

**TOWARD AN HISTORICAL  
UNDERSTANDING OF LEGAL  
CONSCIOUSNESS:  
THE CASE OF CLASSICAL LEGAL THOUGHT  
IN AMERICA, 1850-1940**

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**I.**

My subject is the development and disintegration of a form of American legal thought that emerged between 1850 and 1885 and flourished between 1885 and 1940, allowance made for the spurious precision of dates. Because this way of thinking amounted to a rationalistic ordering of the whole legal universe, I will call it Classical legal thought. For a crucial season, that of the transformation of American economic and social life, the thinking of the legal elite was organized neither around the categories

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of natural right and utilitarianism, nor in the vaguely instrumentalist or nationalist mode of the "Formative Era." During this period, treatise writers, leaders of the bar, Supreme Court Justices, and the like shared a conception of law that appeared to transcend the old conflicting schools, and to ally the profession with science against both philosophical speculation and the crudities of democratic politics.

That the "real" alliance influencing legal outcomes between 1865 and 1940 was that of the older conservatism of the profession with a class of despoiling entrepreneurs and politicians against the working class, the farmers, and the "public interest" is an article of faith in the liberal historiography of the period. I believe that the preoccupation with validating this vision of the recent past has hindered understanding of the dilemmas of modern legal and political theory. We can understand these only if we recognize and confront the existence of legal consciousness as an entity with a measure of autonomy. It is a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest. The autonomy of legal consciousness is a premise; yet that autonomy is no more than relative. Not only the particular concepts and operations characteristic of a period, but also the entity that they together constitute, are intelligible only in terms of the larger structures of social thought and action.

This approach denies the importance neither of ideologies like *laissez-faire*, nor of concrete economic interests, nor of the underlying structure of political power. It insists only that legal consciousness, which has its own structure, mediates their influence on particular legal results. The introduction of a third tier between interest or power and outcomes greatly complicates the task of historical exposition. This essay is devoted to outlining the general conceptual apparatus: the language necessary to describe the form and content of a consciousness. If this is worth the effort, it is because it makes it possible to learn things about our present situation which were obscured by the simpler vision of an unmediated interplay of purposes and outcomes.

Stated in the most general possible way, this is what happened: Before the Civil War, the legal elite conceived the set of legal relationships that together comprise the American legal system—i.e., private citizen to private citizen, private citizen to state, legislature to judiciary, and federal to state government—as qualitatively distinct from one another and as operated legally according to qualitatively distinct analytic principles—i.e., the common law, sovereignty limited by written constitutions, the equilibrium of forces between separate governmental powers, the union of sovereign states.

During the Classical period, the legal elite conceived these four institu-

tional relationships as four particular instances of a single general legal relation: each of them was an example of the delegation of legal powers absolute within their spheres. The role of the judiciary (its sphere of absolute power) was the application of a single, distinctively legal, analytic apparatus to the job of policing the boundaries of these spheres. The legal system appeared to have synthesized successfully the positivist science of law, natural rights constitutionalism, and Classical Economics.

After 1900, this highly-integrated system began a process of further integration that tended toward the reduction of all legal action to the enforcement of intrinsically just ground rules for economic struggle among private actors. The refinements were a response to attacks by liberals and progressives on the political role of the judiciary, but proved ultimately self-destructive. The triumph of a purely formal theory of marginal utility in economics and the appearance of American philosophical pragmatism undermined the analytic apparatus, leading to the dissipation of faith in the intrinsic justice of the rules, and discrediting the notion that they could be objectively developed or applied. The outcome was a disintegration of legal thought into mutually autonomous subcategories different from but somewhat resembling those of the pre-Civil War period, and the recession of the judiciary from the role of guardian of the integrity of fundamental legal relationships.

The rise and fall of Classical legal thought was an integral, necessary event in the current of development within which we live. I reject the conception of "formalism" as an aberrational interlude, marring what would otherwise be a uniform and consistent approach—sometimes vaguely denominated "instrumentalism"—equally characteristic of the pre-Civil War and post-1937 periods. As I see it, we live not in a time of return to the sound practice of 1830, but in a post-Classical age of disintegration.

My primary purpose is to write a history of the transformations of legal consciousness. I believe that it is possible to isolate and describe the significant dimensions or aspects of the body of ideas through which lawyers experience legal issues. But once legal consciousness begins to take on a certain definition, a whole series of hypotheses suggest themselves concerning the relationship between its form and the behavior of the actors in the legal system.

