THE CRITICAL LEGAL STUDIES MOVEMENT

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I. INTRODUCTION: THE TRADITION OF LEFTIST MOVEMENTS IN LEGAL THOUGHT AND PRACTICE

THE critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics.[1]

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[1] Two main tendencies can be distinguished in the critical legal studies movement. One tendency sees past or contemporary doctrine as the expression of a particular vision of society while emphasizing the contradictory and manipulable character of doctrinal argument. Its immediate antecedents lie in antiformalist legal theories and structuralist approaches to cultural history. Examples include Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979), and Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981). Another tendency grows out of the social theories of Marx and Weber and the mode of social and historical analysis that combines functionalist methods with radical aims. Its point of departure has been the thesis that law and legal doctrine reflect, confirm, and reshape the social divisions and hierarchies inherent in a type or stage of social organization such as "capitalism." But this thesis has been increasingly modified by the awareness that institutional types or stages lack the cohesive and foreordained character that received leftist theory attributes to them. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 527 (1977). Many of the essays in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) also exemplify this perspective.

Both tendencies criticize the dominant style of legal doctrine and the legal theories that try to refine and preserve this style. Both repudiate in the course of this critique the attempt to impute current social arrangements to the requirements of industrial society, human nature, or moral order. Both have yet to take a clear position on the method, the content, and even the possibility of prescriptive and programmatic thought, perhaps because some of the assumptions inherited from the radical tradition make it hard to turn constructive proposals into more than statements of commitment or anticipations of history.

The significance of the contrast between these tendencies should not be overstated. The actual works often differ less than the abstract interpretations placed upon them.

The ideas and activities of the movement respond to a familiar situation of constraint upon theoretical insight and transformative effort. This situation is exemplary: its dangers and opportunities reappear in many areas of contemporary politics and thought. Our response may, therefore, also have an exemplary character.

One of the most important obligations anybody has toward a movement in which he participates is to hold up before it what, to his mind, should represent its highest collective self-image. My version of this image of critical legal studies is more proposal than description. It may meet with little agreement among the critical legal scholars. But I have unequivocally preferred the risks of repudiation to those of indefinition. In this, if in nothing else, my statement will exemplify the spirit of our movement.

It may help to begin by placing critical legal studies within the tradition of leftist tendencies in modern legal thought and practice. Two overriding concerns have marked this tradition.

The first concern has been the critique of formalism and objectivism. Let me pause to define formalism and objectivism carefully, for these ideas will play an important role in later stages of my argument. By formalism I do not mean what the term is usually taken to describe: belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice. What I mean by formalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. Though such conflicts may not be entirely bereft of criteria, they fall far short of the rationality that the formalist claims for legal analysis. The formalism I have in mind characteristically invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning. Formalism in the conventional sense — the search for a method of deduction from a gapless system of rules — is merely the anomalous, limiting case of this jurisprudence.

You might add a second distinctive formalist thesis: that

And many writings do not fall into either of the two groups mentioned. *See* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 223 (1981); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

Though the view of critical legal studies presented here cannot be reconciled with much in the way these and other tendencies in the movement understand their own critical practice, I hope it remains faithful to a shared intention and direction.

only through such a restrained, relatively apolitical method of analysis is legal doctrine possible. By legal doctrine or legal analysis, in turn, I mean a form of conceptual practice that combines two characteristics: the willingness to work from the institutionally defined materials of a given collective tradition and the claim to speak authoritatively within this tradition, to elaborate it from within in a way that is meant, at least ultimately, to affect the application of state power. Doctrine can exist — the formalist says or assumes — because of a contrast between the more determinate rationality of legal analysis and the less determinate rationality of ideological contests.

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

By objectivism I mean the belief that the authoritative legal materials — the system of statutes, cases, and accepted legal ideas — embody and sustain a defensible scheme of human association. They display, though always imperfectly, an intelligible moral order. Alternatively they show the results of practical constraints upon social life — constraints such as those of economic efficiency — that, taken together with constant human desires, have a normative force. The laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority.

The modern lawyer may wish to keep his formalism while avoiding objectivist assumptions. He may feel happy to switch from talk about interest group politics in a legislative setting to invocations of impersonal purpose, policy, and principle in an adjudicative or professional one. He is plainly mistaken; formalism presupposes at least a qualified objectivism. For if the impersonal purposes, policies, and principles on which all

but the most mechanical versions of the formalist thesis must rely do not come, as objectivism suggests, from a moral or practical order exhibited, however partially and ambiguously, by the legal materials themselves, where could they come from? They would have to be supplied by some normative theory extrinsic to the law. Even if such a theory could be convincingly established on its own ground, it would be a sheer miracle for its implications to coincide with a large portion of the received doctrinal understandings. At least it would be a miracle unless you had already assumed the truth of objectivism. But if the results of this alien theory failed to overlap with the greater part of received understandings of the law, you would need to reject broad areas of established law and legal doctrine as "mistaken." You would then have trouble maintaining the contrast of doctrine to ideology and political prophecy that represents an essential part of the formalist creed: you would have become a practitioner of the free-wheeling criticism of established arrangements and received ideas. No wonder theorists committed to formalism and the conventional view of doctrine have always fought to retain some remnant of the objectivist thesis. They have done so even at a heavy cost to their reputation among the orthodox, narrow-minded lawyers who otherwise provide their main constituency.

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

If the criticism of formalism and objectivism is the first characteristic theme of leftist movements in modern legal

thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second. The connection between these two activities — the skeptical critique and the strategic militancy — seems both negative and sporadic. It is negative because it remains almost entirely limited to the claim that nothing in the nature of law or in the conceptual structure of legal thought — neither objectivist nor formalist assumptions — constitutes a true obstacle to the advancement of leftist aims. It is sporadic because short-run leftist goals might occasionally be served by the transmutation of political commitments into delusive conceptual necessities.

These themes of leftist legal thought and practice have now been reformulated in the course of being drawn into a larger body of ideas. The results offer new insight into the struggle over power and right, within and beyond the law, and they redefine the meaning of radicalism.

II. The Criticism of Legal Thought

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

A. The Critique of Objectivism

Take first the way we have redefined the attack upon objectivism. Our key idea here is to reinterpret the situation of contemporary law and legal doctrine as the ever more advanced dissolution of the project of the classical, nineteenth century jurists conceived in a certain way. Because both the original project and the signs of its progressive breakdown remain misunderstood, the dissolution has not yet been complete and decisive. The nineteenth century jurists were engaged in a search for the built-in legal structure of the democracy and the market. The nation, at the Lycurgan moment of its history, had opted for a particular type of society: a commitment to a democratic republic and to a market system as a necessary part of that republic. The people might have

chosen some other type of social organization. But in choosing this one, in choosing it for example over an aristocratic and corporatist polity on the old-European model, they also chose the legally defined institutional structure that went along with it. This structure provided legal science with its topic and generated the purposes, policies, and principles to which legal argument might legitimately appeal. Thus, two ideas played the central role in this enterprise. One was the distinction between the foundational politics, responsible for choosing the social type, and the ordinary politics, including the ordinary legislation, operating within the framework established at the foundational moment. The other idea was the existence of an inherent and distinct legal structure of each type of social organization.

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

Historical study has repeatedly shown that every attempt to find the universal legal language of the democracy and the market revealed the falsehood of the original idea. An increasing part of doctrinal analysis and legal theory has been devoted to containing the subversive implications of this discovery.

The general theory of contract and property provided the core domain for the objectivist attempt to disclose the built-in legal content of the market just as the theory of protected

constitutional interests and of the legitimate ends of state action was designed to reveal the intrinsic legal structure of a democratic republic. But the execution kept belying the intention. As the property concept was generalized and decorporealized, it faded into the generic conception of right, which in turn proved to be systematically ambiguous (e.g., Hohfeld) if not entirely indeterminate. Contract, the dynamic counterpart to property, could do no better. The generalization of contract theory revealed, alongside the dominant principles of freedom to choose the partner and the terms, the counterprinciples: that freedom to contract would not be allowed to undermine the communal aspects of social life and that grossly unfair bargains would not be enforced. Though the counterprinciples might be pressed to the corner, they could be neither driven out completely nor subjected to some system of metaprinciples that would settle, once and for all, their relation to the dominant principles. In the most contested areas of contract law, two different views of the sources of obligation still contend. One, which sees the counterprinciples as mere ad hoc qualifications to the dominant principles, identifies the fully articulated act of will and the unilateral imposition of a duty by the state as the two exhaustive sources of obligation. The other view, which treats the counterprinciples as possible generative norms of the entire body of law and doctrine, finds the standard source of obligations in the only partially deliberate ties of mutual dependence and redefines the two conventional sources as extreme, limiting cases. Which of these clashing conceptions provides the real theory of contract? Which describes the institutional structure inherent in the very nature of a market?

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

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

The convergent result of these two modes of attack upon objectivism — the legal-historical and the legal-doctrinal — is to discredit, once and for all, the conception of a system of social types with a built-in institutional structure. The very attempt to work this conception into technical legal detail ends up showing its falsehood. Thus, the insight required to launch the attack against objectivism — the discovery of the indeterminate content of abstract institutional categories like democracy or the market — with its far-reaching subversive implications, was partly authored by a cadre of seemingly harmless and even toadying jurists. Those who live in the temple may delight in the thought that the priests occasionally outdo the prophets.

B. The Critique of Formalism

We have approached the critique of formalism from an angle equally specific. The starting point of our argument is the idea that every branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals. If, for example, you are a constitutional lawyer, you need a theory of the democratic republic that would describe the proper relation between state and society or the essential features of social organization and individual entitlement that government must protect come what may.

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

question or of the realm of social practice governed by that part of the law.

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

To determine which part of established opinion about the meaning and applicability of legal rules you should reject, you need a background prescriptive theory of the relevant area of social practice, a theory that does for the branch of law in question what a doctrine of the republic or of the political process does for constitutional argument. This is where the trouble arises. No matter what the content of this background theory, it is, if taken seriously and pursued to its ultimate conclusions, unlikely to prove compatible with a broad range of the received understandings. Yet just such a compatibility seems to be required by a doctrinal practice that defines itself by contrast to open-ended ideology. For it would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that law-making involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory. This daring and implausible sanctification of the actual is in fact undertaken by the dominant legal theories and tacitly presupposed by the unreflective common sense of orthodox lawyers. Most often, the sanctification takes the form of treating the legal order as a repository of intelligible purposes, policies, and principles, in abrupt contrast to the standard disenchanted view of legislative politics.

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

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

Having recognized this problem with doctrine, modern legal analysis tries to circumvent it in a number of ways. It may, for example, present an entire field of law as the expression of certain underlying theoretical approaches to the subject. These implicit models, it is suggested, fit into some coherent scheme or, at least, point toward a synthesis. In this way it seems possible to reconcile the recognition that legal analysis requires an appeal to an underlying theory of right and social practice with the inability to show that the actual content of law and doctrine in any given area coincides, over an appreciable area of law, with a particular theory. But this recourse merely pushes the problem to another level. No extended body of law in fact coincides with such a metascheme, just as no broad range of historical experience coincides with the implications of one of the evolutionary views that claim to provide a science of history. (That this counts as more than a faint resemblance is a point to which I shall return.) It is always possible to find in actual legal materials radically inconsistent clues about the range of application of each of the models and indeed about the identity of the models themselves.

Once the lawyer abandons these methods of compensation and containment, he returns to a cruder and more cynical device. He merely imposes upon his background conceptions — his theories of right and social practice — an endless series of ad hoc adjustments. The looseness of the theories and the resulting difficulty of distinguishing the ad hoc from the theoretically required make this escape all the easier. Thus, there emerges the characteristic figure of the modern jurist who wants — and needs — to combine the cachet of theoretical refinement, the modernist posture of seeing through everything, with the reliability of the technician whose results re-

main close to the mainstream of professional and social consensus. Determined not to miss out on anything, he has chosen to be an outsider and an insider at the same time. To the achievement of this objective he has determined to sacrifice the momentum of his ideas. We have denounced him wherever we have found him, and we have found him everywhere.

One more objection might be made to this attack upon formalism and upon the type of doctrinal practice that formalism justifies. According to this objection, the attack succeeds only against the systematic constructions of the most ambitious academic jurists, not against the specific, problem-oriented arguments of practical lawyers and judges. It is hard, though, to see how such arguments could be valid, how indeed they might differ from rhetorical posturing, unless they could count as tentative fragments of a possible cohesive view of an extended body of law.

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

C. The Critiques of Objectivism and Formalism Related: Their Significance for Current Legal Theories

Once the arguments against objectivism and formalism have been rendered in these specific ways, their relation to each other gains a new and surprising clarity. As long as the project of the nineteenth century jurists retained its credibility, the problem of doctrine did not emerge. The miracle required and promised by objectivism could take place: the coincidence of the greater part of substantive law and doctrine with a coherent theory, capable of systematic articulation and relentless application. The only theory capable of performing the miracle would have been one that described the inner conceptual and institutional structure of the type of social and governmental organization to which the nation had committed itself at its foundational moment. Such a theory would not have needed to be imported from outside. It would not have been just somebody's favorite system. It would have translated into legal categories the abiding structure of ordinary political and economic activity. Once the objectivist project underlying the claim to reveal the inherent content of a type of social organization ceased to be believable, doctrine in its received form was condemned to the self-subversion that our

critique of formalism has elucidated. But because the nature and defects of the project appeared only gradually, the permanent disequilibrium of doctrine became manifest little by little.

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

The chief instrument of the law and economics school is the equivocal use of the market concept. These analysts give free rein to the very mistake that the increasing formalization of microeconomics was largely meant to avoid: the identification of the abstract market idea or the abstract circumstance of maximizing choice with a particular social and institutional complex. As a result, an analytic apparatus intended, when rigorous, to be entirely free of restrictive assumptions about the workings of society and entirely subsidiary to an empirical or normative theory that needs independent justification gets mistaken for a particular empirical and normative vision. More particularly, the abstract market idea is identified with a specific version of the market — the one that has prevailed in most of the modern history of most Western countries — with all its surrounding social assumptions, real or imagined. The formal analytic notion of allocational efficiency is identified with a specific theory of economic growth or, quite simply, with the introduction, the development, or the defense of this particular institutional and social order. Such are the sophistries by which the law and economics school pretends to discover both the real basis for the overall evolution of the legal

order and the relevant standard by which to criticize occasional departures of that order from its alleged vocation. From this source supposedly come the purposes and policies that do and should play the paramount role in legal reasoning.

