entitlement. But a relationship of sentiment -- it is thought -- cannot be regulated by rules without thereby being distorted or destroyed.

The law would be like Midas, turning to gold whatever it touched.

- b) The family is a structure of power. As such, it calls upon its members to accept gross inequalities in the distribution of trust. The fluidity of entitlements is tolerable because of the existence of authority. The law, however, preaches equality in distrust. Alien to the personalized domination and dependence characteristic of the family.
- c) Putting these two elements together, we come to this result. The family is a structure of power ennobled by sentiment. The redemptive union of authority and affection is the alternative to law.

(3) But what is the real consequence of this policy of abstention by the law? The communal ideal is not fully realized in fact; it is upheld only as a justification of established power. The weak are delivered into the hands of the strong.

(4) The problem of trust cannot be adequately solved by separating off a charmed circle of social relations. The problems of solidarity and trust must be dealt with throughout every aspect of social life. Otherwise one will exalt the ideals of communal spontaneity, but in so doing, bow before the harshness of existing power.

The institutional setting of legality: the adversarial defense of individual entitlements

(1) Under a legal and constitutional order, the primary mechanism for making the system work is the adversarial defense of individual

rights. The individual through his lawyers pushes his rights in court as far as he can. The procedural counterpart to the absolutist conception of rights.

(2) In the long run, and despite occasional reverses, these entitlements are defined ever more broadly and substantively.

a) This is clearest with respect to constitutional rights like due process or equal protection.

b) But it is also true with regard to the rights established by private law.

(3) What would happen in the United States if individual rights even as now defined and the ideal of equal adversarial representation were taken at their word? Most of the citizenry would be constantly sitting as jurors in judgment of the crimes committed by the rest of the citizens; civil litigation would be a major activity of everyday life; almost all madmen would be discharged and roam the streets; no important decisions by officials could be taken without endless hearings. The arrogance of the citizens would become insufferable, lending credence to Augustine's statement that under a society governed by law even the dogs walk down the streets arrogantly.

(4) My point: the working of the system depends upon the non-realization of its own ideals.

(5) The development of these substantive trends and, even more, of the kinds of tendencies for which I earlier argued pre-

supposes the abandonment of the primacy of adversarial representation of individual entitlements. It requires a much greater emphasis on communal self-regulation and on devices of mediation and reconciliation.

### Conclusion

(1) The tendencies of reform of which I have spoken are alive within the legal orders of the major liberal democracies today. How ought one to interpret them?

- a) Are they simply devices that originate as ways to legitimize established power and then produce unexpected consequences when turned by the dominated against their dominators?
- b) Or are they also examples of moral invention and progress -- not fully determined by the realities of power?

(2) There is the danger of overestimating these developments. They can be checked or circumvented whenever they pose a serious threat to established interests and ideals. Thus, they may come to nothing without fundamental political changes -- at the national level as well as at the level of specific institutions. Until that time, the practical importance of changes in legal doctrine is largely their theoretical importance as part of an effort to develop new ways of thinking normatively. Without such normative standards, the struggle for the equalization of power is blind.

(3) But, on the other hand, it would be foolish to underestimate the potential for conflict in the situation. In the course of

the accommodation between the power system and new legitimizing beliefs, it is not possible to trace beforehand where the line of accommodation will be drawn. The position of the line will be set by political imagination and political action.

(4) As long as our powers of moral insight and aspiration are not wholly enslaved to established power, there is a possibility of movement, a chance of fragility, and an occasion for hope. It is on that narrow ground between the existent and the imagined that everything that we are capable of winning or losing is lost or won.

Moral judgment and social theory -- III:  
the direction of political practice

I. Review and introduction

(1) My topic: the relationship of social theory to moral judgment, the conception of moral order required by social theory.

- a) The two kinds of views that I am seeking to avoid.
- b) The elements of a solution at a philosophical level: a conception of the relationship of recurrent human needs and aspirations to particular forms of social life.

(2) The situation of moral discourse reproduced at a more concrete level by the condition of legal theory.

- a) The two main varieties of post-formalist legal theory -- a debunking and a consensualist jurisprudence -- correspond, respectively, to the denial of moral order and to its identification with the ideals and interests of dominant groups and classes.
- b) I suggested that the way beyond consensualist jurisprudence lies in turning its own weapons against it: substituting the consideration of real social interests for that of abstract policies, and the search for a consensus that would be validating for the assumption that such a consensus already exist. Legal doctrine can make a crucial contribution to the criticism and transformation of those structures of power in everyday life that stand in the way of the emergence of shared moral

ideals less heavily compromised than the ones with which we are familiar by their association with systems of domination.