I am particularly interested in the connection between the forms of legal consciousness and what I will call judicial activism or interventionism. Judicial activism is a relative term indicating an unusually great willingness to treat judicial power as an autonomous, creative factor in the development of economic and political life. In public law, it refers to the judge's willingness to intervene dramatically in political life in a way that appears to flout majority sentiment, as represented by the legislature and

executive. In private law, it refers to willingness to change or evolve the law in ways that upset existing patterns of economic and social advantage. As I use it, judicial activism has no inherent political tendency to the right or to the left. The conservative critics of the Warren Court have taught us to see the strong parallel between the right-wing interventionism of the period 1890-1937 (the rights of property and contract) and the left-wing interventionism of 1955-1970 (equality). I take this perspective as a starting point.

The significance of the general phenomenon of activism lies in its premise. It is that human reason is something more than an instrumental mechanism for the execution of collective or individual decisions reached through the clash of interests, passions, or appetites. It is perhaps no more than an accident of our institutional history that we have put judges in the position of being at once enormously powerful and without democratic political legitimation. What is important is that their anomalous position has forced them, generation after generation, to justify their actions in terms that transcend the rhetoric of our political pluralism. They are carriers of the notion that the ideal of justice is accessible to the reason of people acting in the real situations of political and economic life. This is what seems to me valid and worth developing in the theoretical part of our peculiar political/legal tradition. But my sense is that the study of the characteristics of legal consciousness holds the key to a large number of the most puzzling aspects of the intellectual history of law.

## II.

The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind. Yet everyone, including actors who think they disagree profoundly about the substantive issues that matter, would dismiss without a second thought (perhaps as "not a legal argument" or as "simply missing the point") an approach appearing to deny them.

These underlying premises concern the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs which lawyers, judges, and commentators manipulate as they attempt to convince their audiences. Among these premises, there are often links creating subsystems with their own internal organization and rules of operation. These change. For example, they expand and contract to cover—or not cover—a greater or lesser number of the aspects of legal reality that are within legal consciousness at a given time. Classicism, in its developed form circa 1900, was a particularly powerful

subsystem of this kind. My thesis is that by tracing the transformations involved in its emergence, flourishing, and decline, we will find a way to understand the mass of seemingly self-contradictory or plainly mistaken verbiage that makes up the greater part of our legal tradition.

Classical legal thought was a way of understanding the whole American legal system. Its context was the first protracted period in America of the kind of economic and class conflict that had characterized the Western European countries during the period of rapid industrialization. The issues involved were the concentration of industry and finance combined with "cut-throat competition"; the struggle between the farmers and the railroads; the struggle between unions and employers over working conditions and wages; and the relation of state to federal governments in the regulatory process.

The premise of Classicism was that the legal system consisted of a set of institutions, each of which had the traits of a legal actor. Each institution had been delegated by the sovereign people a power to carry out its will, which was absolute within but void outside its sphere. The justification of the judicial role was the existence of a peculiar legal technique rendering the task of policing the boundaries of spheres an objective, quasi-scientific one.

Classicism consisted of two exactly analogous systems whose common link was the judiciary. The two systems evolved in parallel fashion, and it is rarely possible to say with certainty which served as the model for the other. The first system was that of federalism, the participants being Congress, the federal judiciary, and the States. Federal and state governments were seen as exercising "sovereignty," a legal concept formally the same in all cases. The similarity of the respective powers meant that it was equally meaningful to speak of state usurping state; of state usurping federal; of federal usurping state authority.

The second system consisted of individual property holders, a legislature, and a judiciary. Both the property holders and the legislature were seen as exercising a formally identical absolute dominion over property. The difference as among property holders and between them and the legislature was one of jurisdiction. The physical boundaries between citizens were like those between states. The non-physical division of jurisdiction over a given object between legislature and citizen was like that between state and federal governments. Because all the actors held formally identical powers of absolute dominion, one could speak equally of trespass by neighbor against neighbor, by state against citizen, and by citizen against state.

In this system, the judge was also conceived as the holder of a power, whose nature was identical whether the occasion of its exercise was a quarrel between neighbors, between sovereigns, or between citizen and

legislature. Its function was to prevent the various kinds of usurpation already referred to. There was always a danger of the judge, under the cover of performing this function, himself usurping the authority of the legal actors whose spheres he was supposed to be defining. What prevented this was that he acted by elaborating general principles. Whereas the other actors exercised their own wills, he obeyed the will of the people who had set up the whole system in the first place.

Classical legal thought reflected a state of mind deeply preoccupied with an opposition between freedom, conceived as arbitrary and irrational, yet creative and dynamic, and restraint, conceived in similar stark terms, as rigid, principled in an absolutist way, yet necessary as the antidote to freedom. Activity within the spheres of power represented liberty, autonomy, and unbridled mastery for legal actors. By the sharp delineation of boundaries, the virtues of such an unleashing of private energy were to be secured without the dangers of anarchy, and with only that minimum of injustice and immorality that are necessary if there is to be any autonomy at all.

