

THE COMPLEX STRUCTURE OF LEGAL CONSCIOUSNESS

The moment of nineteenth-century legal science

No style of discourse, however powerful its influence, occupies the whole of a legal culture or penetrates all of a legal mind. Even in those places where it is most articulate and effective rationalizing legal analysis gains its characteristic position from its coexistence with different ideas of law. Before turning to the roots and limits of the policy-oriented and principle-based mode of legal reasoning, consider the ordinary shape of this coexistence today. I take my examples from the legal culture that has pushed furthest beyond the limits of nineteenth-century legal science – that of the United States – and I tell the story in the form of a simplified sequence. Three moments of legal consciousness, each uniting a vision of law with a method of legal analysis, have followed one another in time. The later, however, do not fully displace the earlier. They become superimposed upon the preceding ones. This superimposition produces the complex coexistence of distinct ideas of law and practices of analysis marking the legal culture in which, increasingly, we have come to move.

The first moment in this sequence is the moment of nineteenth-century legal science. The animating idea is the effort to make patent the hidden legal content of a free political and economic order. This content consists in a system of property and contract rights and in a system of public-law arrangements and entitlements safeguarding the private order. Hard law is the distributively neutral law of coordination defined by this inbuilt legal content of the type of a free society. It must be distinguished from bad, soft, political law: the product of the hijacking of governmental power by groups who use lawmaking power to distribute rights and resources to themselves.

The methodological instrument for this substantive vision of law is the repertory of techniques we now know derisively as formalism and conceptualism. We should not characterize them as a crude deductivist prejudice about language and interpretation, for they make sense in the context of the idea of a predetermined legal content to a free order. Thus, conceptualism explores the packages of rule and doctrine inherent in the organizing categories of the rights system – categories like property itself – while formalism infers lower-order propositions from higher-order ones. Discursive practices designed to police the boundaries between distributively neutral, good law and redistributive, bad law complement these

basic methods. The primary such policing practice is constructive interpretation, redescribing and reforming bad law, whenever persuasively possible, as good law. The back-up policing practice is constitutional invalidation, striking down those instances of redistribution through law that cannot be preempted through improving interpretation. By deploying all these methods legal science carries out its fundamental mission of representing in a system of legal rules and ideas, and thereby securing against perversion, the scheme of political and economic freedom. Its scientific task matches its political responsibilities.

This approach to law suffocated social conflict. All the active interests and ideologies that wanted more from the promises of modernity, and refused to see in the institutions of their society a scheme of neutral coordination, waged war against it. The project of legal science, however, was not merely attacked from without. Like every powerful imaginative practice, it undermined itself. Its votaries discovered that at every turn in the march from relatively greater abstraction to relatively greater concreteness in the definitions of rules and concepts there was more than one plausible turn to take. Thus, a method designed to vindicate conceptual unity and institutional necessity revealed nevertheless unimagined diversity and opportunity in established law.

The single most important instance of this insight into unwanted indeterminacy was the discovery of irremediable conflict among property rights. The doctrine of *sic utere* was one of many announcing the hope that under a private-property regime each rightholder could enjoy absolute discretion within the citadel of the right. So long as he did not invade anyone else's zone of right and property he could enjoy the privileges of his whims. He could treat property as an alternative not only to personal dependence but also to social interdependence. Practical lawyers, however, discovered that the conflict among rights, reasonably and conventionally exercised, was both pervasive and unavoidable. The law in practice turned out to be rife with *damnum absque iniuria* – instances of damage one rightholder could, with immunity or without liability, do to another – and with competitive injury – the infliction of economic harm resulting from the ordinary practices of economic competition.