(3) At a third and most concrete level, the issue presents itself as one of going beyond the model that tacitly infuses legal doctrine, the major form of legitimation in liberal, and especially constitutional, democracies.

(4) Today, my concerns will be twofold:

- a) To develop further the suggestions I have already made about the reconstruction of legal doctrine.
- b) To outline a general conception of political practice to which this reconstruction of doctrine corresponds, and of which it must be a part.

(5) But, before I turn to these two matters, it seems wise to say something in more general terms about the relationship of theory to practice.

## II. Theory and practice

(1) In my argument, I have rejected the possibility of a sharp distinction between understanding and evaluation. The moral point of view is intrinsic to social theory itself and must provide one of the criteria for choice among competing social theories.

(2) In the course of rejecting this antithesis of social explanation and moral judgment, I have most definitely not accepted another view, with which the rejection of the fact-value dichotomy is often unjustifiably confused. This other view might be de-

scribed as the denial of the distinction between abstract and concrete knowledge. It would assert a continuity between theoretical analysis and concrete choice in particular instances. In the extreme, it is the notion that theory is a code in which you can look up the answers to concrete problems of choice. In its more subtle formulations, it is the idea that theory can become indefinitely more concrete through an interplay between its own development and practical experience -- until it is capable of resolving problems of choice. Marx probably subscribed to this view, as do most of his followers and as did many great philosophers of the past.

(3) This is not just a hobbyhorse of intellectuals. An especially bizarre example of the belief in a continuity of theoretical knowledge and practical choice can be found in military history. If you thought that when people got down to killing each other, they would cut out their nonsense and wake up, you would be mistaken. Illustrations taken from the attitude of the French General Staff toward Bergson, of the German General Staff toward Clausewitz, and of General Giap toward Hegel.

(4) What is wrong with the ideal of a fully concretized knowledge.

- a) First cognitive reason is one that would be accepted by the more subtle exponents of the idea of a continuity between theory and practice. We ought not to sit down to plan the constitution of the future society like some of the French encyclopedists. Such a view disregards the necessary interplay between the development

of theoretical understanding and the transformation of experience. There is another more fundamental challenge to the ideal of concretized knowledge.

- b) Second cognitive reason. All rational discourse as we know it involves an abstraction from particulars -- a flattening out of differences among situations. In social theory, we are concerned to diminish the degree of abstraction while still pursuing the goal of generalizing knowledge. Whence devices like the multiplication of perspectives characteristic of dialectical thought. But such knowledge is still not fully concrete, and a major element of practical judgment is our insight into immediate distinctions among situations and personalities. We make those distinctions with the help of theoretical tools, but we cannot derive them with any degree of necessity from theory itself.
- c) Beyond theory there is another sphere of concrete insight and concrete judgment. The factors that shape our thinking in this sphere are essentially three: theory itself, the historical understanding of the particular situation within which are called upon to choose and to act, and prudence or practical wisdom. What is the relationship of the first element to the other two? Theory provides a framework for reflection, a set of basic orientations and concerns, of methods of analysis and guiding ideas. But it does not, and it cannot,

fully determine the content of either the historical understanding or the practical wisdom with which, as actors in history, we approach real issues of judgment.

There is the danger of confusing the limitations of a particular social theory with the inherent limitations of social theory. We have every reason to hope in the possibility of making social theory both more general and more concrete than it is today. But neither tomorrow nor ten thousand years from now will there be any way of passing directly from theoretical understanding to practical choice.

- d) The demand for a fully concretized theoretical knowledge is morally suspect as well as misconceived. Too often it betrays a supercilious indolence or a craven desire to abdicate moral responsibility. Our attitude toward theory ought to be one of volunteering to construct for ourselves the necessary linkages between the abstract and the concrete rather than sitting back and asking: Where is the rest?

(5) There are affirmative reasons to rejoice in the relative indeterminacy of theory. It means that, in any given political situation, a person who spends most of his time theorizing will not necessarily be -- indeed, he is very unlikely to be -- the best interpreter of the practical implications of his own ideas. There are reasons to prefer some practical interpretations to others, but they are not of the same kind as the reasons for

preferring some theoretical ideas to others. It is this fact, rather than some utopian hope that everyone would be a theorist, that makes the claims of theory compatible with those of democracy.

(6) With this in mind, let me turn to the twin issues of:

- a) the reconstruction of legal doctrine;
- b) the spirit of political practice.