### III.

Classical legal thought was an ordering, in the sense that it took a very large number of actual processes and events and asserted that they could be reduced to a much smaller number with a definite pattern. What was ordered was the enormous mass of rules and standards courts applied to different kinds of cases. The particular simplification that developed was influenced by the actual content of the rules it organized and, in turn, constantly influenced them. In other words, there was a reciprocal action between the system of premises and practice. The study of the Classical subsystem within legal consciousness does not aim at a description of what the practices "actually" were, or of their effects on things like the distribution of power and resources within society. It is designed to tell us about the theoretical atmosphere within which practices occurred, and to tell us about the manner in which the theoretical atmosphere influenced particular results.

The basic mode of this influence of theory on results is that the ordering of myriad practices into a systematization occurs through simplifying and generalizing categories, abstractions that become the tools available when the practitioner (judge or advocate) approaches a new problem. These abstractions operate the way a technology operates on the design of physical objects: the concepts impose limits, suggest directions, provide one of the elements of a style, but do not uniquely determine outcomes. In the Classical systematization, the concept that was most significant in this way was that of a constitutionally delegated power absolute within its

sphere. As time went on, all legally significant action came to be thought of as the exercise or creation of such powers, whether the particular actor was public or private, state or federal, legislative or judicial.

One of the functions of systems of legal thought—one of the reasons for their existence—is the reconciliation of what appear to be conflicts between institutions and contradictions among ideas. In other words, system is necessary not just to permit us to deal in a cognitively effective way with the chaotic mass of rules. It is also necessary because the theorist wishes to show that where many perceive confusion, danger, insecurity, rivalry, and aggressive action, there exists a latent order that has a legitimate claim to our respect. This order, once recognized, is both a reassuring fact and a goal for constructive striving.

Classical legal thought (and in particular the concept of a power absolute within its sphere) appeared to permit the resolution of the basic institutional conflicts between populistic legislatures and private businesses, between legislatures and courts over the legitimacy and extent of judicial review, and between state and federal governments struggling for regulatory jurisdiction. At the level of ideas, it mediated the contradictions between natural rights theories and legal positivism, and between the democratic theory of legislative supremacy and the Classical economic prescriptions about the optimal role of the state in the economy. It placed judges, lawyers, and legal thinkers in the center of the web of government while shielding them from the charge of having usurped the Constitution.

#### IV.

The extremely abstract propositions of the last few paragraphs may become more intelligible applied to one of the most famous of Classical cases, that of *Lochner v. New York*, decided by the Supreme Court in 1905. The majority and dissenting opinions of Justices Peckham and Harlan illustrate some of the more striking traits of Classicism. (The dissent by O.W. Holmes, in which he uttered the immortal phrase, "the Constitution does not enact Mr. Herbert Spencer's *Social Statics*", is a vital document of the attack on Classicism; we will consider it later.)

The issue in *Lochner* was whether a New York statute fixing a ten-hour day for bakers violated the clause of the Fourteenth Amendment forbidding the states to "deprive any person of life, liberty or property without due process of law." Justice Peckham's opinion striking down the law has been a continuing source of outrage, both because of the inhumanity of the result and because it contains language that can be reasonably interpreted as violently hostile to all attempts to use the legal

system as a conscious mechanism to redress the bargaining position of workers in their dealings with employers. In modern legal consciousness, the case serves as a horrible reminder of the bad consequences of Supreme Court justices letting their "subjective" and "political" passions draw them into a kind of judicial review that is both anti-democratic and institutionally suicidal. Modern commentators discussing controversial cases habitually club each other with the charge of "Lochnerism."

It seems a good idea to state emphatically at this point that my purpose is neither to add to the debate about the correctness of *Lochner* and cases like it, nor to try to draw conclusions from it about how modern judges should behave. The case provides, in Harlan's dissent as well as in the majority opinion, good evidence about the structure of the legal consciousness of the period. The concept of legal consciousness, and the particular descriptive characterization of Classical legal thought as a subsystem within it, should help in understanding what the justices thought they were doing. They also help in understanding the nature of the conceptual limits within which they worked. Of course, no one case suffices to "prove" anything about a consciousness, and a single case rarely even illustrates more than a few of its aspects. But if the reader will immerse herself in these long quotations, she may come away at least with a sense of the period's style.

Peckham frames the issue as involving individual rights and public powers. The court (*Lochner v. New York* 1905: 53–54) is in a disinterested position with respect to two exactly analogous entities:

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U.S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U.S. 623; *In re Kemmler*, 136 U.S. 436; *Crowley v. Christensen*, 137 U.S. 86; *In re Converse*, 137 U.S. 624.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or

a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the state.

It is worth pausing a moment to dwell on the odd locution by which Peckham turns the confrontation into one between the "right of the individual" and the "right of the state." This parallelism of concepts comes up again five pages later: "It is a question of which of two powers or rights shall prevail—the power of the State or the right of the individual to liberty of person and freedom of contract." In the second reference, the parallelism is reinforced by showing that rights can be seen as powers, as well as vice versa.