The rights and principles school achieves similar results through very different means. It claims to discern in the leading ideas of the different branches of law, especially when illuminated by a scrupulous, benevolent, and well-prepared professional elite, the signs of an underlying moral order that can then serve as the basis for a system of more or less natural rights. This time, the objective order that guides the main line of legal evolution and serves to criticize the numerous though marginal aberrations is a harshly simplified version of moral ideas supposedly expressed in authoritative legal materials. No longer able to appeal to the idea of the built-in institutional structure of a type of social organization, this school alternates confusedly between two options, both of which it finds unacceptable as a basis for legal theory. One option is that moral consensus (if only it could actually be identified) carries weight just because it exists. The alternative view is that the dominant legal principles count as the manifestations of a transcendent moral order whose content can be identified quite apart from the history and substance of a particular body of law. The third, mediating position for which the school grasps — that consensus on the received principles somehow signals a moral order resting mysteriously upon more than consensus — requires several connected intellectual maneuvers. One is a drastic minimization of the extent to which the law already incorporates conflict over the desirable forms of human association. Another is the presentation of the dominant legal ideas as expressions of higher moral insight, an insight duly contained and corrected by a fidelity to the proprieties of established institutional roles, a fidelity that must itself be mandated by the moral order. Yet another is the deployment of a specific method to reveal the content and implications of this order: generalize from particular doctrines and intuitions, then hypostasize the generalizations into moral truth, and finally use the hypostasis to justify and correct the original material. The intended result of all this hocus-pocus is far clearer than the means used to achieve it. The result is to generate a system of principles and rights that overlaps to just the appropriate extent with the positive content of the laws. Such a system has the suitable degree of revisionary power, the degree necessary to prove that you are neither an all-out and therefore ineffective apologist nor an irresponsible revolutionary.

The law and economics and the rights and principles schools supply a watered-down version of the enterprise of nineteenth century legal science. The endeavor of the classical nineteenth century jurists in turn represented a diluted version of the more common, conservative social doctrines that preceded the emergence of modern social theory. These doctrines pretended to discover a canonical form of social life and personality that could never be fundamentally remade and reimagined even though it might undergo corruption or regeneration. At each succeeding stage of the history of these ideas, the initial conception of a natural form of society becomes weaker: the categories more abstract and indeterminate, the champions more acutely aware of the contentious character of their own claims. Self-consciousness poisons their protestations. Witnessing this latest turn in the history of modern legal thought, no one could be blamed for recalling hopefully Novalis' remark that "when we dream that we dream we are about to awake."

A large part of this history consists in the attempt to deflect the critique of formalism and objectivism by accepting some of its points while saving increasingly less of the original view. The single most striking example in twentieth century American legal thought has been the development of a theory of legal process, institutional roles, and purposive legal reasoning as a response to legal realism. Perhaps the most creditable pretext for these endless moves of confession and avoidance has been the fear that, carried to the extreme, the critique of objectivism and formalism would leave nothing standing. The very possibility of legal doctrine, and perhaps even of normative argument generally, might be destroyed. Thus, ramshackle and plausible compromises have been easily mistaken for theoretical insight. For many of us, the turning point came when we decided, at the risk of confusion, paralysis, and marginality, to pursue the critical attack *à outrance*. When we took the negative ideas relentlessly to their final conclusions, we were rewarded by seeing these ideas turn into the starting points of a constructive program.

III. From Critique to Construction

A. The Constructive Outcome of the Critique of Formalism: Deviationist Doctrine

The defense of the received forms of doctrine has always rested on an implicit challenge: either accept the ruling style, with its aggressive contrast to controversy over the basic terms

of social life, as the true form of doctrine, or find yourself reduced to the inconclusive contest of political visions. This dilemma is merely one of the many specific conceptual counterparts to the general choice: either resign yourself to some established version of social order, or face the war of all against all. The implication of our critique of formalism is to turn the dilemma of doctrine upside down. It is to say that, if any conceptual practice similar to what lawyers now call doctrine can be justified, the class of legitimate doctrinal activities must be sharply enlarged. The received style of doctrine must be redefined as an arbitrarily restricted subset of this larger class. We agree neither on whether this expanded or deviationist doctrine can in fact be constructed nor on what exactly its methods and boundaries should be. But we know that only such an expansion could generate a conceptual practice that maintains the minimal characteristics of doctrine — the willingness to take the extant authoritative materials as starting points and the claim to normative authority — while avoiding the arbitrary juxtaposition of easy analogy and truncated theorizing that characterizes the most ambitious and coherent examples of legal analysis today.

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

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

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

On another description the crucial feature of deviationist doctrine is the willingness to recognize and develop the disharmonies of the law: the conflicts between principles and counterprinciples that can be found in any body of law. Critical doctrine does this by finding in these disharmonies the elements of broader contests among prescriptive conceptions of society.

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

make the entire body of law look intelligible and even justifiable. Above all it serves to resolve what would otherwise be incorrigible indeterminacy in the law. Just as the ambiguities of rules and precedents require recourse to imputed purposes or underlying policies and principles, so the ambiguities of these policies and principles can be avoided only by appealing to some background scheme of association of the sort just described. Yet the conflicting tendencies within law constantly suggest alternative schemes of human association. The focused disputes of legal doctrine repeatedly threaten to escalate into struggles over the basic imaginative structure of social existence.

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

Most legal traditions of the past incorporated the final level of legal argument by relying upon a secular or sacred vision of the one right and necessary order of social life. Modern legal doctrine, however, works in a social context in which society has increasingly been forced open to transformative conflict. It exists in a cultural context in which, to an unprecedented extent, society is understood to be made and imagined rather than merely given. To incorporate the final level of legal analysis in this new setting would be to transform legal doctrine into one more arena for continuing the fight over the right and possible forms of social life. Modern jurists and their philosophers have generally wanted to avoid this result. They have avoided it at the cost of a series of violent and arbitrary intellectual restrictions whose ultimate effect is to turn legal doctrine into an endless array of argumentative tricks. Through its constructive attempts to devise a less confined genre of legal analysis, the critical legal studies movement has insisted upon avoiding this avoidance.

The rationality for which this expanded version of legal doctrine can hope is nothing other than the minimal but perhaps still significant potential rationality of the normal modes of moral and political controversy. You start from the conflicts

between the available ideals of social life in your own social world or legal tradition and their flawed actualizations in present society. You imagine the actualizations transformed, or you transform them in fact, perhaps only by extending an ideal to some area of social life from which it had previously been excluded. Then you revise the ideal conceptions in the light of their new practical embodiments. You might call this process internal development. To engage in it self-reflectively you need make only two crucial assumptions: that no one scheme of association has conclusive authority and that the mutual correction of abstract ideals and their institutional realizations represents the last best hope of the standard forms of normative controversy. The weakness of such a method is obviously its dependence upon the starting points provided by a particular tradition; its strength, the richness of reference to a concrete collective history of ideas and institutions. Legal doctrine rightly understood and practiced is the conduct of internal development through legal materials.

The distinctive character of internal development becomes clear when this method is compared to the other major recourse of normative thought: the visionary insight into a reordered social world. Such insight presents an entirely new plan of collective life, a plan supported by a credible theory of transformation, informed by an image of personality, and guided by the effort to extend opportunities of human connection. Whereas internal development begins by exploring conflicts between ruling ideals and established arrangements, or among those ideals themselves, and then pushes by gradual steps toward ever more drastic ways of reimagining society, visionary insight begins with the picture of a reordered human world. But the political prophet can be understood and be persuasive only because the principles of the world he invokes may be discerned already at work in the anomalies of personal encounter and social practice. No clearcut contrast exists between the normal and the visionary modes of argument, only a continuum of escalation. The strongest proof of their similarity is that they both resort to the same preferred device: the effort to seize upon deviations in current experience and to imagine them transformed, or to transform them in fact, into organizing conceptions and practices. The basis of this resemblance in method is a resemblance in character. Short of claiming access to authoritative revelation or privileged intuition, every normative argument must in some wider sense be internal. If not internal to the interplay between ideals and institutions within a particular tradition, it must be internal to an analogous interplay on the scale of world history.

There are many reasons of prudence, relative propriety, or sheer capability that internal development might not be carried very far in a particular institutional context. A state may even be more or less deliberately set up to deny certain kinds of transformative activity (including the bolder sorts of internal development) any entirely suitable institutional instrument. The existing liberal democracies are a case in point.

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

Two countervailing considerations should guide an appreciation of the limiting effects of the judicial role upon the use of deviationist doctrine. On the one hand, there is the need not to seek in doctrinal breakthroughs a substitute for more tangible and widely based achievements nor to see doctrinal dispute as a replacement for other kinds of practical or imaginative conflict. On the other hand, there is no magic in an established institutional setup: it tends to make out of place the activities that might, in any sphere, transform it. The refusal to sanctify existing arrangements implies a willingness to brave the incongruous use of institutional roles. It is unlikely that from clashing considerations like these any general theory of institutional roles could ever be developed. If it could, its effect would not be to ensure the overall compatibility of authoritative theories of right with the actual content of the legal order. Thus, it would be of no use to those who had expected most from it.

The program of expanded legal analysis — the constructive outcome of our critique of formalism — solves the problem of doctrine only by redefining the terms of the problem itself. The received forms of doctrine and the legal theories that try to justify them seek a method guaranteed both to possess just the right degree of revisionary power and to reaffirm the contrast between legal analysis and ideological conflict. The actual result of this search, however, is to reduce all legal rea-

soning to a tenacious exercise in sophistry, compelled in its most serious and systematic moments to invoke background theories of right and social practice whose implications it must also contain. Deviationist doctrine employs a method, internal development, whose revisionary reach can in the end be limited solely by institutional considerations lacking any higher authority. It lays claim to no privileged status capable of distinguishing it clearly from ideological dispute. Thus, when pushed beyond a certain point, it ceases to look like what we now call doctrine or to serve the narrow purposes of professional argument, especially when such argument takes place in an adjudicative context. Yet at every point it promises only what it can deliver: its looser and more contestable rationality requires no mixture of bold theoretical claims and saving ad hoc adjustments.

The program of enlarged doctrine has a broader significance as well. Every stabilized social world depends, for its serenity, upon the redefinition of power and preconception as legal right or practical necessity. The mundane and visionary struggles over the form of social life must be stopped or circumscribed, and the truce lines reinterpreted as a plausible though flawed version of the rightful order of society. This simple and uncontroversial idea can be restated with greater specificity. Legal rules and doctrines define the basic institutional arrangements of society. These arrangements determine the limits and shape the content of routine economic or governmental activity. The rules that define these formative practices must be interpreted and elaborated as expressions of a more or less coherent normative order, not just as a disconnected series of trophies with which different factions mark their victories in the effort to enlist governmental power in the service of private advantage. Otherwise, the restatement of power and preconception as right would not have been fully accomplished. The generality of rules and the stability of rights would lie in permanent jeopardy. The interpretive elaboration of the norms that define a social world would turn into an occasion to begin all over again the fight over the structure of this world. In the societies with which modern legal theory deals, the formative order of social life has been subject to continuing conflict and cumulative insight and thereby deprived of some of its halo of naturalness and necessity. The appeal to abstract categories of legal right and technical necessity becomes all the more important and the required truncations of legal or technical reasoning all the more obvious and abrupt. The single most important example of this truncation in legal doctrine and legal theory has already been

mentioned: silence over the divergent schemes of social life that are manifest in conflicting bodies of rule, policy, and principle.

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

B. The Constructive Outcome of the Critique of Objectivism: Redefining the Institutional Forms of the Democracy and the Market

The constructive outcome of our critique of objectivism is to turn us toward the search for alternative institutional forms of the available institutional ideals, most especially the market and the democracy. The chief medium in which we pursue this quest is deviationist doctrine itself, including the historical and analytic criticism of received legal conceptions. For its full development, such a search requires three bodies of supporting and animating ideas. The first is a credible theory of social transformation. Without such a theory, we would lack standards by which to distinguish more or less realistic programmatic ideals. Programmatic debate would then fall back into its characteristic modern dilemma. The proposals that depart sharply from existing realities end up looking like utopian fantasies that merely invert a social reality they do not seriously imagine transformed. The proposals that stay close to established reality represent marginal adjustments that hardly seem worth fighting for. The programmatic mind alternates between the two converse and complementary dangers of effortless redefinition and blind capitulation. The second supporting set of ideas is a conception of the ideal that should guide the reconstruction of the institutional forms. This ideal may represent some form of visionary insight responding to a particular historical circumstance. Or it may be simply an attempt to capture and generalize the meaning of a particular

process of internal development. A third set of ideas is a conception of the proper relation of law to society. The alternative institutional forms, like the arrangements they replace, must be worked out in legal categories and by the method of deviationist doctrine.

One way to clarify the origin and character if not the justification of the ideal that inspires our programmatic institutional ideas is to say that our program arises from the generalization of aims more or less shared by the great secular doctrines of emancipation of the recent past — liberalism, socialism, and communism — and by the social theories that supported them. At the heart of each of these doctrines lay the belief that the weakening of social divisions and hierarchies would reveal deeper individual and collective identities and liberate productive and creative powers. The theoretical and practical consequences of this belief were drastically constricted by dogmatic assumptions about the possible forms of social transformation and their possible institutional results. We have attacked the second set of constraints and therefore, by implication, the first. The result is a more generalized or radicalized version of the social ideal.