### III. The reconstruction of classical legal doctrine

(1) It is widely agreed that the classical model of legal doctrine that I described in the last class is in the process of disintegration in all the major liberal democracies. No sense of an alternative has emerged, nor, if my argument is correct, can it emerge within the framework of consensualist jurisprudence. A large part of the energies of contemporary legal thought are devoted to preventing the dissolution of the cadaver. But the mummifiers forget that it is one thing to keep a corpse from rotting and another thing to restore it to life.

(2) What is the standpoint from which I state what progress would consist in? The perspective developed in my criticism of the tradition of social theory: the increasing reconciliation of individuality and sociability and the reorganization of power in the interests of this reconciliation.

(3) Moreover, I believe that many of these tendencies are at work in contemporary law and legal thought, though the question of the extent, the manner, and therefore also the concrete

political significance of their development remains essentially open.

The model of substantive doctrine

(4) The ideal of autonomy is complemented by an ideal of solidarity and thereby changed in its significance. The effort to overcome the oscillation between radical individualism and radical collectivism that marks the classical model.

- a) The theory of rights. Deny in areas other than those teaching upon the basic personal freedoms of expression, association, and movement the sharp distinction between zones of entitlement and no-entitlement. The exercise of rights subject to standards determining the extent to which in a concrete situation one is empowered to sacrifice other people's interests. No reason to suppose that the same standard would be imposed in all kinds of relations. In the law as it now stands, there are certain kinds of special relations in which a party is obliged to treat the other party's interests as having a weight at least equal to his own. But in other relations -- in the ordinary bargain -- a party is entitled to treat the other party's interests as if they were of no account. In an alternative system, one might distinguish between relations in which the parties are compelled to treat each other's interests as of equal account, and relations in which one or both parties are required to treat the other party's interests

as of some account. Some of the relevant factors might be the intention of the parties, the extent to which a party has in fact trusted another, their comparative degree of power over each other, and the degree to which their relationship has some of the attributes of community. The main focus is on the quality of relations among people rather than on the conformity of their bargains to abstract criteria of just price or just value.

- b) The theory of the sources of obligations. Obligations arise primarily from the facts of interdependence and mutual reliance. The fully articulated agreement and the act of imposition by the state are the exceptional rather than the standard sources of obligation. Within such a system there can be no hard and fast distinction between legal and moral obligations.

(5) The antithesis of distributive and exchange justice is rejected. Distributive considerations are recognized to be part of the justice of exchange. Does not mean a wholesale judicial revision of the terms of all agreements. Does mean, first, that our willingness to control within outer limits the substantive fairness of agreements ought to be related to a judgment of the extent to which the parties are in a situation of unequal power and, second, that in making such a judgment we abandon the inherently tenuous and haphazard line between aberrational and structural kinds of inequality.

(6) The reconsideration of the relationship between rule and non-rule elements in law, formalist and antiformalist methods.

- a) The relativization of zones of entitlement and the convergence of exchange and distributive justice make it less necessary to rely upon rule formalism. Moreover, standards restraining the pursuit of self-interest may enumerate relevant factors but be resistant to statement as formal rules.
- b) Nevertheless, there may be a need for an emphasis upon formal rules when we are in the area of basic personal freedoms, when the parties to a relationship have little contact and few shared purposes, or when the disparity of power among them is such that in the absence of fixed rules the weak would be too subject to abuse by the strong. This last case another example of the importance of approaching the problem of solidarity always in relation to the problem of power.

The limits of law: the division of areas of social life to which the law does and does not apply

(7) The whole spirit of such a system of legal doctrine is inimical to the idea that one can solve the problem of community by establishing beyond the frontiers of impersonal law a region of social life constituted by the marriage of personal affection and personalistic authority. The consequence would be to uphold the reality of domination under the name of community. Hence, the

alternative system of legal doctrine must embrace every area of social life.

The institutional framework: the adversarial vindication of individual entitlements

(8) Such transformations as I have outlined would require a much greater emphasis on non-adversarial means for the elaboration and protection of rights: devices of mediation and collaboration that allow people in different settings directly to participate in the development of the moral ideas that are to govern their lives.

(9) Nonetheless, in the actual world, where the existing forms of communal life are bound up with systems and doctrines of domination, it would be dangerous to dismantle too extensively and too soon the procedural machinery of legalism. For all its defects, that machinery serves as a vantage point from which to attack and transform existing modes or power.

The general problem

(10) In all these areas, my constant concern has been to suggest that we must keep our eyes fixed upon the relationship of the problem of solidarity to the problem of power; the interplay between the search for community and the struggle against domination.

IV. The spirit of politics

(1) None of these developments in legal doctrine would be possible or even significant unless accompanied by much broader political transformations to which they would nevertheless

contribute the indispensable normative element. Specifically, transformations designed to change the kind of class system and division of labor I earlier discussed.