Every initiative in the deployment of rights proved to have what the economists later called “externalities.” To prohibit the initiatives or to make the rightholder pay for all of them (“internalizing the externalities”) would be to inhibit productive action and to eviscerate the force of the rights. But to allow the rights-invading use of rights and to pick and choose in the imposition of liability for the prejudicial consequences was

to recognize the poverty of the pure logic of rights. There was no way to resolve the conflicts, or to make the selections, by probing more deeply into the system of categories and doctrines. It was necessary to take a stand and to justify it by reference to judgements of purpose, whether avowedly factional or allegedly impersonal. Doctrines of competitive injury and of *damnum absque iniuria* revealed the ineradicable contest among property rights, however such rights might be defined, in the law of a market economy. They marked horizontal conflicts among owners, and required policy compromises to resolve them.

Legal thought took much longer to recognize a second, vertical style of conflict: a series of unavoidable and interlocking choices about the conditions on which economic agents could run risks without incurring immediate economic death. The red line of failure and liability at which economic agents must cease to function, going bankrupt or paying for the consequences of the harms they inflict upon others, has no fixed and natural place in the legal logic of a market economy. The jurists and the legislator had to confront a connected set of dilemmas: immediate bankruptcy for failed firms or the chance for a second life through reorganization under the control of present management (the Chapter 11 of American bankruptcy law); unlimited or limited liability in combined economic activity; the governmental monopoly of money-making or its independent creation by banks, and, with the choice of the public monopoly of money and the emergence of a central banking system, insured or uninsured bank deposits.

The structure of these dilemmas was always the same. The impulse to contain moral hazard and to make people responsible for the uncompensated consequences of their activities had to be balanced against the need to encourage risk-taking behavior in production and in finance. There was never a way to distinguish beforehand, and in general, rule-bound terms, the good risk-bearing activities from the bad ones. Indeed, the impossibility of making such a distinction has been one of the reasons to prefer a market economy in the first place. Similarly, the existence of a class of people happy to pay a premium for the privilege of running a risk has been said to be the historical justification of "capitalism," if by capitalism we understand not just the abstract conception of a market economy but a particular version of that economy rewarding personal success with personal wealth.

The red line was not only movable, it had to be moved all the time, and no particular way of demarcating it seemed wholly satisfactory. Once again, the choices had to be made by purposive judgements of policy that

the jurists were powerless to infer from the supposed legal logic of the economic order. We still struggle to understand that assumptions about the possible institutional forms of the market economy – assumptions worked out in the detailed language of law – shape what we imagine the possible solutions to both the horizontal and the vertical conflicts among property rights to be.

It is one thing to recognize that horizontal and vertical conflicts among property rights are pervasive; that we cannot infer the solutions to them from the abstract conception of a market economy and of its legal logic; and that such localized solutions as we may adopt must rely upon fragmentary and contested compromises among policies or interests. It is another thing to identify in some of these solutions the germs of a market economy and of a system of private law distinct from the ones established in the contemporary industrial democracies.

For example, Chapter 11-style corporate reorganization in American bankruptcy law provides an alternative to the death of a firm in the red: the management of the firm may be given a chance to borrow and to reform while the firm holds its creditors at bay. (Similar provisions exist in the bankruptcy laws of all the industrial democracies.) There are analogies to Chapter 11 in many fields of law, all the way from the intervention of the IMF and of consortia of governments to rescue countries undergoing liquidity crises to the public supervision of regional economic reconstruction when major parts of industry risk going broke. (Think of the selective turnaround decisions undertaken by the *Treuhandgesellschaft* in the reconstruction and privatization of East German industry.)

Suppose that we lack reliable, *ex ante* economic standards by which to identify the deserving beneficiaries of selective turnaround. Suppose, further, that the success of selective turnaround – the wisdom of the initial decisions and the support for their continuing execution in firms and communities – depends, as so many economic initiatives do, upon several interlocking forms of cooperation: between firms and local governments, between local governments and community organizations, between investors and workers, between insiders (jobholders in the rescued enterprises) and outsiders (workers in established firms and job seekers). Under these assumptions, selective turnaround may demand a comprehensive and complex legal structure of cooperation among interests.