This version may be stated in three equivalent forms. The first form is the cumulative loosening of the fixed order of society — its plan of social division and hierarchy, its enacted scheme of the possible and desirable modes of human association. The sense of this progressive dissolution is that to every aspect of the social order there should correspond some practical or imaginative activity that makes it vulnerable to collective conflict and deliberation. (Expanded doctrine itself exemplifies such an activity.) In this way no part of the social world can be secluded from destabilizing struggle. A second version of the ideal that guides the elaboration of alternative institutional forms is that the life chances and life experiences of the individual should be increasingly freed from the tyranny of abstract social categories. He should not be the puppet of his place in the contrast of classes, sexes, and nations. The opportunities, experiences, and values conventionally associated with these contrasting categories should be deliberately jumbled. A third, equivalent version of the ideal is that the contrast between what a social world incorporates and what it excludes, between routine and revolution, should be broken down as much as possible; the active power to remake and reimagine the structure of social life should enter into the character of everyday existence. None of the social and mental forms within which we habitually move nor all the ones that have ever been produced in history describe or determine ex-

haustively our capabilities of human connection. None escapes the quality of being partial and provisional. But these mental and social worlds nevertheless differ in the degree as well as the character and severity of their constraining quality. The search for the less conditional and confining forms of social life is the search for a social world that can better do justice to a being whose most remarkable quality is precisely the power to overcome and revise, with time, every social or mental structure in which he moves. These three equivalent versions of the ideal, deliberately stated in a form of extreme abstraction, have a directing force, as the next Section tries to show, though at every stage of the advance toward concreteness the transition to the next level remains loose and speculative.

Together with this approach to the social ideal goes a conception of law and its desirable relation to society. There was a time in modern Western history, in the prerevolutionary Europe of aristocratic and corporatist polities, when perhaps the single most important theme of legal thought lay in the idea that the law in general and the constitution in particular should be an expression and a defense of the underlying order of social division and hierarchy. The system of rights was meant to exhibit on its surface the gross structure of society, like those Renaissance buildings whose facades transcribe their internal design. Perhaps the most important shift in the history of modern legal thought has been the one that led from this conception to the idea that the constitution and the law should describe the basic possible dealings among people, as property owners and as citizens, without regard to the place individuals occupy within the social order. According to this modern view, the system of rights would rise above the real social order. Rights would work either as if this order did not exist or as if it could be adequately tamed and justified by the mere expedient of treating it as nonexistent for purposes of rights definition. The critical legal studies movement has committed itself to another change in the conception of the relation of law to society, potentially equal in scope and importance to the shift I have just recalled. Law and constitution are now to be seen as just the reverse of what prerevolutionary theory demanded. They become the denial rather than the reaffirmation of the plan of social division and hierarchy. The ideal aim of the system of rights, taken as a whole and in each of its branches, is to serve as a counterprogram to the maintenance or reemergence of any scheme of division and hierarchy that can become effectively insulated against the ordinarily available forms of challenge.

If this counterprogram seems to require an extreme and almost paradoxical voluntarism, there are several exculpatory factors to bear in mind. First, this view merely takes the preconceptions of liberal legal and political theory seriously and pushes them to their conclusions. It asks what would be needed for social life itself to acquire in fact the features that to a considerable extent liberal politics already possess. Far from representing a sudden reversal of the past experiences of society and social thought, it builds upon a history of theoretical insight and practical politics: the insight into the artifactual character of social life, the politics of destroying the immunity of fixed social structures to politics. Second, one of the most important bases of this view of the relation of law to society is simply the recognition that societies differ among themselves in the extent to which they lay themselves open to self-revision. To see this difference, it is enough to compare the liberal democracies themselves to the societies that preceded them. Third, the antagonistic view of the relation of law to society need not, indeed it could not, be applied all at once. It serves as a regulative ideal capable of guiding modest but potentially cumulative changes. The next parts of my argument may help to show how this process can happen and what precisely it means.

C. From a Social Ideal to an Institutional Program

1. Political and Cultural Revolution. — The social ideal and the view of the relation of law to social life that I have just described can be translated into a program for the reconstruction of the state and the rest of the large-scale institutional structure of society. They can also be taken as the basis for a vision of transformed personal relations. This Section deals primarily with the first and ultimately the less important of these two series of implications. My argument begins by suggesting how a program for reconstructing the basic institutional arrangements of society can be inferred, by internal development, from the criticism of existing institutional practices and ideals, especially the ideals and practices of democracy. It then goes on to outline this program in three contexts: the organization of government, the organization of the economy, and the system of rights.

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

Given these reciprocal connections, it may be helpful to understand the general character of the view of regenerate personal connections that accompanies the institutional program I am about to discuss.

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

The guiding and unifying aim of the cultural-revolutionary practice I have in mind lies perhaps in the systematic remaking of all direct personal connections — like those between superiors and subordinates or between men and women — through their progressive emancipation from a background plan of social division and hierarchy. Such a plan provides these dealings with a prewritten script. It makes the opportunities of practical exchange or passionate attachment respect the limits imposed by some established power order. It assigns fixed roles to people according to the position that they hold within a predetermined set of social or gender contrasts.

Thus described, the cultural-revolutionary program may seem entirely negative. It can nevertheless be restated in the affirmative mode. It wants the opportunities and experiences available to different categories of people to be more freely recombined. This facility of recombination matters both as a good in itself and as an occasion to improve the character of social life. It is easy enough to understand how such a facility might respond to practical concerns: productive capabilities may develop as the forms of production and exchange become more independent of any given, rigid organizational or social

context. The hope of improvement also extends, though more obscurely and controversially, to the domain of community and passion. For example, people may be enabled and encouraged to combine in a single character qualities that ruling stereotypes assign separately to men and women.

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

The program outlined here may be justified directly as an interpretation of what a particular social ideal and its corresponding image of personality require for our historical circumstance. We can reach similar results by applying the method of internal development described in the preceding Section: by taking the available ideals of democracy and comparing them to existing institutional arrangements that supposedly embody these ideals in practice. The convergence of this internal line of argument with the inferences that might be drawn directly from an ideal of the self or society should hardly cause surprise; it merely confirms the parallelism of internal development and visionary insight.

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

This minimalist view of political legitimacy would make no sense if the society in which the state existed were organized according to a rigid and pronounced system of social divisions and hierarchies that set the life chances of each individual. Either the dominant groups in this hierarchy would turn the state into their relatively passive instrument or the state, though "autonomous," would become relatively marginal to

the actual organization of society. Thus, the minimalist standard must be extended to incorporate the demand for some significant fragmentation and weakening of this plan of social hierarchy and division; this extension of the standard remains no less significant for being vague. One way to make the internal argument against the existing versions of democracy is to judge them by the standard of this extended minimalist requirement for state and society.

The argument is familiar enough and usually includes the following three ideas, which emphasize the failure of existing democracies to meet the minimalist requirement. First, the established forms of economic and political organization enable relatively small groups of people to control the basic terms of collective prosperity by making the crucial investment decisions. For reasons to be developed later, the style of constitutional arrangements makes it hard to win state power on behalf of any serious transformation, such as a commitment to change the institutional form of the market and the locus of ultimate control over the pace and direction of accumulation. Moreover, even the most distant threat of reform can be met by the immediate response of disinvestment and capital flight, with their sequel of economic crisis and electoral unpopularity. A second criticism emphasizes the importance of major areas of organizational life — factories, bureaucracies, and offices; hospitals and schools — in which people exercise and suffer powers that are neither subject to effective democratic accountability nor indeed capable of being fully justified by those two apparent alternatives to democracy: free contract and blind technical necessity. To a large extent, these citadels of private power remain insulated from the risks of party-political conflict: everything from the "checks and balances" style of governmental organization to the lack of a credible vision of how markets and democracies might be alternatively organized contributes to this insulation. Thus, the ordinary experience of social life gives the lie to the promises of citizenship. A third and narrower criticism points out that from their position of relative insulation these citadels can corrupt even the circumscribed internal life of the democracy through their influence upon the means of communication and the financing of party politics.

The case against the established forms of democracy may be put on another footing, which though less familiar than the criticisms just enumerated preserves the hallmarks of internal argument. Politics in the established democracies are characteristically obsessed with a small number of options for governmental activity. (The same point could of course be made

even more strongly for the communist countries of the present day.) Take the broad area of macroeconomic policy as an example.

There come times when left-leaning political parties bent on reform ride into power on a wave of promises to redistribute wealth. If these parties are ambitious and leftist enough, their platforms include plans to change the institutional structure of the state and the economy. But these reformist schemes usually come to grief before they have been seriously tested. Constitutional guarantees for the effective restraint of governmental power encourage postponement, resistance, and impasse. At the same time, the fear of redistribution and reform provokes economic crisis through disinvestment and capital flight. From all sides the would-be reformers find their electoral support eroded by difficulties of transition that the institutional structure aggravates, as often by design as by unintended effect. They turn in desperation or disenchantment toward short-term goals of modest redistribution and renewed economic growth and stability. Even these objectives elude them within the given structure of governmental and economic activity. Before having had a chance to leave much of an imprint on enduring institutions, they are thrown out of office. Another, reactionary party comes to power promising to help everyone by reaccelerating economic growth. At its most ambitious, it speaks of establishing or restoring free competition. But — for reasons to be mentioned later — a quantum jump in the degree of economic decentralization cannot be reconciled with economies of scale and other technical considerations without drastic changes in the bases of decentralization, changes furthest from conservative minds. The program of the reactionary party comes down quickly to the thesis that you help everyone by helping out first the people with the capital to invest. In the situation I describe, however, the investors can never get enough to behave according to rule. They know the fickleness of the democracy. They have, most of them, long ceased to be the innovative, risk-bearing entrepreneurs of fable. Mere handouts will not change them, nor will greed ensure ingenuity. Because it has not seen inequality redeemed by riches, a disoriented and disheartened electorate dismisses the reactionaries and gives the reformers one more chance to fail.

In this dismal, compulsive round of policy alternatives, each side already anticipates and internalizes the prospect of failure. The reformers cannot decide whether to argue for the reorganization of the economy and the state or to rest content with building up the welfare system within the established

forms of governmental and economic organization. The reactionaries hesitate between taking their free competition slogans seriously and truckling to the rich unabashedly. Political hopes undergo a cumulative deflation. Politics are lived out as a series of second-best solutions to intractable problems. The purists of each camp can plausibly claim that their ideas have never been tried out. The cynics can advise us to face up to reality by surrendering to the existent.

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

The repetitious quality of political life to which the preceding paragraphs allude stands in clear conflict with the visionary commitment to weaken the contrast between the petty fights within a formative institutional order and the larger struggles about it. A social world dominated by such compulsions is one that reduces even its most active and informed citizens to the condition of unresisting if not unknowing puppets. The recurrence of the reform cycles also supports an internal line of criticism. This internal argument requires replacing the idea of a state not hostage to a faction with the equally familiar notion of a social order all of whose basic features are directly or indirectly chosen by equal citizens and rightholders rather than imposed by irresponsible privilege or blind tradition. No one chose the particular alternatives among which we are in fact made to choose, nor can they be understood in their specific content as a direct result of the fact that people's choices conflict. Here is a society that cannot live up to its essential self-image.

To imagine and establish a state that had more truly ceased to be hostage to a faction, in a society that had more truly rid itself of a background scheme of inadequately vulnerable division and hierarchy, we might need to transform every aspect of the existing institutional order. The transformed arrangements might then suggest a revision of the democratic ideal with which we had begun. From the idea of a state not

hostage to a faction, existing in a society freed from a rigid and determinate order of division and hierarchy, we might move to the conception of an institutional structure, itself self-revising, that would provide constant occasions to disrupt any fixed structure of power and coordination in social life. Any such emergent structure would be broken up before having a chance to shield itself from the risks of ordinary conflict.

One way to develop this conception of an empowered democracy into a set of more concrete institutional principles is to define the more precise obstacles to its realization in each major sphere of institutional change: the organization of the state, the organization of the economy (or of the market), and the organization of rights. This procedure will have the advantage of distinguishing the program from a timeless, utopian blueprint. No matter how radical the proposed rearrangements may appear, they represent the adjustment of an historically specific institutional system in the light of a series of historically given though possibly self-correcting ideals.

3. The Organization of Government. — Take first the shaping of government and of the contest over the possession and uses of governmental power. The main problem lies in the fact that the very devices for restraining state power also tend to deadlock it. They establish a rough equivalence between the transformative reach of a political project and the obstacles that the structure of the state and party politics imposes upon its execution. This structure helps form, and reinforces once formed, the interests and preconceptions that crystallize around any stabilized social situation. As a result, the struggles of official politics fail to provide sufficient occasion to disrupt further the background structure of division and hierarchy in social life, and thus give rise to the facts emphasized by the earlier, internal objections to the established sorts of democracy. Yet — and here we come to the heart of the problem — every attempt to revise the institutional arrangements that exercise this structure-preserving influence seems to undermine the restraints upon governmental power that are needed to secure freedom. A successful resolution of this dilemma must provide ways to restrain the state without effectively paralyzing its transformative activities.

Such a resolution might include the following elements. First, the branches of government should be multiplied. To every crucial feature of the social order there should correspond some form and arena of potentially destabilizing and broadly based conflict over the uses of state power. Alternatively put, the organization of government and of conflict over governmental power should provide a suitable institutional

setting for every major kind of practical or imaginative activity of transformation. (Recall, for example, those more ambitious sorts of injunctive relief afforded by contemporary American law that involve large-scale disruptions or reconstructions of existing institutions. Such relief should not fall under a cloud because it does not fully fit either the judicial or the legislative contexts in the contemporary state.) Different branches of government might be designed to be accountable to popular sovereignty and party-political rivalry in different ways. Second, the conflicts among these more numerous branches of government should be settled by principles of priority among branches and of devolution to the electorate. These principles must resolve impasses cleanly and quickly. They should replace the multiple devices of distancing and dispersal (including the traditional focus on "checks and balances") that seek to restrain power through the deliberate perpetuation of impasse. Third, the programmatic center of government — the party in office — should have a real chance to try out its programs. That a constitutional concern for decisional mobility need neither leave state power unchecked nor injure the vital rights of opposition is shown by the experience of many European constitutions since the First World War. These constitutions have emphasized this concern on a more modest level without jeopardizing public freedoms. The significance of this three-point program of governmental reform will become clearer when seen against the double background of an economic order that enables the issues of party politics to be fought out in the midst of everyday activities and a system of rights that safeguards individual security without immunizing large areas of social practice from the struggles of the democracy.