It may seem as though there is an asymmetry between rights and powers implicit in the presentation of the situation as one in which rights are not "absolute," but rather limited by the police power. But this is an accident of exposition:

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for (*Lochner v. New York*, 1905: 56).

Both the right and the power are entitled to protection; each overrides and annihilates the other, and is in that sense absolute, but only within a "sphere." The two concepts are mutually limiting. The two categories of right and power could be spatialized as two contiguous areas. They most certainly do not come across as conflicting "interests" to be "balanced" within some imagined field of forces.

The Classical conception of the judicial role is stated by Peckham, in the next sentence after that last quoted, as a deduction from the character of legal rights and powers:

In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the

question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? (*Lochner v. New York*, 1905: 56).

The notion is that of an objective task of drawing lines or categorizing actions as though they were objects to be located in the spatial map of spheres of power. This task constitutes itself a "power" to be exercised within and only within a limited sphere, as Peckham says in the next paragraph:

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

There are two important traits of Classical legal thought that are not well illustrated by Peckham's opinion. These are the two large structural traits. First, the identity of private law (individual-individual) rights with constitutional law (individual-state) rights is present only implicitly. Peckham takes it as established that constitutional "liberty" includes "contract"; that everyone agrees that the baker-employer relation is "contract" within the constitutional definition; and that the fixing of hours abridges "freedom of contract." The nature of the triangular individual-individual-state relation becomes clear only when there is some argument about the correspondence between constitutional freedom of contract and common law freedom of contract.

Second, the relation of this triangular structure to that of federalism (state-state-federal government) is missing from the majority opinion, but suggested in the dissent, as we will see in a moment.

The main point about Harlan's dissent is that it employs exactly the same conceptual structure as the majority opinion:

Speaking generally, the State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to every one, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." This was declared in *Allgever v. Louisiana*, 165 U.S. 578, 589. But in the same case it was conceded that the right to contract in relation to persons and property or to do business, within a State, may be "regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes." (*Lochner v. New York*, 1905: 65-66).

Like Peckham, Harlan argues that the Court's function is to carry out the objective task of classification, and that this judicial power is strictly limited:

Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. *Mugler v. Kansas, supra*. Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens, *Patterson v. Kentucky, supra*; or that it is not promotive of the health of the employees in question. *Holden v. Hardy, Lawton v. Steele, supra*; or that the regulation prescribed by the State is utterly unreasonable and extravagant or wholly arbitrary, *Gundling v. Chicago, supra*. Still less can I say that the statute is, beyond question, a plain palpable invasion of rights secured by the fundamental law. *Jacobson v. Massachusetts, supra*. Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York (*Lochner v. New York, 1905: 69-70*).

The justices differed, however, and not just about the application of the rules to the facts of this case. Peckham stated his test for classifying a statute as follows:

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute (*Lochner v. New York, 1905: 61*).

Harlan stated the test very differently:

Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is

never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. . . . If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *McCulloch v. Maryland*, 4 Wheat. 316, 421 (*Lochner v. New York*, 1905: 68).

Let me be quick to say that two legal actors can differ about far more than the placing of a burden of proof and still share a legal consciousness. Indeed, Peckham and Harlan share so much that one might argue that there were simply some well-settled legal rules, and a disagreement about burden of proof. Who needs a pretentious concept like consciousness to explain the situation? Alternatively, one can see the similar statements I have quoted from majority and dissenting opinions as a kind of compulsory curtsy to the audience before the "real" battle, which is over whether the judiciary should favor capital or labor in the struggle for social justice. As I said a moment ago, a case "proves" nothing. If proof is to be had, it is in the eating of the later courses.

But note, nonetheless, that at the end of the last passage quoted, Harlan cites the case of *McCulloch v. Maryland*. He cites it for the proposition that "when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional."

*McCulloch* was a case about the relation of state to federal powers, decided in 1819. Marshall's opinion for the Court argued that both state and federal powers are absolute within their spheres, and that the job of the Court is to employ an objective technique of constitutional exegesis to draw the line between them. I believe that at the time *McCulloch v. Maryland* was decided, it would have seemed, to the overwhelming majority of the legal elite, decidedly bizarre to offer the case as authority about the relation between individual rights and state power, whether one was talking about federal or state constitutional law. Harlan very classically assumes that the concept of a power is essentially the same in the two systems. The argument is that this kind of change is important.

## V.

The emergence of Classical legal thought was an instance of the phenomenon of change in the mode of "integration" of consciousness. Integration refers to an aspect of legal consciousness at a particular moment in time: the manner in which the different elements that are in it (e.g., the doctrine of consideration and the rule against perpetuities) fit together

into subsystems. The notion is that we can compare and contrast states of consciousness with respect to this aspect.