Such a structure may include transactions that amount to continuing discussions; reciprocal reliance and adjustment that stop short of becoming articulated contracts; property rights that violate the traditional property-right logic of the brightline demarcation of zones of entitlement;

and supervisory or coordinating associations that stand midway between governments and firms. To develop such suggestions would be to reinvent the legal form of the market economy. To begin reinventing the legal form of the market economy would be to bring pressure to bear against the inherited legal forms of representative democracy and of free civil society.

There is a difference between recognizing that conflicts among property rights must be resolved by flawed, rough-and-ready compromises, and seeing in some of these compromises the possible starting points of a cumulative institutional transformation. It is, however, no more than a difference in how far we keep moving away from the original idea of a market economy with an inbuilt and determinate legal logic. Nonetheless, although legal thought has decisively done the first of these two jobs, it has just as unequivocally failed to accomplish, or even to imagine, the second.

The self-subversive work of legal thought, illustrated by the progressive discovery of the horizontal and vertical conflicts among property rights, has had two remarkable features. The first is that it has gone so far. The second is that it has nevertheless stopped where it has.

Under these restraints, legal analysis has slowly developed its insight into the political constitution and the institutional contingency of the market economy. The whole movement of legal doctrine and legal theory for the last hundred and fifty years has been a struggle to develop this insight and to understand its implications. The struggle, however, was waged by, as well as against, legal science; legal science waged war against itself.

Contemporary jurists mistakenly believe themselves to be free of the taint of this vision of law. Thus, American legal theory regularly congratulates itself on its rejection of "Lochnerism": the fetishistic acceptance and constitutional entrenchment of a particular private-rights system against all efforts to redistribute rights and resources and to regulate economic activity. In fact, however, Lochnerism has survived as an undercurrent of later moments of legal consciousness. In this latent position it has turned out to be all the more recalcitrant to criticism. To be sure, it has enjoyed its most vigorous afterlife in economics rather than in legal thought: all but the most austere and self-denying versions of economic analysis continue to rely upon the idea of a natural legal-institutional form of the market economy, open to only minor variations.

This belated and unconfessed Lochnerism also continues to leave its mark upon law. It does so, sometimes, in the form of organizing conceptions such as the state-action doctrine in American law and the functional

equivalents to that doctrine in other legal systems. State-action doctrine assumes the validity of a distinction between social arrangements that are politically constituted and social arrangements that are somehow just prepolitically there. Yet that distinction rather than one of its now derided byproducts – the special authority of private-law rules and concepts to mark neutral baselines against which to judge governmental activism – was precisely the central axiom of Lochnerism. Sometimes we can identify the influence of this vision of law in a set of attitudes eluding precise doctrinal manifestation, such as the willingness to accept the greater stability and rationality of the central rules of private law. This view contrasts private law to the circumstantial and controversial efforts of the regulatory and redistributive state as if the rules of property and exchange were any less artificial than the provisions for tax-and-transfer. However, the single most important demonstration of the continuing power of the project of legal science is rationalizing legal analysis, the style of discourse that displaced nineteenth-century legal science while remaining dependent upon many of its assumptions and devoted to many of its ambitions.

The moment of rationalizing legal analysis

The second moment in contemporary legal consciousness is the moment of rationalizing legal analysis itself: the policy-oriented and principle-based style of legal analysis that, recognizing the reliance of legal analysis upon the ascription of purpose, gave to the guiding purposes the content of general conceptions of collective welfare or political right. This idealizing and generalizing discourse about law in the language of connected principle and policy ideas was not, however, the sole successor to the earlier project of legal science. At least two different vocabularies for thinking and talking about law have flourished in the aftermath of that project: the view of law as the outcome of a series of compromises in a well-ordered conflict of organized interests – the conception sometimes labelled “interest-group pluralism” – and the idea of law as the flawed but tentative embodiment of impersonal ideals of welfare and right. I shall soon have more to say about the paradoxical and disconcerting transactions between these two vocabularies: the one leading to an understanding of law as a series of regulated contracts among interest groups; the other producing a view of law as a partial expression of general and idealized purpose. The latter approach rather than the former has achieved canonical status in professional and academic legal culture. It is, in any event, the one closest in spirit and consequence to the legal science it displaced. The coexistence of these two

vocabularies serves to introduce the central organizing distinction of the new style of legal analysis.