(2) When we seek to make judgments about how to reach this goal in any particular society like the United States today we have to develop and complement our theoretical ideas with elements of historical understanding of that particular society and practical insight into the opportunities for action within it. That is quite a different kind of enterprise from the one I have sought to develop here.

Nevertheless, when we do engage in this other enterprise, we ought to bear in mind certain general, and indeed even classical, principles to which political practice should be faithful if the tenor of my argument is correct.

(3) The first of these principles is to assert the spirit of contingency which is the true spirit of politics and of history. That means that we ought to reject a conception of political practice that takes concrete features of social organization for granted as reflecting either unchangeable historical trends or objective dictates of abstract values like efficiency. It has been said that the crowning achievement of historical study is to gain an intuitive sense of how things do not happen. One of the ways they do not happen is by being born along irreversible historical tides. The only ultimate constraints are the constraints of human insight and aspiration.

(4) The second principle is to politicize everyday life. That means to relate the conflicts of national and international politics to the struggle for democratic control with specific social institutions. The possibilities of mass politics will be decisively affected by the extent to which politics and political consciousness can be made to enter every sphere of social life -- whether it be the factory, the bureau, or the family -- where power is exercised. To recur to an earlier metaphor, that means shattering the screen which separates the public from the private life.

(5) The third principle is to look for the points of cleavage and conflict in the situation. But most especially for those sources of unrest that reflect suppressed or displaced human needs and aspirations. To remember, as one does this, that the only kinds of community worth saving are the ones that can survive a great deal of conflict and be strengthened by it.

(6) The fourth principle is always to deal with the problem of community from the standpoint of the problem of power and with the problem of power from the angle of the problem of community. This is the dilemma with which one must grapple. On the one hand, there is the danger that communitarian ideals may mask and help legitimate a mode of domination. The task of taming power always has priority over that of building community. On the other hand, it is never enough to postpone to some indefinite time in the future the realization of our ideals of communal life, lest our

means breed their own ends. We must already seek to anticipate in the character of the political movements in which we participate some features of the social situation toward which we are trying to work

(7) The fifth principle is to maintain a sense of the relative autonomy of political practice both from objective features of social organization and from abstract theoretical commitments. Politics is politics, and not something else. This means that we should be on the alert against allowing our actions to be guided by sectarian distinctions and prejudices inherited from the past. It also means that we can hope to forge in political practice itself new alliances and therefore new possibilities that would seem ruled out by established ideas about how different groups or classes are capable of acting.

#### V. Conclusion

(1) What is the view of moral progress and moral perfection that animates the conception of legal doctrine and political practice to which I have alluded? It is an absolutely classical view, and we have no reason to believe that it will ever change its content or decline in its authority. The only reason to mention it is to remind ourselves that it is the fixed star in the firmament, and that everything else revolves around it.

(2) It is the claim of this view that society becomes more perfect to the extent that it satisfies two conditions, neither of which it is capable of satisfying fully or wholly reconciling

with the other. First, people must become more vulnerable to each other so that they carry each other's burdens and assume the risks of involvement in each other's lives. Second, this reciprocal vulnerability must occur under conditions of increasing equality so that it does not represent the domination of some by others. The whole art of politics is to determine to what extent, and by what means, these two objectives can be satisfied and brought into harmony with each other. Another way of saying that the ultimate political issue is the relationship of the problem of solidarity to the problem of power.

(3) This ideal of social perfection is based upon a view of the moral growth of the individual person. The core of this notion is the idea that no one rescues himself; that no man by his powers alone can bring his moral faculties to a higher development. By entering into the situation of his fellows, he can reinforce his independent sense of self through the strengthening of his life in community. By opening himself to other people, he runs the risk of almost irreparable harm, but he also wins the chance of receiving from them, as grace from heaven, the saving gift of love.

Conclusion

(1) All theoretical inquiry about man and society begins and ends in the elucidation of our immediate moral experience. So I thought that by way of conclusion I might say a few things about the relationship of moral experience to the kind of inquiry in which we have been engaged here.

- a) What are the basic existential puzzles that provoke social theory?
- b) What are the moral qualities most important to the successful pursuit of social theory?
- c) What are the moral forces that most often stand in the way of progress in social theory and, most specifically, the moral forces active in a situation like the one we are in right here in this course? And how can one or ought one to deal with these obstacles?

(2) First, the existential riddles. Social theory arises from two basic questions. It loses its way when it forgets them; it regains strength when it returns to them.