One way to do this is to attempt a kind of map of the subsystems composing a consciousness. We construct a map by asking whether a legal actor experiences a particular rule or doctrine as a possibly useful analogy in an argument about some other particular rule or doctrine. When we feel that an argument for X can draw on the arguments for Y, then, by definition, these two are parts of a subsystem. If the arguments for Y would never come to mind or would be dismissed as absurd in the argument for X, then they are parts of different subsystems. Another way of putting the same idea is that if your position about X puts a good deal of moral and intellectual pressure on you to take a particular position with respect to Y, then the two are part of a subsystem. If you experience no such pressure, they are not.

One can test the manner of integration of the parts of a legal consciousness through the answers to questions like the following: We have to decide whether, in the absence of a relevant statute, the federal government can get an injunction from a federal court against a railroad strike on the ground that the strike has interrupted interstate commerce. First, is it relevant that the courts would grant an injunction against a state statute which discriminated against interstate commerce through unequal taxation? Second, is it relevant that a private party, under the private law of nuisance, can obtain an injunction against a house of prostitution?

Justice Brewer's opinion in the 1895 case of *In re Debs* answers these two questions in ways that seem highly implausible to modern critics, yet were merely "creative," given the legal consciousness of the time. In *Debs*, the initial question was whether the federal government had any business at all protecting the railroads against invasion of private property rights of a type usually regulated by the states. Supposing some basis of federal jurisdiction, it was not clear that the strike leaders had violated any criminal provision of federal law. If they had not, there was no obvious basis for federal action against them; if they had, then the usual notion would have been that equity would not enjoin a crime, especially when the injunction would deprive the accused of the right to a jury trial. The conceptual problems involved in convicting Debs of contempt make the head swim.

As Justice Brewer approached the case, there was a single important fact involved: simply by ordering its members to strike, the union leaders had had the power, as a practical matter, to interrupt interstate commerce by railroad. Given this factual premise, Brewer (*In re Debs*, 1895: 577) posed two questions:

First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a

forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

His answer to the first question begins by defining the relation of federal to state power over commerce. It points out that federal power over commerce is absolute within its sphere of subject matter jurisdiction, so that the federal government acts directly on the citizen in this regard. The states have their own sphere of authority, over matters of local police, and "the one does not exclude the other, except where both cannot be executed at the same time." Then federal power is supreme. Brewer sets forth the basic Classical notions about the relation between state and federal powers.

At first blush, it seems that the only relevance of this discussion is to show federal jurisdiction based on the fact that commerce and the mails are involved. But Brewer (*In re Debs*, 1895: 581) concludes with the following:

It is curious to note the fact that in a large proportion of the cases in respect to inter-state commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

Brewer here analogizes the exercise of the sovereign legislative will of a state to the exercise of private will by the citizen and asserts that the absolute power of the federal government within its sphere of commerce is the same with respect to each. The assertion of the identity of the commerce power in the two relations gives it definition, as against individuals, since the Court can draw on the whole body of case law about federal-state conflicts over economic regulatory powers. Nothing could be more Classical than this course of argument. The conclusion from an analysis wholly in terms of the relation of the federal commerce power to the state police power is that "the national government may prevent any unlawful and forcible interference" with interstate commerce or the transportation of the mails, whether public or private.

Brewer's second question was whether the federal government, granted a power to remove obstructions to interstate commerce, could proceed by injunction. For contemporaries, the most striking thing about his answer was the assertion that the executive can use the army (and the "militia") to remove a private obstruction without recourse to any ju-

dicial process and without statutory authority of any kind. This seemed to some like a stirring reaffirmation of the inherent power of the central government to act quickly and decisively against semi-revolutionary left-wing tactics. To others, it seemed an invitation to shoot first and ask the question of legality afterward. The argument has been with us ever since. For our purposes, it is less important than the next step: Brewer claims that if the government can, in the absence of a statute, act directly to suppress an obstruction, then it should be able, still without a statute, to act by injunction to the same purpose.

The executive may be able simply to act, but a federal court can grant an injunction only according to law. By hypothesis, there is no statute covering the obstruction in hand. So what is the basis of the injunction? In other words, where can the court go for a definition of which private activities are lawful and which are unlawful invasions of the governmental regulatory power?

Brewer's answer was to invoke the law of nuisance. The federal government's entitlement to an injunction was defined by the right of public authorities to abate as public nuisances obstructions to their highways. And in case the reader had doubts about this body of law as a basis for a strike-breaking jurisdiction, Brewer (*In re Debs*, 1895: 592—93) appealed to the body of private law doctrines defining the relations of property holders among themselves:

The difference between a public nuisance and a private nuisance is that the one affects the people at large and the other simply the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. Of course, circumstances may exist in one case, which do not in another, to induce the court to interfere or to refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance.