Rationalizing legal analysis puts the contrast between law as impersonal policy and principle and law as factional self-dealing by powerful interest groups in place of the more ambitious and inflexible contrast between law as a distributively neutral framework of coordination among free and equal individuals and law as an illicit, redistributive intervention by the government in this framework. Correctly understood, the parallel between these two pairs of distinctions should be too close for comfort. What is gone is the idea of a fixed system of private and public rights implicit in the very definition of a free political and economic order. Rationalizing legal analysis has rejected, together with that idea, its chief corollary: the claim of the private-law system of property and contract to provide a distributively neutral standard against which to judge the legitimacy of governmental "intervention." It has nevertheless rescued from the ruin of that claim the commitment to represent law as the search for a public interest capable of description in the language of policy and principle and resolutely contrasted to factional self-promotion through lawmaking.

No component of public interest seems more important than the commitment to assure people of the practical conditions effectively to enjoy the rights of free citizens, free economic agents, and free individuals. The regulatory and redistributive activity of the state gains legitimacy, and demonstrates its connection with the public interest, by having as its mission the satisfaction of the requirements for the effective enjoyment of rights.

The self-conscious task of this representation of law was to imagine as law the regulatory and redistributive activity of an activist government. This is the work in which rationalizing legal analysis has been most successful. The larger task was to reimagine from the perspective of social democracy the working methods of legal reasoning and the entire body of law and legal institutions including traditional private law. In this larger work the success of rationalizing legal analysis, and of its supporting cast of theories of law, has been far less certain. Indeed, the incompleteness of the larger mission has given contemporary jurists an excuse to disclaim broader intellectual or transformative ambitions; there is so much work left to do. Spellbound by the Atlas complex it has willed upon itself, legal thought halts in its journey away from the nineteenth-century project of legal science.

Later sections explore the motivations and the limitations of this now

dominant way of thinking and talking about law. Once again, the combination of real social conflicts and irrepressible intellectual self-subversion has begun to expose its frailties. The endless strife over group benefits and burdens, social incorporation and exclusion, in the era of regulatory and redistributive government undermines the authority of the idea that any particular pattern of regulation and redistribution could be held up as the authoritative correction to the preexisting social order: the one that would make real the promises of liberal democracy. More troubling yet is the discovery that the most important sources of frustration of the effective enjoyment of rights may lie in practices and institutions that the policy tools of an institutionally conservative social democracy are unable to reach and that the lawyer's discourse of policy and principle is powerless to represent.

As a strategy for limiting inequality, tax-and-transfer has ordinarily had disappointing results. In few countries has it produced more than marginal increases in equality of wealth and income, and it has had an even more modest effect upon the distribution of economic power. Every major effort at redistribution through tax-and-transfer produces economic stress and crisis either directly through disinvestment and capital flight or indirectly through its corrosive effects upon public finance. This practical disappointment finds expression in a mode of discourse contrasting equity and efficiency as goals locked in a tense and often inverse relation. The alternative would be a reorganization of the system for production and exchange, and of the relations between public power and private initiative, influencing the primary distribution of wealth and income, while affirming and extending the scope of market activity. Such an alternative, however, depends on institutional experiments, including experiments in the property regime, that the social-democratic compromise seems to have foreclosed.