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

This way of maintaining a market order creates two kinds of obstacles for the program of empowered democracy: problems of freedom and problems of economic convenience.

This style of market organization threatens democratic freedom on both the large and the small scale. It does so on a small scale by giving the occupants of some fixed social stations the power to reduce the occupants of other social stations to dependence. Individual or collective contract rights cannot fully counterbalance this dependence. Practical imperatives of organizational efficiency cannot fully justify it. This mode of market organization also poses a large scale threat to democracy. It does so by allowing relatively small groups, in control of investment decisions, to have a decisive say over the conditions of collective prosperity or impoverishment.

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

The first such damaging effect of the current market system is the constraint that it imposes upon the absolute degree of decentralization in the economy. For one thing, within this institutional version of the market any attempt to break up large-scale enterprises seems to violate overriding economies of scale. For another thing, a serious deconcentration of industry would imply the disbanding of trade unions, a measure tolerable in a mass democracy only if accompanied by the dissolution of large business enterprises or the assertion of an alternative mode of political guidance of the economy. No wonder the program of promoting "free competition" looks like a romantic adventure, invoked more often than not as a cover for some set of favored deals between government and big business.

A second effect goes to what might be called economic plasticity: the encouragement of economic experimentation or, more precisely, the power to recombine and renew not merely factors of production but also the components of the institutional context of production and exchange. The version of the market I have described makes initiatives for the revision of this context depend overwhelmingly upon the factional interests of those who, in the name of the property norm and impersonal technical requirements, take the lead in organizing work and supervising economic accumulation. One of the most subtle and specific ways in which privilege discourages experimentation is the maintenance of a series of institutional

conditions that help establish a relatively clear contrast between the way work tends to be organized in the mainstream of industry (as well as of administration and warfare) and in its experimental vanguard. In the mainstream a stark contrast prevails between task-defining and task-executing activities. Its specific industrial concomitants are rigid production processes, product-specific machines, and mass production, all dependent upon enormous capital outlays and relatively stable product, labor, and financial markets. In the vanguard of industry, administration, and warfare, this contrast gives way to a more continuous interaction between task-defining and task-executing activities in a climate that favors flexibility in the forms, the instruments, and the outcomes of work. The predominance of the more rigid, experiment-avoiding mode requires specific institutional conditions that the existing kind of market economy supplies. Prominent among these conditions, in economic life, are the devices that enable the inflexible and costly enterprise to protect itself against instability in the financial markets (e.g., by generating its own internal investment funds) or in the product and labor markets (e.g., by relying upon temporary, less privileged workers or satellite enterprises for the part of production that responds to the unstable margin of demand).

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

A system of market organization capable of dealing with these multiple dangers to freedom and prosperity must not reduce the generative principle of economic decentralization to

the mere assignment of absolute claims to divisible portions of social capital in a context of huge disparities of scale, influence, and advantage. An alternative principle that conforms to the aims of empowered democracy, to its constitutional organization and its system of rights, might be described as either an economic or a legal idea.

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

Such a system might hope to become both more decentralized and more plastic than the existing market order. The institutional provisions for decentralized production and exchange would be subject to ongoing political controversy. The relative immunity of these arrangements to serious conflict and frequent revision in the existing democracies and market orders suggests that the arrangements cannot be freely transformed by economic actors. It merely shows that they are fixed by a system of legal entitlements and de facto power relations that governments seem able to change only marginally and that common prejudice dogmatically identifies with the inherent nature of a market system. One of the points of contention in the reformed system might be expected to become precisely the extent to which the range of permissible variation in the institutional forms of production and exchange should be expanded, in the economy as a whole or in particular sectors of it, for the sake of experiment and innovation.

The legal counterpart to the rotating capital fund is the disaggregation of the consolidated property right. As any civilian or common lawyer should have known from the start, what we call property is merely a collection of heterogeneous

faculties. These faculties can be broken up and assigned to different entities. Thus, under the revised market system, some of the faculties that now constitute property might be attributed to the democratic agencies that set the terms of capital-taking while others would be exercised by the capital-takers themselves.

5. The System of Rights. — Alongside the organization of government and the economy, the system of rights constitutes yet another domain for institutional reconstruction. In its present form, this system causes two main problems for the program of empowered democracy. Individual safeguards rest on two supports: the system of property rights, which threatens to reduce some individuals to direct dependence upon others, and the set of political and civic rights and welfare entitlements, which poses no such threat. Yet any alternative economic order seems to aggravate the danger to freedom. I shall say no more of this problem of immunity and domination for the moment: it has already been discussed in the course of my earlier remarks about economic organization, and it is dealt with more fully in a later Section on the implications of our work for the structure of ideological controversy.

The established system of rights presents another, less familiar obstacle to the aims of this institutional program: the absence of legal principles and entitlements capable of informing communal life — those areas of social existence where people stand in a relationship of heightened mutual vulnerability and responsibility toward each other. For one thing, our dominant conception of right imagines the right as a zone of discretion of the rightholder, a zone whose boundaries are more or less rigidly fixed at the time of the initial definition of the right. The right is a loaded gun that the rightholder may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down. But the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person are incompatible with this view of right and therefore, if this is the only possible view, with any regime of rights. For another thing, the still-ruling account of the sources of obligations sees obligations to arise primarily from either perfected acts of will (e.g., the fully formalized, bilateral executory contract) or the unilateral imposition of a duty by the state. Though a large and growing body of legal rights and ideas recognizes, under names such as the reliance interest, legally protected relationships that fail to fit these two categories, these relationships remain anomalous from the standpoint of our basic legal thinking about the sources of obligation. Most of our recognized

moral duties to each other and especially those that characterize communities arise from relationships of interdependence that have been only partially articulated by the will and only obliquely influenced by the state. Within this ordinary moral experience, the two major sources of legal obligation represent the exceptional, limiting cases.

It may not at first seem self-evident either what the question of rights and community has to do with the program of empowered democracy or how it connects with the problem of immunity and domination. Remember that the program of institutional reconstruction matters not only for its own sake, but also for its encouragement to a systematic shift in the character of direct personal relations and, above all, in the available forms of community. This is the other element in the translation of the social ideal into concrete social practice: the element characterized at the outset of this Section as the cumulative emancipation of personal relations from the constraints of some background plan of social division and hierarchy, as the recombination of qualities and experiences associated with different social roles, and as the development of an ideal of community no longer reduced to merely the obsessional and stifling counterimage to the quality of practical social life. These reformed varieties of communal experience need to be thought out in legal categories and protected by legal rights: not to give these reconstructed forms of solidarity and subjectivity institutional support would be — as current experience shows — merely to abandon them to entrenched forms of human connection at war with our ideals. Yet the received ideas about the nature of rights and the sources of obligation cannot readily inform even the existing sorts of communal existence, much less the ones to which we aspire.

The rights and community issue addresses the mere form of rules and entitlements. The immunity and domination problem refers to the specific social effects of a particular right: consolidated property, the absolute claim to a divisible portion of social capital. How then do these two problems relate? In the high classicism of nineteenth century legal thought, the property right was the very model of right generally. The consolidated property right had to be a zone of absolute discretion. In this zone the rightholder could avoid any tangle of claims to mutual responsibility. It was natural that this conception of right should be extended to all rights. As the focus of worldly ambition, property had an obvious practical importance within the system of legal categories. Moreover, the commitment to seclude basic economic arrangements from democratic politics made lawyers want to see in this particular

brand of property the inherent nature of right rather than just a special case in need of special defense. The dominant jurisprudence was pressed into support: property seemed to exemplify with unequalled clarity the feature of rights that mattered most to the nineteenth century objectivist — the possibility of derivation from the inherent structure of a type of society. As this version of objectivism lost authority, another, more ambiguous license to extrapolate from property to other rights began to take its place: the discovery of the economic and analytic arbitrariness of any firm distinction between rights over material resources and other rights. Thus, the absence of legal principles and categories suited to communal life turns out to be as much the surprising by-product of the legal form given to the market as the consequence of an inability to assimilate existing varieties of community to the ruling vision of society.

To deal effectively with the two overlapping problems I have discussed — the problem of immunity and domination and the problem of rights and community — the law might have to distinguish four kinds of rights. The concept of right is subsidiary to that of a system of rights. A system of rights describes the relative positions of individuals or groups within a legally defined set of institutional arrangements. These arrangements must be basic and comprehensive enough to define a social world in which certain instrumental or passionate dealings among people are encouraged and others disfavored. One kind of right gives the individual a zone of unchecked discretionary action that others, whether private citizens or governmental officials, may not invade. But we must not mistake the species for the genus nor claim to have stated how we understand even this species of right until we have made clear the institutional context of its operation. Fully developed, the system of rights described and justified here would presuppose and be presupposed by the principles of governmental and economic organization earlier outlined. The four types of right that constitute this system would carry different senses; the tyranny of consolidated property over our thinking about entitlements would at last be overthrown. All of these categories of right nevertheless share certain fundamental attributes. Each establishes a specific form of human connection that contributes to a scheme of collective self-government and resists the influence of social division and hierarchy.

The first category consists of the immunity rights. These rights establish the nearly absolute claim of the individual to security against the state, other organizations, and other individuals. As much as is compatible with the risks of politics,

they constitute the fixed, Archimedean point in this system. As political and civic rights (organization, expression, and participation), as welfare entitlements, and as options to withdraw functionally and even territorially from the established social order, they give the individual the fundamental sense of safety that enables him to accept a broadened practice of collective conflict without feeling his vital security endangered. The system of immunity rights in the empowered democracy differs from current individual safeguards both by the vastly increased opportunities to exercise these rights and by its scrupulous avoidance of the guarantees of security that, like consolidated property, help defend power orders against democratic politics.

Destabilization rights define a second class of entitlements: claims to the disruption of established institutions and forms of social practice that have achieved the very sort of insulation and have contributed to the very kind of crystallized plan of social hierarchy and division that the entire constitution wants to avoid. This is the most novel and puzzling piece of the system of rights; it is discussed in detail below.

Market rights constitute a third species of entitlement. They represent conditional and provisional claims to divisible portions of social capital. The form and substance of these rights, as successors to the absolute, consolidated property right, are suggested by the proposed alternative way of organizing a market. How provisional and conditional they should be, in any given sector or in the economy as a whole, poses one of the key questions to be answered by conscious collective decision. Whatever their fixity, however, they must be treated as a subcategory of right rather than as the exemplary type of entitlement to which all other types must be assimilated.

Solidarity rights make up a fourth category: the legal entitlements of communal life. Solidarity rights give legal force to many of the expectations that arise from the relations of mutual reliance and vulnerability that have neither been fully articulated by the will nor unilaterally constructed by the state. Each solidarity right has a two-staged career. The initial moment of the right is an incomplete definition that incorporates standards of good-faith loyalty or responsibility. The second moment is the completing definition through which the rightholders themselves (or the judges if the rightholders fail) set in context the concrete boundaries to the exercise of the right according to the actual effect that the threatened exercise seems likely to have upon the parties to the relationship.

6. Transformative Ideals and Political Realism. — It would be a mistake to suppose that this program for government, the economy, and the system of rights need be carried out either

in its entirety or not at all. Though its several parts presuppose and reinforce each other, they can also all be realized in intermediate steps as long as advances in one area of institutional reconstruction gain sustenance from parallel moves in other areas. The mediating links can begin with seemingly modest readjustments of established governmental, economic, and legal systems. Thus, the scheme of governmental organization might inspire the branches of an existing, unreconstructed state to assume new and partly incongruous functions. The desired economic regime might suggest partial and transitional methods of political control over accumulation. Those committed to institute such controls could, for example, take advantage of the occasions created by the endless series of governmental attempts to sustain full employment and continued growth. (Think of the opportunities generated by the more overt public subsidization of industry. Because the immediate beneficiaries of the subsidies are big businesses rather than, as they have often been in agriculture, family enterprises, a pressure may be created to increase governmental or political influence over basic investment decisions in exchange for public help.) The proposed system of rights can serve to orient the development of concrete bodies of rule and doctrine in every area of law characterized by ambiguity, controversy, and growth: it can become part of the guiding element in our practice of deviationist doctrine.

The entire program of institutional reconstruction represents among other things an attempt to break the stranglehold of a false antithesis that has dominated political thought since the late eighteenth century. This opposition is the contrast between a theorized picture, either idealized or depreciatory, of existing democracies and a counterimage of republican community. Thus, in a typical and famous version of the contrast, Benjamin Constant distinguished the ancient from the modern republics. In the ancient republics, the entire citizenry had an active experience of self-rule, devotion to the common good, and life on the historical stage, but correspondingly few opportunities for private enjoyment or the development of subjectivity. In the modern republics, subjectivity and enjoyment flourished, though at the cost of a shrinking of the public space. The opposition between the two kinds of state is false, not because it can be resolved by some easy reconciliation, but because it amounts to a sham. The picture contrasted to the existing democracies, whether or not made to describe any real society of the past, is simply their inverted self-image, the receptacle of everything that seems missing in contemporary social life, and a confession of practical and imaginative fail-

ure. Precisely because the idealized communal republic cannot emerge from present reality as the outcome of any plausible sequence of political transformations and conceptual adjustments, it confirms the power of the established order in the very act of pretending to deny it.

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

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

IV. Two Models of Doctrine

A. From an Institutional Program to a Doctrinal Example: Equal Protection and Destabilization Rights

1. The Uses of Equal Protection. — My argument now focuses more intensively upon a particular area of the institutional program described in the previous Section: destabilization rights and their limited counterparts in current theory and doctrine. This focus allows me to develop in greater illustrative detail the most obscure and original part of the proposed system of rights and the one that best reveals the ruling intentions of the entire program. The analysis also

serves as the first of two examples of deviationist doctrine at work. In particular, it suggests how a conception of the system of rights in some drastically transformed and more ideal society might help guide the development of doctrine in existing societies. Moreover, it might do so without relinquishing the threshold features of doctrinal practice: the claim to justified influence upon the exercise of state power and the willingness to develop a legal system, step by step, from some position initially compatible with its authoritative materials, its institutional context, and even its received canons of argument. To exhibit this relation between an ideal vision and the conduct of legal analysis in the here and now is to go some way toward fulfilling the claim that deviationist doctrine relativizes the contrast between legal reasoning and ideological controversy. It preserves the valid element in the received idea of doctrine precisely by broadening our sense of what doctrinal argument can and should look like.