Brewer's opinion supplied the total absence of closely analogous precedents with what he took to be logical inferences from precedents about the relation of federal commerce power to state police power, about the power of a state to remove physical obstruction from highways and water-ways, and about the abatement by injunction of nuisances in general. I will argue that his frame of mind in so arguing was different from that of the judges of 1870. His analogies almost certainly would not have occurred to them; but they would have found his assurance of the objective character of the method of inference quite natural. His approach was also very different from that of today's Supreme Court. Modern judges have easy mental access to Brewer's analogies, but little faith in the possibility of drawing logical inferences from them.

## VI.

As the example suggests, it is often useful to divide the question of the mode of integration into two more specific subsidiary questions. First, there is the question of how many of the doctrinal areas or fields within legal consciousness have been assimilated to a particular integrating sub-system or structure that interests us. In other words, there is a question of horizontal inclusion and exclusion, of incorporation into a particular schema. Questions like those just put concerning the *In re Debs* opinion are designed to measure this aspect, which I will sometimes call the breadth of integration.

Second, there is the question of the internal structure of items within a subsystem. Here, the issue is the nature of the relevance of ideas to one another, given incorporation or assimilation. There are many possible modes of organization within a subsystem. For example, we may feel that the minute we know that the states cannot pass laws impeding commerce, it follows "logically," "necessarily," "obviously," and as "part of the nature of things" that the federal government can obtain an injunction against a strike that disrupts interstate rail traffic. Or we might feel that the state-federal cases were useful "by analogy," and then want to say something about their aptness or compellingness as such. Or we might see the two situations as requiring the application of a single principle to quite radically different contexts, with the relevance of the state-federal cases lying in that they establish the principle and illustrate the prudential manner of its application.

Each of these modes of interrelation involves the experience of being bound, to some extent, to do X as an implication of commitment to Y. Within a subsystem, the positions we take can influence each other in this way because they are linked through abstractions. If they are treated as deductions from a single premise, then that premise is the link. If they influence each other "by analogy," then we have managed to disentangle certain key aspects from each for comparison. Over time, there are constant changes in the relationships between the particular, concrete, situationally well-defined rules judges use in real everyday cases and those more abstract, open-ended maxims, principles, doctrinal categories and general legal concepts (e.g., "duty," "power") that tie the rules together. I will refer to this set of relationships as the "vertical" dimension of a subsystem within legal consciousness.

The vertical dimension has the same structure as the horizontal. In each, there is a distinction between two experiences. Horizontally, bodies of doctrine are assimilated to the integrating subsystem, or they are not. In the vertical dimension, there is either a connection between an abstract proposition (contract protects will of the parties) and a particular rule (expectation damages), or there is not. By inquiring about the breadth of

inclusion and the degree of abstraction in the different subsystems within a legal consciousness at different times, we can arrive at a history of the experience of judicial boundness. It is this history, as much as that of particular doctrines or philosophies, that powerfully influences the place of law and lawyers in social life.

## VII.

The notion of a vertical dimension of a subsystem within legal consciousness may be clarified by a description in those terms of our modern understanding of legal reasoning. We begin with the idea that legal actors enjoy a large number of particular rights and are subject to a large number of particular duties. For example, the law grants me expectation damages for breach of contract. It also grants me an action of trespass for nominal intrusions on my property, and so forth through a list of, say, 300 other particular rules of law of which I am beneficiary or which obligate me.

What do these rules have in common? We organize them for convenience, for reasons of utility into larger categories—e.g., once I have 15 rules that all refer to situations of agreement, I may decide, for some purposes, to refer to them collectively as rules of "contract." The notion of this type of classification is not that the contract category adds or subtracts anything, by itself, to or from the 15 rules I denote by it. If I learn a new rule, I will decide to include it or exclude it by asking whether it is useful to include it. And if my purposes in using the word change, I will feel no hesitation in expelling some of my 15 rules and adding new ones; the fact that I still use the word "contract" to describe my new collection gives me no qualms at all.

If you ask me the basis of one of my rules, I might answer that it is a maximizer of utility. Or I might answer that it protects a natural right, or that it is a binding precedent, or that it is a statute. The one thing that I would not do would be to justify it on the ground that it is "implicit in the institution of contract." This would make no sense, since that concept is no more than my invented category to group some rules that I often want to refer to together. Nothing is included in "contract," except what we have decided to put into it. Nothing is "implicit" in the existence of the category except some purpose making it convenient to refer to the rules together. "Contract" as a category won't be changed if we abolish a particular component, except that it will have 14 instead of 15 members.