As the limits of the social-democratic compromise become manifest, rationalizing legal analysis finds itself pulled between two forces. On the one hand, it clings to the attempt to put the best face on the established institutional settlement, treating it not as a transitory and accidental set of compromises but as a lasting and rational framework, to be perfected rather than challenged or changed. On the other hand, however, to take seriously the view of law as an embodiment of social ideals, describable in the language of policy and principle, is to admit that these ideals may come into conflict with actual practices and organizations. Complex enforcement is the single most striking expression of this countervailing impulse in legal doctrine. Up until now, a division of domains has

concealed this conflict of directions. The immunization of institutional arrangements against close scrutiny has prevailed in the vision of substantive law. The selective probing of institutions has remained largely confined to development of procedural remedies such as those of complex enforcement. The consequence of this procedural innovation, we have seen, is to use the available roles and agents of the legal process incongruously: judges undertake complex enforcement because they want to, because the mandate of substantive law seems to require that someone undertake it, and because all other branches of government seem just as unsuited to the task as the judiciary is. Lacking the resources of authority, expertise, and funds with which to do the job, they do it haltingly and at the margins, until they run out of power and out of will. Thus, by the self-subversive logic of evolution in legal ideas, we derationalize procedure the better to vindicate the rationalization of substantive law. At the next turn of our thinking, we might well ask why we should not derationalize substantive law the better to affirm our interests and ideals.

There are several equivalent ways in which to describe the core of weakness and self-subversion in rationalizing legal analysis; later sections approach this task from a number of directions. On one description the focus of perplexity in rationalizing legal analysis is the difficulty of sustaining the organizing distinction between factional interest and impersonal policy or principle. Every particular definition of the public interest, in the idealized language of policy and principle, will seem either too indeterminate to guide judgement toward particular outcomes or too difficult to disentangle from controversial beliefs, connected, in turn, to factional interests.

The most revealing and disconcerting aspect of this discursive practice, however, becomes apparent when we focus on the relation between legal ideals and social facts. Consider, as an example, the typical form of a law-review article by an American legal academic at the close of the twentieth century. Such an article typically presents an extended part of legal rule and doctrine as the expression of a connected set of policies and principles. It criticizes part of that received body of rule and doctrine as inadequate to the achievement of the ascribed ideal purposes. It concludes with a proposal for law reform resulting in a more defensible and comprehensive equilibrium between the detailed legal material and the ideal conceptions intended to make sense of that material. But why should the reform stop at one point rather than another? Why should it not advance more deeply into the stuff of social arrangements, reconstructing them for the sake of the ideal conceptions, and then, later on,

redefining the ideal conceptions in the light of the actual or imagined rearrangements? An implicit judgement of practical political feasibility controls the answer to this question. Given that most of the institutional background must, as a practical matter, be held constant at any given time, proposals for institutional tinkering should remain modest and marginal. Moreover, given that the author is speaking in the impersonal voice of the quasi-judge or the quasi-bureaucrat, the reform proposals should never seem too sectarian. Thus, the practice of rationalizing legal analysis comes to be shaped by implicit constraints that the analytic practice itself leaves largely unchallenged and unexplored. From this conformity to shadowy and unjustified constraints arises the sense of relative arbitrariness, of confusion between normative justification and practical strategy, that, increasingly, becomes part of the actual experience of doing legal analysis.

The example of the law-review article may seem limited in its significance to the situation of a jurist who, without administrative or adjudicative responsibilities, but with a desire to remain connected to the worlds of practical administration and adjudication, offers proposals to reform law. Yet the earlier example of the complex injunctions suggests that the problem reappears in many of the roles in which we practice legal analysis. The judge must revise received legal understandings, from time to time, but if he revises too many of them, or revises a few of them too radically, and if in so doing he challenges and changes some part of the institutional order defined in law, he transgresses the boundaries of the role assigned to him by rationalizing legal analysis. What keeps him within these boundaries? The happy assurance that most of the received body of law and legal understanding at any given time can in fact be represented as the expression of connected policies and principles? If so, how could such a harmony between the prospective history of law as a history of conflicts among groups, interests, and visions and the retrospective rationalization of law as an intelligible scheme of policy and principle ever occur? Or is the restraint of revisionary power by the judge something that comes from an independent set of standards about what judges may appropriately do? If so, from where do these standards come? Whatever their content and origin, how can they escape imposing a severe and wandering constraint upon our capacity to reimagine and to reconstruct law as the expression of policy and principle?