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

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

The second job equal protection and its counterparts have been expected to perform is far more ambitious and controversial. It is to serve as a constraint upon the generalizing categories that the law may employ: a generality-correcting task. Sympathetically viewed, generality correction aims to prevent government from establishing or reinforcing through the laws collective disadvantages inconsistent with the princi-

ple that in a democracy each person should count as one. Unlike the generality-requiring function, the generality-correcting mission seems to require from those responsible for administering the legal system a comprehensive view of the proper role of the constitution and the law in society. This second variant of equal protection typically employs two crucial conceptual devices that shape and limit its operation. The analysis of these intellectual maneuvers will help disclose the conception of law and society that sustains generality-correcting equal protection.

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

The other crucial device is the idea known in American law as the state action requirement. The point is to limit the constitutional constraint upon legislative freedom to the instances of disadvantage that governmental rather than private power helps to uphold. This provides a second chance to ward off the danger that equal protection review might be used to turn society upside down and to disrupt the institutional logic of the constitution. But though this second chance may offer a useful hedge against thoughtless or subversive enthusiasm, it ought to be largely unnecessary. The restraint formerly imposed by the state action requirement might instead be provided by a direct analysis of the actual or intended effect of the laws upon collective disadvantage. More significantly, a major objection to the constitutional plan would be presented if there existed many instances of collective disadvantage that could not be corrected by the normal processes of politics and yet remained free from any other constitutional check because

government could not be faulted for them. The state would then resemble all too closely those prerevolutionary governments nestled within a highly defined social order that they were powerless to change. But the state that modern constitutional and legal theory addresses is supposed to be one that effectively subjects the basic arrangements of society — and especially those that establish power relationships — to the wills of equal citizens and rightholders.

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

The constitution establishes a procedure for conflict over the uses of governmental power that prevents any one segment of society from bringing first the state and then social life itself permanently under the heel of its own interests and opinions. This prevention results partly from the system of individual safeguards (including contract and property rights), partly from the institutional devices for restraining any one power in the state and for guaranteeing the electoral replacement of officeholders, and partly from the nature of the society in which such a state can subsist and that, in turn, this state helps to maintain and perfect. Such a society is one in which individuals and the groups that they voluntarily form can pursue different aims and experiment with different productive economic relationships and forms of communal life. Life chances are not overwhelmingly determined by relative positions in a plan of social division and hierarchy. To a significant extent, people move around in civil society and band together in much the same way in which, as citizens, they participate in the partisan contests of the republic. Without a society that at least approaches this condition, the state earlier described could not exist: it would be either overthrown or reduced to

impotence. (How such a state could ever have appeared in the first place is a problem that, for the purpose at hand, can be put to one side.)

Government — the underlying view acknowledges — must nevertheless constantly intervene in the arrangements of this social world. The precise relation between state and society is, within limits, one of the issues at stake in democratic politics. Each group attempts to advance its interests and ideas by arranging this relationship in a slightly different way. Furthermore, a plausible argument claims that as a matter of both right and prudence everyone should be provided material and cultural conditions that enable him to develop his plans as a private person and to make his weight felt as a citizen. He should have access to these means no matter how he may have fared in the free collisions and alliances that supposedly mark social life. The character of democratic society usually ensures, the underlying view assumes, that through their own efforts individuals can escape confinement to a disadvantaged group. The character of the democratic state usually guarantees groups the ability to fight back through political action against disadvantage, particularly against the burdens that have arisen from some previous pattern of state action. Occasionally, however, the collective inferiority has taken such deep root that it cannot be avoided or corrected by the standard means. Social oppression contributes to political isolation and defeat, which in turn reinforce oppression. A segment of the population then finds itself denied the substance of citizenship and rightholding. This deprivation jeopardizes the legitimacy of the entire constitutional and social order. Here generality-correcting equal protection intervenes by prohibiting legislation that threatens to destroy the social foundations of the constitutional order. Such legislation aggravates a group disadvantage, incorrigible by the normal devices of electoral politics, through the use of legal categories that map the distinctions of a hierarchical order in society.

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

To make the underlying view explicit is already to go a long way toward discrediting it. No wonder so much ingenuity

has been devoted to saying as little about it as possible. Consider first some general objections to this view as a conception of what society and the state could and should be like. I shall limit myself to enumerating some of the arguments and stating their common theme; their development would ultimately require a comprehensive social theory.

First, the view assumes that there is a way of shaping the legally defined institutional arrangements of society so that they approach a pure structure of reciprocity and coordination. This framework would allow people to deal and to combine with each other and regularly to change social stations, all within the broad limits established by the extremes of collective moral tolerance. Once the framework had been set up, the individual would find himself free to change social stations. The state would need merely to correct occasional breakdowns or imperfections in the operation of the established order. But this futile search for the natural, prepolitical structure of human interaction and the all too facile identification of this structure with the established version of democracy protect this democratic system against the very challenges that might bring it closer to its professed aims.

Second, the view of politics — narrowly defined as institutionalized conflict over the mastery and uses of governmental power — fails for the same reasons. Its aim is to create a political process that can serve as an impartial device for summing up the wills of individuals about the proper role of the state in the kind of society already described. The system of representative government charged with this task is carefully designed to prevent manipulation by transitory and inflamed majorities who, misguided by demagogues or fools, might wreck the underlying pure structure of power and coordination. But precisely because government cannot easily disrupt the social order, it becomes the victim and protector of this order. It turns into a pervasively biased method of collective choice. The search for the neutral method for summing up the opinions of the citizenry diverts us from the more realistic attempt to create a polity that would in fact be more open to self-revision and more capable of dismantling any established or emergent structure of social division and hierarchy.

A third objection goes to the relation between the social world that the underlying view portrays and the controlling image of personality (or of relations among people) that justifies this world and that its institutions in turn exhibit and secure. It is a world meant to be neutral among different ways of life and ideals of personality, at least among those that do not

require the exercise of subjugation. Yet it cannot reach this goal for the very reason that its proposed form of social organization cannot be the pure structure of human interaction nor its favored mode of politics the unbiased method for the summation of opinion. The search for a social world indifferent to the choice of images of personality gets in the way of building a society whose institutions in fact display and encourage a more inclusive and defensible ideal of personality.

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

The underlying view may be attacked, more directly, as a false picture of what society already is or approximates rather than as a flawed account of what it can and should become. All of the considerations mentioned earlier in the course of the internal argument against the established versions of democracy become relevant again here. Though their confirmation would require extended empirical study, they do not for the most part depend upon counterintuitive or even especially controversial ideas. The underlying view seems strangely to conflict with widespread opinions about what society is actually like, not just with the empirical beliefs of leftists and other malcontents.

In equal protection thought, the disparity between assumptions about social reality and the ordinary experience of social life comes to a head on a specific point: the conflict between the need to make empirical premises about society more realistic and the pressure not to disrupt the institutional setup of the state. If it turned out that the irremediable disadvantages that trigger the application of generality-correcting equal protection were widespread, one of two disturbing conclusions would follow. The judiciary would have to assume ever greater responsibilities to revise the results of legislation and to transform, through such review, the structure of power in society. Though "the least representative branch," it would quickly find itself involved in a vast, censorial superpolitics that would eviscerate the ordinary partisan and legislative politics that the constitution and constitutional practice have

established. Alternatively — and far more plausibly, given the constraints upon judicial power — the judiciary might simply refuse to acknowledge or correct the irremediable disadvantages. These disadvantages would then accumulate or rigidify, and produce a long sequel of subversive effects upon the claims of the established order to allegiance and of the underlying conception to credibility. As the recent legal experience of the United States at the zenith of "liberal" judicial ambition and power shows, the two outcomes may even occur simultaneously: judges strain the institutional scheme, while social life nevertheless continues to confound the empirical assumptions of dominant theory.

3. The American Doctrine of Equal Protection. — Everything that has been said thus far about equal protection and its presuppositions might be applied, with variations, to any Western liberal constitutional democracy. The same notions even reappear in altered form among the dominant legal and political ideas of countries that lack constitutional review and accept legislative sovereignty. Consider now the specific structure of equal protection doctrine in the United States since the Second World War. The analysis will focus upon the doctrinal ideas that constitute the American version of the core device of generality-correcting equal protection: the identification of the groups that merit special concern and of the legislative categories that deserve special scrutiny.

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

Three connected sets of ideas enter into current American equal protection doctrine. The first is a taxonomy of both legislative categories and the social categories to which they refer, a taxonomy constructed for the purpose of determining the suitability of judicial review in particular instances. The

doctrine contrasts suspect and permissible classifications, a contrast sometimes stretched to include the intermediate sensitive classification. The point of these distinctions is to express a highly contentious view of American society and politics in a fashion as uncontentious as possible and thereby to meet the requirements of the underlying view. Thus, blacks and certain other ethnic groups afterward analogized to them are singled out as the prime instance of those irremediably and exceptionally disadvantaged segments of the population that generality-correcting equal protection is mainly designed to protect. The proponents of the "intermediate classification" category have considered women the proper beneficiaries of a judicial scrutiny that is more vigilant than what ordinary legislative classifications call for, though less demanding than what suspect distinctions justify. But what about all of those legislative categories that, directly or indirectly, mention or reinforce entrenched positions in the social division of labor and systematic, discontinuous differentials of access to wealth, power, and culture? These inequalities could certainly not be said to be anomalous. Yet their existence and their tenacity in the face of political attack is a matter of common observation and a staple of analysis and commentary in historiography and social science. To defend the thesis that racial and sexual advantages count most because they are in fact more severe than other forms of social division and hierarachy would involve the established doctrine in controversies that it could not easily win. In this circumstance the dogmatic and arbitrary assertion of implausible distinctions may seem wiser, if it can be gotten away with, than the attempt to support the assertion by fact and theory.

The remaining components of contemporary American equal protection doctrine represent a throwback to the objectivism of nineteenth century constitutional theory. The second element of the doctrine consists in the reference to fundamental interests that serve as functional surrogates for suspect classifications in eliciting heightened judicial vigilance. A well worked-out system of fundamental interests entrusted to judicial protection in the kind of state that the American Constitution sets up would have to be a neutral framework of democratic politics. It would mark the constitutive elements in a set of social relations and of links between state and society that inhere in the very project of a constitutional democracy. It could not represent the judges' own vision of the proper limits to democratic politics. A fragmentary system of fundamental interests could be nothing but a fragmentary version of such a framework. Moreover, to do the specific work

of generality-correcting equal protection, it needs to mark the differences between permissible and impermissible ways in which the state may sustain a pattern of collective disadvantage. Thus, the second element of the American equal protection doctrine presupposes the underlying view even more dogmatically, though less directly, than does the first.

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

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

4. Equal Protection Reconceived and Reconstructed. — The closest counterpart to equal protection in the institutional and conceptual system of empowered democracy is the law and doctrine of destabilization rights. The destabilization rights imply the replacement of the underlying view by the conception of state, society, and personality sketched in earlier Sections. Such a conception might be reached through the internal criticism and rearrangement of established ideals and institutions. In the course of this internal development, however, it would be necessary to abandon once and for all the

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

The central idea of the system of destabilization rights is to provide a claim upon governmental power obliging government to disrupt those forms of division and hierarchy that, contrary to the spirit of the constitution, manage to achieve stability only by distancing themselves from the transformative conflicts that might disturb them. Such a doctrine would do the work undertaken by both generality-requiring and generality-correcting equal protection. It would do so, however, without the capricious distinctions and confining premises of established doctrine. The safeguard against the discriminatory persecution of the individual — the concern of the generality requirement — would expand into a guarantee against whatever might threaten his richly defined position of immunity. The correction of irremediable collective disadvantages through checks upon legislative classification — the theme of generality correction — would undergo two complementary expansions. It would free itself from its arbitrarily selective focus upon some sorts of group inferiority (e.g., race and gender in American law) to the exclusion of others (e.g., class). Rather than just correct specific collective disadvantages within the circumscribed area of state action, it would also seek to break up entire areas of institutional life and social practice that run contrary to the scheme of the new-modeled constitution.

The idea of destabilization rights, like the larger program to which it belongs, results from the interaction between a social ideal and beliefs about the actual workings of a society. Prominent among these beliefs is the thesis that insulation from broadly based conflicts, whether at the heights of state authority or in the daily incidents of practical life, constitutes a necessary condition for the development of stable power orders in particular spheres of society. The thesis may be wrong. At least, however, its presentation serves to support the claim of deviationist doctrine to be frankly continuous with social theory as well as with ideological conflict.

The expansive character of destabilization rights threatens to aggravate a tension that already characterizes equal protec-

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

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

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

The destabilization right might also operate in another, far less extreme way. It would act not to invalidate laws directly but to disrupt power orders in particular institutions or localized areas of social practice. The power orders to be disrupted would be those that, in violation of the principles governing

social and economic organization, had become effectively insulated from the disturbances of democratic conflict. As a result, they would threaten to eviscerate the force of democratic processes in just the way that citadels of private power do in the existing democracies. Such a localized form of conflict-proof social practice may be the outcome of many legislative acts over time rather than of a single law. On the other hand, any given precept may produce the most serious effects of power entrenchment in but a few of its many contexts of application. The guiding criteria for the development of this branch of the law would be found in the principles that inform social and economic organization in the empowered democracy.