- a) One of these puzzles is how and why social life could ever generate a hierarchy that makes some individuals and groups subject to others.
- b) The second puzzle is more general in the eyes of those who disbelieve that an inclusive and ordered hierarchy is a necessary feature of social life. How can or do

men in society come to terms with two conflicting sets of desires that they have: on the one hand, the desire to affirm their autonomy from nature, from other people and from their own works and deeds; on the other hand, the desire to recognize one's own self as integrated with nature, as at home in community, and as fully represented in one's own deeds and works?

- c) The ruling ambition of any social theory, whether explicitly stated or tacitly held, must be to deal with these two puzzles -- the puzzle about domination and the puzzle about the place of the self in the world -- and to relate them to each other.

(3) What, then, are the qualities of moral vision required to pursue social theory in this spirit?

- a) First, there must be a sense of wonderment about the very existence and possibility of power, and this sense is bound up at the deeper levels of the mind with an ardent hatred of servility in all its forms.
- b) Second, there must be the quality of sympathetic imagination that allows us to recognize the bearing of even the most concrete and seemingly trivial features of social organization on man's ultimate concerns with his relationship to his own work, to other people, and to nature.
- c) Third, the haughty independence of the critical mind must be accompanied by a delight in the integrity and the particularity of every event and person in history -- a delight that keeps us from sacrificing the richness of the

historical world on the altar of abstraction.

(4) What are the specific moral forces likely to deflect us from the right kind of approach to social theory -- in a course like this one, in a situation like our own? First consider a few of the wrong kinds of reasons that may attract people to such an inquiry.

- a) Some may look for diversion from the serious business of specialized study or for a vacation in a field to which they have no serious intellectual or moral commitment. They will soon find social theory less entertaining than they expected. From their brief foray into it, they will get only what they deserve -- a permanent distaste for speculative social thought.
- b) A second group looks for the organization and vindication of knowledge already acquired in more specialized study. Something that will help them fit together the bits and pieces that have been hoarded up elsewhere. Theirs is a fundamental misconception of the nature of theory, which creates only by first destroying. Social theory, like all theory, is revolutionary by its nature. It presupposes that we can understand our beliefs as a system and therefore as something contingent. It makes the hidden order of ideas that determines and limits the possibilities of our thinking open to attack and revision. It points out that we can grasp the contradictions in our thought and the conflicts in life to which those contradictions correspond.

c) Third, there will be those who are looking for a connection between social theory and their own discontent and puzzlement about their situations. These are the most serious and the best. With them, however, there is the danger that the longing for solace will overwhelm the desire for understanding. In their anxiety to receive from theory the consolation it cannot give, they may overlook the enlightenment it is able to provide.

(5) The teacher who views social theory from the perspective I have described is, in turn, likely to be in an equivocal moral position. The situation of abstract thinking and abstract criticism allows him to feign a carping disengagement from the reality he is criticizing combined with the pleasures of addressing a reasonably subdued crowd. The authorities of the university tell him, in effect, we shall pander to your narcissism and you, in exchange, will stand for our pluralism. You think you are a voice crying out in the desert, but give us time, and we shall make you into a minor ornament of our temple.

(6) There is then the temptation to feel that the whole enterprise is irremediably tainted by the motives that draw one into it. I think that this response is wrong for two reasons, of which one has to do with the nature of virtue and the other with the powers of theory.

(7) There is a notion that constantly misleads us in the moral life. It is the tendency that repeatedly pushes people into the belief that there are only two possible positions one can ultimately have: innocence, which is identified with a contemplative

abstention from action, and corruption, which is equated with action in the world. One seems forced to choose between the powerlessness of an innocence that refuses to be compromised by the world and the determination to act, which seems to presuppose a rejection of every ideal of purity.

But such a view is mistaken at the core, and is itself the sign of corruption. First, theory is also a form of activity that is done in the world and involves the compromises of the world. It is not made in heaven; it is made on earth by people with earthly vices and earthly longings. Second, the only kind of virtue worth having is one that accepts the burdens and responsibilities of involvement. Virtue is not the serene possession of innocence, but the struggle for improvement from a compromised position within the world. When a tiger becomes perfect, it has long since turned into a rug, and it is much better to be an imperfect tiger than a perfect rug.

(8) I have spoken about the false alternative of innocence and corruption. There is another reason why one should hesitate to allow one's skepticism about motives and circumstances to shake one's confidence in the possibilities of social theory, in particular, and of speculative thought, in general. There just is something mysterious and terrible about the ability of speculative thought to reach us. Even in the most adverse of conditions and in the most corrupt of forms, it retains the power to speak to the mind and to move the soul. It begins in doubt, it works

in darkness and it leads often to despair. But those who pursue it with clarity and courage may find that it ends in the discovery of hope, a hope for once not based on illusion and complacency but on knowledge and striving.