In the system I have been describing, the units of thought, the operative wholes, are dozens of very concrete rules; the category of "contract" is non-operative, artificial, composite. But what does "operative" mean? It means that the rule of expectation damages can be used to provide solutions to problems, while the category of contract simply records the out-

comes of solutions. For instance, supposing that I believe that *it is the rule* that I get expectation damages, and I justify this on the ground that such a rule most efficiently promotes reliance on contracts. Now suppose that there is a rule that a seller of a fungible good injured by a buyer's breach on a falling market can collect the difference between contract price and market price. If asked to justify *this* rule, I might very well state that it was "implicit" in the more general rule about expectation damages. In any case, I would almost certainly acknowledge a much closer relation between this rule and the more general rule of expectation damages than I would acknowledge between the latter rule and the principle that *pacta sunt servanda*.

It is possible to imagine a very different state of consciousness of the body of rules integrated in the subsystem of contracts. An observer might, and during the Classical period many observers did, see all the rules gathered under the contract rubric as implications of a general principle of freedom of contract, or one might conceive them all as the working out of the social purpose summarized by the notion of contract, or as designed to re-enforce a natural right of contract, or as included in a single composite utilitarian calculation about the enforcement of agreements.

We simply do not understand the system this way. We apply the deductive mode, the style of reasoning from general to particular, from maxim to application, from premises to implications, only from the level, say, of the rule of expectation damages to that of contract price less market price. We see the expectation rule as quite distinct from the rule about duress, and it does not occur to us to propose a more abstract category as providing a single, all-embracing, compulsive rationale. (Contract protects will; in cases of duress, there is no will to protect; in case of breach, the equivalent of the willed performance is expectation damages.) We treat duress rules and damage rules in relation to, say, freedom of contract, the way a Classical observer might have treated contract, tort, and property in relation to the more abstract category of "private law."

Within contracts, there are two different modes of reasoning and argument, reflecting the two different forms of relationship that may exist between the rules. Sometimes, a lawyer attempts to show that the correct decision in the case is compelled because the situation is subsumed by implication within a powerful operative rule or category. (Because we have adopted the expectation rule, we have also adopted the contract and market rule.) Sometimes, the lawyer argues for his proposed solution as resting on its own bottom, as valid without compulsive assistance from other rules of the contract subsystem. (He may do this in terms of utilitarian social maximization, or natural rights, or morality, or statutory authority.)

The point is that between the operative rule and the more particular

subrule, there is structure, direction, influence, finally compulsion. Between two operative rules each justified in its own right, or between an operative rule and a passive, non-operative conventionally defined category ("contract" in the example given above), there is no nexus except the looser sense that it is convenient (or not) to deal with them together when pursuing some extrinsically determined set of purposes.

Suppose that for purely utilitarian reasons we adopt a particular operative rule of contract law felt to have many implications. Now suppose that on examination it appears that one of the implied subrules costs more than it is worth, taken apart. A utilitarian may argue that he can consistently reject the subrule and replace it with something else, while accepting the operative rule. If this is so (i.e., if the rule-maker feels that he can consistently enforce both the operative rule and the new antagonistic sub-rule), then the relationship of downward derivation I have been talking about never existed in the first place. In other words, what I am referring to is the psychological fact of the feeling of boundness in moving from general to particular, so that rejection of the particular would be felt inescapably to *mean* rejection of the general and *vice versa*. If the judge decides that the breaching buyer must pay only one-half the contract price less the market price, we would simply deny that he was enforcing a rule of expectation damages. What is involved here is a distinction between two *experiences*: that of being bound in all consistency to accept A given B, and that of being able to consider B on its own merits in spite of having accepted A.

It should already be clear that a defining characteristic of Classical legal thought was the assimilation of a great deal of law to a single subsystem dominated by the concept of a power absolute within its judicially delineated sphere. A second defining characteristic of Classicism, in contrast to pre-Classical and modern thinking, was the claim that very abstract propositions were nonetheless operative.

I am speaking of across-the-board changes in the way legal reasoning operated. During the period 1850-1900, as the Classical subsystem expanded, there was a general increase, and since about 1900 we have experienced a general decrease, in the felt operativeness of constitutional and doctrinal principles. With the disintegration of Classicism, there has been something close to a disappearance of an experience that appears to have been common at the turn of the century: that of the compulsion by which an abstraction dictates, objectively, apolitically, in a non-discretionary fashion, a particular result. As a consequence, there are claims to an objective basis for judicial review, and to an objective basis for innovation in private law, that seemed perfectly plausible during the period of the broadening and tightening of the Classical schema, but seem anti-democratic or merely naive in these days of its decadence.