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

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

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

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

5. Authority and Realism in Doctrine. — This entire discussion has proceeded on the basis of two limiting assumptions that should now be made explicit. The first assumption is a suspension of disbelief in the possibility of normative argument. When placed in the context of the critical and constructive ideas presented earlier, the revised approach to equal protection as a system of destabilization rights claims to exemplify in the form of deviationist doctrine a mode of normative discourse that can hope to be more than the thinly veiled assertion of power and preconception. The choice of underlying conceptions — the view of state and society, the scheme of possible and desirable forms of human association — may be a limited part of legal argument, but once we move beyond the most limited disputes it becomes a crucial part. It has only the uncertain authority of either the method of internal development that it uses or the visionary ideal that may occasionally provide its point of departure. At each crucial juncture in the advance toward more concrete levels of analysis, different conclusions might reasonably be drawn. At every point the foundations remain contestable and the implications loose. To some this view may seem perilously close to skepticism. But you can say of normative argument what has been said of comedy: that it is a narrow escape not from truth but from despair. The emphasis falls on the narrowness of the escape; you cannot even be sure in the end whether you have made it. Perhaps the only view of normative argument that can be made to stick is one that approaches skepticism without being engulfed by it. Better this view than the familiar alternation between boastful moral dogmatism and barely hidden moral agnosticism.

The other assumption qualifying this and all other versions of deviationist doctrine is that the particular results for which I have argued could never be made to triumph through a

doctrinal putsch. Even with judicial support, these ideas could flourish only if backed by the transformation of dominant views of state and society, by the experimental remaking of particular institutional settings in the light of these ideas, and by the capture of parcels of governmental power outside the judiciary. Without this sustenance and echo, developments in legal doctrine within or outside a judicial setting can do no more than create transitory and limited practical opportunities while giving persuasive specificity to an insufficiently discriminate ideal.

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

This objection makes a serious mistake about the relation of reason to democracy. The appeal to a spurious conceptual necessity may prove tactically expedient. In the end, however, it always represents a defeat for our cause, no matter who may be the temporary victors in the broadened doctrinal debate. For such an appeal invariably attributes to a particular set of institutional arrangements and imaginative assumptions an authority that they lack. It thereby helps arrest people within a social world whose defenses against transforming conflict are merely the reverse side of a net of relations of dominion and dependence. Every strike against this misunderstanding of social life is also a blow in favor of the program to which we have committed ourselves.

B. From an Institutional Program to a Doctrinal Example: Contract, Market, and Solidarity

1. Contract Theory Disintegrated. — Another example of deviationist doctrine will serve two purposes. Together with the first example, it will give some sense of the wide variety of forms that expanded doctrine can take while highlighting what these forms have in common. It will also develop in detail the conception of solidarity rights and market rights put forward in the earlier institutional program. Set side by side, the two examples represent the outline of a systematic vision of public and private law, a vision of current as well as transformed law. Now, as before, it is important not to confuse the model of doctrine with the material to which it is

applied: the same model might be brought to bear on any branch of law. Some variants of deviationist doctrine, however, will be more successful in certain areas of law than in others. The relation of model to material implies a judgment of suitability. The concrete material here comes from contemporary American law, though, with marginal adjustments, it might have been taken from almost any common law or civilian jurisdiction in the West.

The problems to be discussed include all those that present-day legal thought treats as issues of contract. The argument, however, reaches far beyond the scope of our still-reigning contract theory. For the applicability of this theory has been subject over time to several qualifications. First, there are the exclusions: whole areas of law, like family law, labor law, antitrust, corporate law, and perhaps even international law, that were once regarded as branches of unified contract theory but gradually came to be seen as requiring a specific set of categories unassimilable to that theory. Then there are the exceptions: bodies of law and social practice such as fiduciary relationships that come under an anomalous set of principles within the central area of contract. Finally, there are the repressions: problems like those of long-term contractual dealings that, though resistant to the solutions provided by a theory oriented primarily toward the one-shot, arm's-length, and low-trust transaction, are nevertheless more often dealt with by ad hoc deviations from the dominant rules and ideas than by clearly distinct norms. When you add up the exclusions, the exceptions, and the repressions, you begin to wonder in just what sense traditional contract theory dominates at all. It seems like an empire whose claimed or perceived authority vastly outreaches its actual power. Yet this theory continues to rule in at least one important sense: it compels all other modes of thought to define themselves negatively, by contrast to it. This intellectual dominance turns out to have important practical consequences.

A major objective of the following argument is to show how this whole field of problems can be grasped by a single, cohesive set of ideas. Thus, though its main concern is to contribute to the development of a prescriptive vision, it also claims to supply the conceptual instruments with which to understand contract and related fields more clearly and coherently. It wants to replace the contrast between the overbearing theory and the runaway exclusions, exceptions, and repressions with a view that can explain or justify different practical solutions for different practical problems within a continuous set of ideas. If this task can be accomplished, the proposed

account will have beaten the received theory at its own game of persuasive generalization. As might be expected in the case of legal doctrine, new explanations come hand in hand with new evaluations: the same ideas that can effectively reunify and reorganize the entire realm of contract problems also help discredit the normative commitments of established thought.

Classical contract theory has always proved seductive to jurists in search of a legal calculus that could claim to generate the impersonal rules of free human interaction. For the same reason, it offers the most valuable challenge to a conception of doctrine that emphasizes the continuity of legal analysis with ideological conflict. The cost of the attempt to penetrate the inner defenses of a seemingly apolitical technique is greater complexity. Moreover, the earlier model dealt with an aspect of the gross institutional structure of society. This one must address a portion of the fine texture of social life and strive for the delicacy that the legal analysis of this texture demands.

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

2. Principle and Counterprinciple: Freedom to Contract and Community. — The initial stage in this variant of devia-

tionist doctrine is the effort to understand the better part of contract law and doctrine as an expression of a small number of opposing ideas: principles and counterprinciples. These ideas connect the more concrete legal rules and standards to a set of background assumptions about the kinds of human association that can and should prevail in different areas of social life. The principles and counterprinciples are more than artifacts of theoretical curiosity. They provisionally settle what would otherwise be pervasive ambiguities in the more concrete legal materials. But they themselves can be understood and justified only as expressions of background schemes of possible and desirable human association. For only this deeper context can offer guidance about the relative reach and the specific content of the opposing principles and counterprinciples. Because the conventional methods of legal analysis are committed to the contrast between doctrine and ideology or philosophy, they almost invariably prefer to leave implicit the reference to the larger imaginative foundations of rules and principles. Thus, I have argued, they gain a semblance of higher certainty at the cost of an arbitrary dogmatism.

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

The structure of reigning ideas about contract and its adjacent fields can be stated with the greatest possible simplicity, in the form of only two pairs of principles and counterprinciples. If we were concerned with a specific contract problem, many intermediate levels of generalization might be warranted.

The first principle is that of the freedom to enter or to refuse to enter into contracts. More specifically, it is the faculty of choosing your contract partners. It might be called, for short, the freedom to contract. The qualifications that the law of assignment imposes upon the doctrine of privity show that the principle of freedom of contract is marked by a certain complexity of meaning even when the currently dominant forms of market organization are taken for granted. In a system that treats the consolidated property right as the ex-

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

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

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

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

so rigidly and narrowly that the fine texture of reciprocities is left entirely unprotected.

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

The general first-level rule in contemporary Anglo-American contract law is that a declaration of intent to be legally bound may be unnecessary, although a declaration of intent not to be held at law may be effective. Those who devote themselves to self-interest in the harsh business world are presumed to want all the help they can get to avoid being done in by their contract partners. A second-level rule guides and qualifies the interpretation of the first-level one. Whenever possible a court construes intention in a manner that protects justified reliance and reads the parties out of a situation in which they stand at each other's mercy. Thus, if the bargain is one for separate deliveries over a long period and one party has seriously relied upon continued supply, the court may be expected to lean over backwards to interpret the exclusion of liability as narrowly as possible. A third-level rule limits the scope of both the first-level and second-level ones. As a qualification to the latter, it affirms that the impulse to interpret intent so as to avoid delivering one party into another's hands will be suppressed in noncommercial contexts. As a limitation upon the former, it reverses in family life or friendship the presumption of intent to be legally bound; an explicit assertion of intent will be required. "Social arrangements," it is said, are either rarely intended to have legal consequence or ought not to have such consequences. Intent should be construed accordingly. In one sense this third-level criterion is prior to the other two, for it determines the scope of their application. Its apparent justification lies in the attempt to defend private community against the disruptive intervention of the law and of the regime of rigidly defined rights and duties that the law would bring in its wake. Just why private community needs this defense is something that can

be explained only after the vision that underlies the interplay between the principle of freedom to contract and its counterprinciple has been made explicit.

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

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

The idea that there is an area of experience outside the serious world of work, in which communal relations flourish, can be made to justify the devolution of practical life to the harshest self-interest. The premises to this devolution recall the contrast between Venice and Belmont in *The Merchant of Venice*. In Venice people make contracts; in Belmont they exchange wedding rings. In Venice they are held together by combinations of interest; in Belmont by mutual affection. The wealth and power of Venice depend upon the willingness of its courts to hold men to their contracts. The charm of Belmont is to provide its inhabitants with a community in which contracts remain for the most part superfluous. Venice is tolerable because its citizens can flee occasionally to Belmont and

appeal from Venetian justice to Belmontine mercy. But the very existence of Belmont presupposes the prosperity of Venice, from which the denizens of Belmont gain their means of livelihood. This is the form of life classical contract theory claims to describe and seeks to define — an existence separated into a sphere of trade supervised by the state and an area of private family and friendship largely though not wholly beyond the reach of contract. Each half of this life both denies the other and depends upon it. Each is at once the other's partner and its enemy.

The larger imaginative background to this contrast is a vision of social life that distinguishes more or less sharply among separate models of human connection. These models are meant to be realized in separate areas of social life: democracy for the state and citizenship, private community for family and friendship, and an amalgam of contract and impersonal technical hierarchy for the everyday world of work and exchange. The most remarkable feature of this vision is its exclusion of the more morally ambitious models of human connection from the prosaic activities and institutions that absorb most people most of the time. These models are democracy and private community. Their moral ambition consists in their promise of a partial reconciliation between the competing claims of self-assertion and attachment to other people — a reconciliation, in fact, between two competing sides of the experience of self-assertion itself. According to the logic of the vision, any attempt to extend these ideals beyond their proper realm of application into everyday life will meet with disaster. Not only will the extension fail, but the practical and psychological conditions that enable the higher ideals to flourish on their own ground may also be destroyed in the course of the attempt.

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

First, the family is supposed to depend upon a union of sentiments and a flexible give-and-take that contract law, with its fixed allocations of right and duty under rigid rules, would disrupt. The very process by which the members of a family

cast their relationships in the language of formal entitlement would confirm and hasten the dissolution of the family. Communal life needs to maintain the lines of right and duty fluid in attention to an untrammeled trust. It must subordinate the jealous defense of individualistic prerogative to the promotion of shared purpose and the reinforcement of mutual involvement.

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

Classical contract theory was born fighting against such a frankly personalistic and asymmetrical exercise of power. Family law may still be penetrated by notions of status and attentive to hierarchic distinctions among relatives. But the modern law of contract was built as the culminating expression of abstract universalism. It is hostile to personal authority as a source of order; it preaches equality in distrust. The mechanisms of egalitarian, self-interested bargaining and adjudication cannot be made to jibe with the illiberal blend of power and allegiance.

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

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

The dangerous contrast of contract to community does not exhaust the social vision expressed by the interplay between the first principle and its counterprinciple. This interplay also suggests a conception of obligations arising from social interdependencies that cannot be reconciled with the simple opposition of contract and community. If this alternative imaginative strand could be disentangled from that opposition, it might provide a better basis for a reunified contract theory. This suggestion will pay off richly later in the analysis.

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

A regime of contract is just another legal name for a market. It ceases to exist when inequalities of power and knowledge accumulate to the point of turning a set of contractual

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

At first these two boundaries — allowing the inequalities to accumulate unrestrictedly and correcting them as soon as they emerge — may seem to leave so large an intermediate space of solution that they hardly constrain the organization of a contract regime. There are any number of points within them at which the compromise between correction and allowance might be struck. The decision to draw the line at one place rather than another cannot itself be deduced from the abstract idea of a market. When, however, we combine the analysis of this tension with the thesis that the market lacks any inherent institutional structure, the joint result of the two ideas begins to look far more consequential. The distance between the boundaries does not remain constant as the institutional character of the market changes. Some market regimes, taken in their actual political and social settings, may regularly generate or incorporate so much inequality that the minimum of correction needed to prevent them from degenerating into power orders amounts to more than the maximum correction compatible with the autonomy of decentralized market decisions. (Note the resemblance to the earlier argument about inequality and equal protection.) The real solution is then to change the institutional character of the market. In the absence of such a solution, attempts must be made to find moderating solutions, either by singling out the most serious problems for special treatment (e.g., labor law) or by preferring vague slogans (e.g., good faith, unconscionability) that can be used to support limited, ad hoc corrective interventions. Both of these responses have in common the capacity to limit the

subversive impact of correction upon the central though shrinking and porous body of contract law.

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

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

One or both parties may attribute to something they exchange a quality it does not possess, or conversely they may ignore a quality it does have. An event supervenient to the making of an executory contract may change, perhaps radically, the relative value of the performances. In either case a discrepancy may emerge between the actual and the expected or imagined value. At what point does the distortion produced by the mistake about the present or the future justify a revision of the contract? To let the losses fall where they lay or ought to have lain at the moment of discharge might produce an outcome at least as arbitrary as the strict enforcement of the original agreement. Hence, if a revision is to take place at all, the real issue becomes whether and how to find an alternative distribution of profits and losses. Against correction you may argue that all contracts are guesses by which parties imagine how much things are likely to be worth to them in the future. The outer limit to this argument, however, lies in the assumptions made about the risks that the parties intended to assume. The problem arises constantly from an ambiguity in the expectancies that contract law is supposed to protect: the expectancy may be an interest either in a certain performance or in the exchange value that this performance embodies. Even when the performance consists in a payment of

money, the ambiguity does not disappear. Money itself matters for its value in exchange, and this value may be subject to radical and unexpected dislocations.

The issue could be settled if the law saw the parties in every ordinary transaction as high-risk gamblers and abided relentlessly by the logic that things are worth only the values that parties place on them in particular transactions. But this the law refuses to do. To the objection that this refusal merely construes party intent rather than imposing an independent idea of fairness, there are two answers. First, given the impossibility of spelling out all the presuppositions of a transaction, intentions never could be enough. Second, in rejecting the extreme gambling idea, the law commits itself to the search for minimalist standards of equivalence that transcend the terms of particular transactions, standards needed both to tell when things have gone wrong and to set them right.