The moment of the tactical reinterpretation of legal doctrine

Such varieties of bafflement have today become an integral part of the experience of doing policy-oriented and principle-based legal analysis. Together with the destabilizing forces that come from outside – from the real politics of an activist, regulatory, and redistributive government – they have given rise to a third moment in the evolution of modern legal consciousness, superimposed upon the two earlier moments, of nineteenth-century legal science and rationalizing legal analysis. This third moment is the redefinition of the principle-based and policy-oriented style of legal discourse as a tactic deployed in the service of a distinctive family of political projects.

I shall label this family of political projects conservative reformism: the pursuit of programmatic goals, such as more economic competition or greater equality of practical opportunity and cultural voice, within the limits imposed by the established institutional order. A specially influential version of conservative reformism in the development of the tactical moment in contemporary legal consciousness has been what I shall label progressive pessimistic reformism.

Two beliefs and a commitment define progressive pessimistic reformism. The first belief is what makes it a species of conservative reformism: no institutional change is in the cards. Moreover, even if such a change were possible and desirable, we, the jurists, cannot be its legitimate and effective agents. The second belief is what makes it pessimistic: in the politics of lawmaking, the self-serving majority will regularly dump on marginalized and powerless groups. Even if we could ensure cumulative change in the formative arrangements and enacted beliefs of society, it would likely make things even more dangerous for the most vulnerable groups. Their protective rights might be swept away in the enthusiasm of a reconstructive period. The tax-and-transfer schemes of an institutionally conservative social democracy and the retrospective improvement of law by rationalizing legal analysis offer the weak their best hope. Indeed, seen in this revealing light, social democracy and rationalizing legal analysis are the twin instruments of the same political project. By putting the best face on the law, by representing it as impersonal policy and principle rather than as the triumph of powerful and partial coalitions of interests, the lawyer can make things better for the people who need help most. In the name of the idealizing interpretation of law, he can redistribute rights and resources to the repeated victims of the lawmaking coalitions. The

progressive commitment is, therefore, the determination so to use rationalizing legal analysis.

From such a vantage point the canonical style of legal doctrine may be a lie, but it is a noble and a necessary lie. It gives insurance against the worst as well as the promise of modest but real improvement in the condition of those who, without its help, would stand to lose most.

The analytic practice accompanying this vision of law hardly differs from the recourse to ideal purposes in rationalizing legal analysis. It is rationalizing legal analysis with an ironic proviso: that although the assumptions of the method may not be literally believable they serve a vital goal. The subtlety in this conversion of vision into vocabulary and of vocabulary into strategy is that the strategic imperative requires the agent to continue speaking the vocabulary of the vision in which he has ceased to believe. In so doing, he fails fully to grasp the hidden restraints implicit in his supposedly strategic language. Rationalizing legal analysis, it turns out, is not equally well suited for all varieties of politics. It suits an institutionally conservative politics: one that renounces persistent and cumulative tinkering with the institutional structure and seeks, instead, to redistribute rights and resources within that structure.

When the major problems of society begin to require, for their solution, experimentalism about practical arrangements, this defect proves fatal. The tactic avenges itself against the tactician.

The present form of legal consciousness is not one of these moments of legal thought or another. It is, rather, the combination of all three. All three ways of thinking coexist not only in the same legal and political culture but often in the same individual minds. The result is a discursive community bound together, as discursive communities so often are, according to the principle enunciated by the narrator in Proust's novel: we are friends with those whose ideas are at the same level of confusion as our own.