## VIII.

While the legal elite may have experienced these changes in terms of a radical opposition between full operativeness and complete lack of nexus between abstraction and subrule, it does not follow that the historian should describe legal consciousness in these terms. We know that a rule or doctrine is within a subsystem only by applying some quantitative criterion of relatedness, just as we determine operativeness by looking at a quantitatively variable interaction between abstraction and concrete rule. Wouldn't it be better to say that there is a general equilibrium system of relationships, with every element in legal consciousness related to every other, at least to that minimal degree necessary to lead us to define it as, in fact, "in" rather than out of consciousness?

If my main concern were a static analysis, comparing states of a given system or of different systems frozen at particular moments, then the general equilibrium model might be the best. My purpose, however, is to describe a particular historical process: the emergence, flourishing, and decay of a particular integrating subsystem (Classicism) within a particular historical consciousness (that of the American legal elite between 1850 and 1940). For this purpose, the image of the grid or network of forces is inadequate. The importance of the materials for us is much better conveyed by the image of a microscopic organism that takes to itself and transforms the biologically distinct organisms around it; finds itself trans-formed by the very process of assimilating those foreign bodies; and finally falls apart into a set of pieces which bear no more than an indirect and subtle resemblance either to their integrating predecessor or to the various weaker organisms the predecessor fed on.

I mean to be vague as to why the Classical subsystem triumphed over its contenders. My focus here is on *how* it happened, on the series of interactions among ideas within legal consciousness, rather than on the various kinds of energy that impelled the interactions. Given this initial point of view, what is salient is that particular ideas were initially relatively isolated, though within legal consciousness. Then, abruptly or gradually, a distinct, qualitatively new process took hold of them: they were drawn into the integrating subsystem of Classicism. In the process, they changed. In the process of causing those changes in the parts, the integrating subsystem went through its own transformation of internal structure, a tightening in the mode of interrelatedness.

The notion of incorporation or assimilation of elements conveys the transformation of the parts as they came in contact with the Classical subsystem. The notion of change in the level of abstraction at which concepts remain operative conveys the idea that the subsystem evolved as a whole. To some meaningful extent, it changed autonomously from, although in response to, what happened outside of it. The description of the historical process is thus cast in organic terms. We can identify, and

follow through time, clusters of ideas that are entities. They develop, evolve, transform themselves, but are nonetheless somehow "the same thing," as opposed to other entities, that they were at the beginning.

### **A GLOSSARY OF TERMS, BY WAY OF SUMMARY**

*Consciousness* refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values, and theories about the world and self. I use the term only in this vague, all-inclusive sense. It defines the universe within which are situated the more sharply delineated concepts that are the vehicles for analysis.

*Legal Consciousness* is an only slightly more defined notion. It refers to the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment.

*A subsystem within legal consciousnesses* is a kind of *structure*; that is, a formal arrangement of some of the elements in consciousness. Sub-systems are structures that arrange relatively large numbers of elements; e.g., the Madisonian equilibrium theory of federalism. Any number of subsystems can exist within consciousness at a given moment. Unlike the concept of consciousness, those of structure and subsystem can be given precise meaning. They are tools of analysis.

*Classical legal thought, pre-Classical legal thought, and modern legal thought*: Pre-Classical legal thought flourished between 1800 and 1860 and declined between 1860 and 1885. Classical legal thought emerged between 1850 and 1885, flourished between 1885 and 1935, but was in rapid decline by 1940. Modern legal thought emerged between 1900 and 1930 and survives to this day.

A subsystem *integrates* some number of the elements in a legal consciousness; that is, it includes them in a formal arrangement. Such an arrangement has a *horizontal dimension* and a *vertical dimension*. A description of the horizontal dimension tells us how many of all the rules in consciousness are within a particular subsystem, and the manner in which they are related to one another. A description of the vertical dimension tells us how the more and less abstract elements in a doctrinal area are related.

*Assimilation* refers to the transformation undergone by elements in legal consciousness as they are drawn into a subsystem.

*Operativeness* is a property of some rules and principles. It is the ability to generate subrules, more concrete prescriptions that are felt to be inescapable once the abstraction is assented to.

One of the functions of a structure within consciousness, and particularly of a subsystem, is the *mediation* of the *contradictions of experience*. The sense of contradiction arises from the persistent existence within consciousness of elements which seem mutually exclusive. These can be inconsistent facts, conflicting emotions, or operative abstractions whose implication contradict one another. Mediation is the reduction of the sense of contradiction by an arrangement of the elements that makes the problem less salient.<sup>1</sup>

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### NOTE

1. This is a slightly revised version of an essay written in 1975. The works of Ihering (1883), Pollock and Maitland (1968), Levi-Strauss (1966), Piaget (1962), Mannheim (1936), Lukacs (1971), and Marcuse (1941) were the main influences on the conception of legal history put forward. I also profited greatly from reading early drafts of Unger (1975, 1976) and Horwitz (1977). Readers interested in the further development of the ideas outlined here should consult Kennedy (1976, 1979).

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