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

The counterprinciple of fairness reappears in the rules and doctrines that police the bargaining process itself. An agreement will be enforced only if it results from an indispensable minimum of free and considered decision by all parties concerned. The obvious attraction of this tactic is that it seems to dispense with the need to second-guess the equivalence of the performances. It therefore minimizes the market-subverting effects of interventionist correction. Besides, it merely extends into contract law the same quest for neutral process that characterizes the traditional liberal case for established institutions and the ruling methods of liberal political philosophy. Here as elsewhere this search runs into trouble. The heart of the trouble lies in what must be done to reconcile the idealized bargaining picture with the existing institutional forms of the market economy. The attempted reconciliation ends up requiring — however sporadically and indirectly —

the very policing of contract terms that the emphasis on bargaining procedures is meant to avoid. No branch of contract law presents these themes more clearly than the law of duress.

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

The most characteristic result of this multiple expansion has been the doctrine of economic duress with its key concept of equal bargaining power. According to this doctrine, a contract may be voidable for economic duress whenever a significant inequality of bargaining power exists between the parties. Gross inequalities of bargaining power, however, are all too common in the current forms of market economy, a fact shown not only by the dealings between individual consumers and large corporate enterprises, but also by the huge disparities of scale and market influence among enterprises themselves. Thus, the doctrine of economic duress must serve as a roving commission to correct the most egregious and overt forms of an omnipresent type of disparity. But the unproven assumption of the doctrine is that the amount of corrective intervention needed to keep a contractual regime from becoming a power order will not be so great that it destroys the vitality of decentralized decisionmaking through contract. If this assumption proved false, no compromise between correction and abstention could achieve its intended effect. The only solution would be the one that every such compromise is meant to avoid: the remaking of the institutional arrangements that define the market economy. The doctrinal manifestation of this problem is the vagueness of the concept of economic duress. The cost of preventing the revised duress doctrine from running wild and from correcting almost everything is to draw unstable, unjustified, and unjustifiable lines between the contracts that are voidable and those that are not. In the event, the law draws these lines by a strategy of studied indefinition, though it might just as well have done so — as it so often does elsewhere — through precise but makeshift distinctions.

In at least one area of social life, however, the equivocations of economic duress will not do: the relations between

capital and labor. If labor were not allowed to organize and to bargain collectively, the disparity between the contract model and economic reality would remain immense and unmistakable in a central aspect of social life. It would then be clear that the only kind of correction capable of distinguishing contract from subjugation would be one that effectively abolished contract by policing all of the terms or correcting all of the outcomes. The solution has been to factor labor relations out of the central body of contract law and to enlist the method of "countervailing power": once workers are allowed to organize, they can face employers on equal terms. The institutionalized collective bargaining of labor and management can then reestablish the validity of the contract model. It can do so without threatening any deeper disruption and without even making it appear that the rest of the economic order is also an artifact of institutional invention and social warfare. But the limited solution faces two connected problems. These constitute the central issues of labor law doctrine.

The first problem could be called the paradox of procedural justice. Its specific doctrinal context in American labor law is the problem of the duty to bargain in good faith and of its relation to the administrative and judicial scrutiny of the substantive proposals made in the course of collective bargaining. The special, reconstructed market of capital and labor will not work unless both parties remain committed to it, unless they accept it as the basic institutional framework of their relations to each other. Unlike the general market and the general polity, it might be circumvented precisely because it is only a localized part of that surrounding order, constructed according to distinctive rules. The more powerful party — usually though not always the employer — will have the incentive to move outside it. The duty to bargain in good faith is the duty to take the special framework as the one that counts. But how is the performance of this duty to be assessed? If the court or administrative agency rests content with a show of compliance — a willingness to go through the motions of bargaining — the duty loses its force. The parties can then trust only to their power and guile. On the other hand, any more ambitious test of compliance seems to require that the National Labor Relations Board or the court pass judgment on the fairness of the proposals and counterproposals that the parties make to each other in the course of their negotiations. This requirement would involve the supervisory body in something perilously close to the substantive regulation of labor relations that the whole machinery of countervailing power is designed to avoid. Thus, the American Congress amended the

National Labor Relations Act to overturn a line of administrative and judicial decisions that took the duty to bargain in good faith as a mandate to evaluate the content of party offers and counteroffers. Yet even after having had this view repudiated by the legislature, the National Labor Relations Board found more circumspect ways to reassert it. The paradox of procedural justice suggests why: as the institution most immediately responsible for supervising the integrity of the collective bargaining system as a corrective institutional framework, the Board had good reason not to give up.

The second, related problem that plagues the technique of countervailing power is a paradox of managerial discretion. Its most familiar doctrinal referent in American law is the issue of retained rights. Are the rights and obligations left unspecified in a collective bargaining agreement arbitrable grievances, or are they matters within the scope of managerial authority? To treat them all as issues for continued bargaining and arbitration is to imply that the entire internal life of the organization must be subject to a regime of fixed rules and rights. This would jeopardize the requirement of discretion and flexibility — the ability to change the organization of work according to emergent practical opportunities and constraints — that any productive or practical institution needs. To accept the alternative, retained-rights approach, however, is to undermine the credibility of countervailing power as a route to the restoration of contractual dealings between capital and labor. For there then appears to be a basic imbalance in the relations of the two parties. Of course, the discretionary authority that collective bargaining cannot reach might be justified as a dictate of impersonal technical necessity. Any such justification, however, becomes vulnerable to arguments and experiments that show how similar practical results can be achieved by alternative ways of organizing work, within the same or different economic systems. The root of the difficulty lies in the impossibility of fully contractualizing power in the internal life of an organization and in the pressure for an alternative mode of legitimation and accountability. The reorganization of the workplace and the economy would have to do what collective bargaining and alleged technical imperatives cannot but must pretend to accomplish.

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

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

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

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

The analysis of the interplay between the second principle and counterprinciple reveals many permutations of a single central problem. The fairness correction must be focused and sporadic rather than pervasive if the regime of contract is not to be superseded by an overriding method of allocation. Yet

in its limited and contract-preserving form, the correction becomes arbitrarily selective: for every situation corrected, there seems to exist another similar to it that is left untouched. This lesson is the same taught by the analysis of generality-correcting equal protection: a pattern of unjustifiable distinctions appears as the alternative to an overbearing and comprehensive intervention. There, in equal protection, this intervention would frustrate the constitutional plan by concentrating all real power in the hands of judges or other operators of doctrine. Here, in contract, it would liquidate the contractual regime while preserving its outward forms. Here, as there, the real solution is the transformation — including the transformation through doctrine — of the institutional framework of economic and political action.

The relation of the two counterprinciples to the two principles can be represented in two different ways. The dominant view treats the existing institutional structure as given. It regards the imaginative scheme of models of possible and desirable human association, including the contrast of contract to community, as rigidly defined. On this view the counterprinciples are anomalies. They prevent the principles from doing injustice in unusual if not extreme cases. The separation of equity and common law in Anglo-American legal history lent this approach institutional support. But if we start from the assumption that the underlying institutional and imaginative order can and should be changed, the counterprinciples lose any stable, natural, and contained relation to the principles. They may even serve as the points of departure for a system of law and doctrine that reverses the traditional relationship and reduces the principles to a specialized role. The next step of the argument makes good on this possibility.

4. The Countervision Tested: Instances of Exemplary Difficulty. — The second stage of this model of deviationist doctrine is the analysis of areas of more intense legal controversy that put to the test the choice between these two views of the relationship of principles and counterprinciples. These instances of exemplary difficulty provide some of the materials with which to develop the second, more controversial view into a general theory of the nature of entitlements and the sources of obligation. They are exemplary because, though seemingly unimportant and contrived, they lay bare the fundamental disputes in an entire field of law. They have two defining characteristics. First, they are circumstances in which case law and doctrine divide. Because no one view prevails, the coherence of the doctrinal system seems to break down, and the decisions of judges appear unpredictable. Second, the

peculiar sort of disintegration involved brings to the fore the rivalry of whole systems of legal thought: in particular, the conflict between alternative conceptions of the interplay between principle and counterprinciple in that area of law. The analysis of these zones of heightened argument prepares the way for turning the countervision into a general theory of the sources of obligation and the nature of rights, a theory capable of guiding the reconstruction of contract doctrine.

I have chosen as instances of exemplary difficulty a series of related problems in the contemporary American law of mistake. The limited goals of this model of doctrine will be satisfied by presenting these problems in the form of three typical, recurrent fact situations and the basic divisions in case law and doctrine that they elicit. Just as contract has been widely regarded as the branch of law most suitable for "pure," apolitical analysis and technique, so the rules and doctrines of mistake within contract are often taken to represent the high point of this technical purity. In this branch of law, the existence of clear solutions is often said to be more important than their content. Thus, it will be especially pleasing to rediscover here the traces of a larger conflict of vision.

Take first the standard situation of contracts concluded by correspondence or by other means that entail a substantial lapse of time between offer and acceptance. Insofar as the law of offer and acceptance is meant to repress the offeree's speculation as well as to protect his reliance, it makes a basic assumption about the possibilities of moral judgment. The assumption is that it would be too dangerous to attempt distinctions between cases of wrongful and innocent revocation. Wrongful revocations would be those by which an offeror seeks to revoke an offer already received, or an offeree tries to revoke an acceptance already dispatched but not yet received, because of afterthoughts about the profitability of the deal or changes in market conditions supervening upon the dispatch of the acceptance. Innocent revocations would occur in circumstances in which the offeror or the offeree revokes to correct a mistake that does not concern business judgment. He may, for example, be placing a bid that results from faulty calculations or from a misapprehension of what he has agreed to do. The law of mistake fails to cover his unilateral error. The other party may not have been harmed, either because he has not yet relied or because, as the addressee of an acceptance dispatched but not yet received, he could not have relied. Classical contract theory would regulate wrongful and innocent revocations alike. It would assert that such distinctions in the moral quality of conduct are too fine and fragile

to serve as useful bases for rules of offer and acceptance. Either the wicked must be discharged to protect the good or the good must be sacrificed lest the wicked be excused.

An alternative approach would distinguish between innocent and wrongful revocations. It would, for example, prohibit the revocation of an already dispatched acceptance when the purpose of the revocation is merely to shift a significant unexpected loss to the offeror. But it might allow an innocent revocation to take effect, depending on the relative blamelessness of the offeree's miscalculations and the seriousness of the offeror's prospective loss.

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

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

In contrast to the ordinary contract-by-correspondence cases, the mistake in calculations constitutes a second recurrent fact situation. Now the contract is made between parties in each other's presence. One party commits an error, innocent save for negligence, in the calculations that immediately precede the integration or writing down of the contract. He seeks to correct the mistake after the contract has been made but before the other party has acted in reliance upon it.

Current law gives clear solutions when the writing misstates the agreement or a party has misjudged the market. Trouble comes with a mistake in the mechanical calculations

that produced the memorandum. There are two situations to distinguish. If the offeree knows or has reason to know of the offeror's mistake, he does not prevail. If he relies upon the offer, his reliance must be dismissed as unjustified. If the offeree neither knows nor has reason to know of the offeror's mistake in the mechanical calculations that produced the memorandum, there are two further cases to distinguish.

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

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

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

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

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

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

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

Why should this be a hard case if the mistake-in-calculations problem becomes a close one only when the offeree has not yet acted at all upon the mistaken offer? In that case the least reliance by the innocent offeree may be enough to dissipate all doubt and to give him a tranquil right against the mistaken offeror. The difference is the existence in the earlier situation of a commercial offer that has been fully accepted.

A contract or something close to it has come into being, although born under the cloud of an error in the steps just prior to integration. In the general-contractor and subcontractor case, however, there is no acceptance, hence no contract, unless you either adopt the implausible unilateral-contract analysis, according to which use of the bid was itself the acceptance sought, or apply promissory estoppel doctrine and view the estoppel as a mere "substitute for consideration."

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

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

Thus, this last instance of exemplary difficulty lends further support to the sense that we confront in all of these foci of perplexity not merely a choice among competing concerns within a shared conceptual framework, but a struggle between conceptual frameworks themselves, a struggle whose outcome matters for the resolution of concrete legal problems. That the center of controversy falls in one place rather than another in a given jurisdiction at a given time is simply a function of the relative influence of the rival views and of their specific content. Because the classical vision defines its field of operation so largely in terms of commercial context and completed formalities, the strength of the countervision might be measured

by its capacity to render controversial situations that come increasingly close to the limiting case of an extreme commercial setting and fully completed formalities. But that there is a coherent countervision at work here and that it implies an alternative view of how the counterprinciples relate to the principles are propositions that have not yet been fully established. To do so is the task of a third stage of this model of deviationist doctrine. It makes the countervision perspicuous by explicating and generalizing its key assumptions about the sources of obligations and the nature of rights.

5. The Countervision Generalized: The Sources of Obligations and the Nature of Rights. — This third stage of the analysis can be abbreviated because its main points have been anticipated earlier. The dominant approach to contract problems assumes that obligations have two main sources: the unilateral imposition of a duty by the state (as in many forms of tort liability) and the articulated agreement in full conformity to the established procedures for contractmaking. Contract theory treats any additional source, including relations of interdependence, as either an uncertain penumbra of the articulated agreement or an equitable qualification to the basic principles of the law. The theory of rights that fits this view of the sources of obligation is one that sees an entitlement as designing a zone of discretionary action whose limits are set at the moment of the initial definition of the entitlement. The boundary lines may be subject to dispute in a given context of actual or threatened exercise of the right, but not to major extension or retracing. A concern with the effects of the exercise upon another party would turn concrete relations of interdependence into sources of obligations that could complete or even supersede bargained terms.

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

dence and the impact that a particular exercise of a right might have upon other parties to the relationship or upon the relationship itself.

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

The instances of exemplary difficulty might also have been drawn from areas like the problems of good faith bargaining and retained rights in labor law or of economic duress in general contract. They would then have focused the analysis upon the problem of distinguishing a contract regime from a power order. The countervision thus generated would start by emphasizing the impossibility of adequately distinguishing contract from domination without either changing the institutional structure of economic activity or, at least, adopting a range of second-best alternatives to this institutional reconstruction. One such imperfect alternative might be the relentless insistence upon the features of present law that are designed to prevent the confusion of contract with subjugation. The stubborn attempts of the National Labor Relations Board to resist the evisceration of the duty to bargain in good faith offer a modest example. The general contract theory capable of giving a secure place to this version of the countervision would incorporate the thesis that systems of contract law and contract doctrine differ crucially in the degree to which they can avoid correcting bargains to death without allowing them to become a disguise for subjugation. The view would also recognize that the institutional organization of the economy, as defined by the law, determines these differences among market systems. Such a contract theory would imply a basic shift in the relation of the counterprinciple of fairness to the principle of freedom of contract.

Thus, the initial content of the countervision depends in part upon the instances of exemplary difficulty with which you begin. A more inclusive version would emerge from the probing of many such instances in different areas of the law. A

satisfactory theoretical conception would be one that made intelligible all the key ideas of each of these partial countervisions while helping resolve conflicts between them. For the range of problems discussed here, it would be a conception that set the view of contract and power just described alongside the revised theory of rights and of the sources of obligation. The aim is not closure and completeness but the continued criticism and self-revision that the method of internal development practices.

6. The Countervision Extended and Restricted. — The fourth stage of this model of doctrine is the development of the countervision described in the second stage and generalized in the third. The development takes place through the extension of the countervision to legal problems that do not constitute instances of exemplary difficulty in current law. Take for this purpose the law of fiduciary relations and the question of its place within the main corpus of contract law. One of the more remarkable features of classical contract theory is its oscillation between an ideal of strict altruism in a confined range of situations and a tolerance for unrestrained self-interest in the great majority of contracts. Thus, in fiduciary relations one party may be required to confer upon the other party's interests a weight greater than upon his own (or, in any event, at least equal to his own). In the ordinary commercial contract, however, the other party's interests can be treated as of no account as long as the rightholder remains within his zone of discretionary action. (Qualifications to this standard, like the rules governing mitigation of damages, are relatively unimportant.) This license merely restates the approach to the nature of rights and to the sources of obligations that characterizes mainstream contract theory. The higher standard of solidarity — the one that gives primacy to the other party's interests — is necessarily exceptional. Any attempt to insist upon it in the generality of dealings would depart so radically from the standards by which people ordinarily deal with each other that it would merely encourage massive circumvention and hypocrisy coupled with a stifling despotism of virtue. It does not follow, however, that ordinary contracts and human encounters should be surrendered to the notion that one may treat other people's interests as if they were nonexistent. In fact, the parties to continuing or recurrent contractual relations, and often even to one-shot transactions, seem generally to adhere to a far stricter standard.

The countervision refuses to acquiesce in the stark opposition of community as selfless devotion and contract as unsentimental money-making. The theoretical ideas about the

quality of entitlements and the sources of obligation that assign a leading role to the counterprinciples imply a subtle and continuous shading of contract and community. Informed by those ideas, doctrine might develop a series of distinguishing criteria to characterize situations suitable for the application of a more limited solidarity constraint, a constraint requiring each party to give some force to the other party's interests, though perhaps less than to his own. The need and the justification for such an intermediate standard have already been anticipated by the two-tiered theory of rights that the countervision presupposes. The circumstances suitable for its application might be selected on the basis of features that would include expressed intent, induced or even unwarranted trust in fact, disparity of power manifest in one party's greater vulnerability to harm, and the continuing character of the contractual relationship.

The mention of such criteria already suggests a change in the technique by which different contractual situations are selected for different standards of constraint upon self-interest. The current law of fiduciary relations consists largely of a list of special circumstances, often defined by signs that have only an oblique connection with the facts that engender trust or justify self-restraint. Take, for example, the joint venture, an agreement that imposes fiduciary duties upon the coadventurers. It may be defined simply as an informal partnership of limited scope and duration that provides for a sharing of gains and losses by all the venturers. A contractual arrangement, however, may involve a close, difficult, and long-term collaboration that calls for the exercise of prudent discretion without being directed toward an uncertain profit. Such an undertaking may well be viewed by its participants as one demanding from each of them the most scrupulous regard to mutual loyalty. Conversely, a contract that looks to an undefined reward rather than to an exchange of predetermined performances may require, and be understood to require, only a minimum of actual cooperation.

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

the idea of the contract as a common enterprise animated by mutual loyalty.

The fourth stage of this model of doctrine involves the extension of the countervision to problems that may not already be targets of controversy. It therefore raises the question of how far into related fields of law the view of the nature of entitlements and the sources of obligation that develops the countervision should be pushed. The approach to contract described here does not represent a universally applicable theory of rights. We need not follow the nineteenth century jurists and their disciples in taking consolidated property and its counterparts in contract as the model for all rights. This caution applies as much to the countervision as to the view it seeks to replace. What the earlier program describes as immunity rights and their more limited analogues in established law may best be understood and protected by a bright-line or one-tier theory of entitlements. Such a theory may also suit the many circumstances in which the factual assumptions of the two-tier theory are weakened. For it must be remembered that the countervision describes a spectrum of situations. It continues to recognize the classical form of contract rights as a special case.

Just when does this special case occur? One way of telling is to ask to what extent the various factors that justify higher expectations of trust and standards of self-restraint are present. Another way is to compare a current practical problem with what the institutional program describes as market rights. The market rights mentioned in that program serve primarily as the legal instruments of enterprises transacting in an institutional context that severs the link between the devices of civic or material security and the instruments of subjugation. The reformed institutional framework limits both the extent and the consequences of disparity in economic power. There is no reason not to characterize many of the dealings between enterprises in such a framework as pure gambles entirely beyond the reach of the counterprinciples of community and fairness and appropriate to the most extreme version of classical contract doctrine. In fact, the institutional transformation of the economy might justify a new contrast of contract and community; the line would merely be drawn in a different place, and it would have in context a different ideological meaning and a different practical effect. To the extent that situations in contemporary economic practice resemble those identified in the program as the proper field for the application of market rights, they too should be governed by gamblers' rules.

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

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

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

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

economic life and a variety of subversive though ultimately inadequate surrogates for this transformation.

The two internal critical themes stand by synecdoche for the two major traditions of criticism of modern society that antedate the rise of modernist literature and philosophy. One of these traditions objects to the denial of solidarity and to the absence of the varieties of communal life that could mediate between the isolated individual and the large-scale organizations of the social world. The other tradition emphasizes the continuity of group domination under forms of practice and thought that both conceal and reproduce it. The deviationist doctrinal argument shows how the two traditions can merge into a more comprehensive and satisfactory line of criticism once analysis descends to institutional detail. The practical and theoretical solutions to the problem of overcorrecting and undercorrecting contract converge with the implications of the attempt to soften the antagonism between contract and community.

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

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

Given that the conflict over these alternative schemes of human association can be silenced only at the cost of making legal analysis arbitrary and dogmatic, the question remains:

how far can and should legal doctrine, especially when operating in an adjudicative context, alter established legal understandings and the social practices and institutional arrangements that these understandings reinforce? The issue is posed most forcefully by the extension of the countervision to areas of the law in which the dominant approach seems largely uncontested in received doctrine. The answer to this second query is not determined, though it may be powerfully influenced, by the response to the first one.

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

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

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

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

Both models of doctrine begin from the same view of the relations among the three levels of law and legal analysis: authoritative rules and precedents expressed today mainly by statutes and judical decisions, organizing principles and counterprinciples, and imaginative schemes of social life that assign distinct models of human association to different sectors of social practice. The attempt to reassert and reexamine a set of legal norms and ideas in the face of fresh problems highlights two sources of permanent though often latent uncertainty and conflict and thus demonstrates once again how the effort to reproduce a practical or imaginative order in society supplies instruments and occasions for the demólition of that order. The interpretation of large bodies of rules and precedents must rely tacitly if not explicitly upon principles and counterprinciples, and the understanding of principles and counterprinciples must in turn presuppose conceptions of what the dealings among people can and should be like in each sphere of social life, even if these conceptions are said to be somehow embodied in the law rather than imported into it from outside. Each time the next deepest level is exposed, the exposure produces a twofold destabilizing effect. The more superficial level (the rules and precedents in relation to the principles and counterprinciples, the principles and counterprinciples in relation to the models of possible and desirable association) is shown to be but a flawed realization of the deeper one, while the empirical and normative beliefs that constitute this deeper level are made controversial if not implausible in the very process of being exposed. Alongside these vertical tensions between levels of legal analysis, the reconsideration of law in untried contexts generates horizontal conflicts within each level. For each is revealed as the stage for a contest among ideals, a contest that becomes fiercer as we move down the sequence of levels.

Conventional legal doctrine, and the legal theories that propose to refine it the better to support it, try to suppress or minimize both the horizontal and the vertical conflicts. Deviationist doctrine, on the contrary, wants to bring these instabilities to the surface: first, because this is the form subver-

sion takes in the domain of legal ideas and, second, because if insight and justification can be achieved at all in legal doctrine or any other field of normative argument, they can be achieved only through the repeated practice of such subversion, under its double aspect of internal development and visionary thought.

Though the two kinds of instability implicate and reinforce each other, one may temporarily receive pride of place. The first style of doctrine emphasizes the vertical conflicts; the second style, the horizontal ones. But the two emphases can be effected and combined in any number of ways; the methods suggested here exemplify an approach that might follow a different tack while remaining faithful to the same central conception. Yet even these limited versions of deviationist doctrine can be successfully applied to every branch of law.

V. UNDERLYING CONCEPTIONS AND BROADER IMPLICATIONS

A. Beyond Internal Development: Social Understanding and Normative Commitment

This entire constructive argument — the institutional program and the practice of deviationist doctrine — amounts to an exercise in imagining internal development. For the sake of guidance, the exercise projects the results of an interplay between practices and ideals that must in fact be driven forward by social conflicts and made actual in collective experiments. For the sake of specificity, the exercise pursues this interplay into the realm of legal doctrine, a realm from which prophets and plain people are banned so that power may be wielded in a hush. If it manages to avoid the resulting dangers of idealism and elitism, the attempt to imagine internal development still remains open to two related objections. It seems just an accident that we happen to start in a tradition in which the practice of internal development leads in the direction charted here. As agents who can transcend and criticize the cultures into which we were born, we want to know whether and why we should give weight to this accident. Moreover, any tradition is so rich in ambiguity that persuasive arguments can be offered for developing it in alternative directions.

These objections show why, over the long run, internal development needs visionary thought, that other mode of normative practice, as a complement and a corrective. When visionary thought works as theory rather than as prophetic intuition, it characteristically takes the form of a systematic

conception of society and personality (each implied by the other) for which it claims normative authority. By stating dogmatically the rudiments of a speculative social theory and then arguing for its normative force, the following pages indicate the type of case that would have to be made to answer more fully the two criticisms just mentioned. For these ideas about society, personality, and normativity elucidate and support the basic direction taken by the programmatic and doctrinal arguments of this essay.

In every society we can distinguish the repetitious activities and conflicts that absorb much of people's effort from the formative institutional and imaginative order that usually remains undisturbed by these routines and gives them their shape. The routines include the habitual limits to the uses of governmental power, the available ways for combining labor and capital, and the accepted styles and criteria of normative argument. In the contemporary North Atlantic countries, the formative institutional context incorporates an ordering of work that obsessively contrasts task-defining and task-executing activities, a contract and property system that uses the allocation of absolute claims to portions of capital as the means for creating markets, and an approach to state and party organization that deadlocks government and demobilizes society by the same devices with which it proposes to guard citizens against oppression. The legal rules and rights that, together with customary power relations, define these institutional arrangements are made intelligible and acceptable by a background scheme of possible and desirable forms of human association. This scheme presents each sector of society as the natural domain for the realization of a specific social ideal, be it private community, liberal democracy, or a mixture of technical hierarchy with contractual agreement.

Formative contexts such as this one represent frozen politics: they arise and subsist through the interruption and containment of fighting over the basic terms of collective life. Having emerged, they gain a second-order reality as premises of people's ideas about interests, loyalties, and possibilities, as the invariant constraint to which organizational and technological methods adapt, and as the example of worldly and spiritual progress that the more successful countries give to the more backward ones. Nevertheless, formative contexts are not cohesive systems that must stand or fall as a piece. The elements that compose them can be recombined with the elements of other systems. It follows that concepts such as "capitalism" must be spurious whenever they are meant to designate a stage of world-historical evolution or one of a finite list

of possible types of society. There are no historical laws that might justify a theory of compulsive stages or limited varieties of social organization.

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

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

Negative capability is the practical and spiritual, individual and collective empowerment made possible by the disentrenchment of formative structures. Disentrenchment means not permanent instability, but the making of structures that turn the occasions for their reproduction into opportunities for their correction. Disentrenchment therefore promises to liberate societies from their blind lurching between protracted stagnation and rare and risky revolution. A thesis of this Article is that the formative contexts of the present day impose unnecessary and unjustifiable constraints upon the growth of negative capability.

Negative capability contributes to productive capacities. For the expansion of these capacities is hindered to the extent that the ability to recombine factors of production fails to extend into a power to revise the institutional context of production or, more generally, to the extent that an entrenched plan of social division and hierarchy predetermines the practical relations among people and thus narrows the ground for experiment. Negative capability moderates the conflict between self-assertion or self-expression and attachment to other people. For this conflict — in reality a tension between the conflicting demands of self-assertion themselves — is aggravated by the mechanisms of subjugation and dependence that

turn social life into an endless sacrifice of private autonomy. Negative capability advances insight into society and history. For to identify the routines of a particular, contingent order, or of any limited list of such orders, with general laws of social organization and historical change is to bestow upon these alleged laws a force that they would otherwise lack.

The theory of negative capability presupposes that over the long run the practical, moral, and cognitive advantages to be won by disentrenching formative contexts outweigh in the strength and universality of their appeal the benefits to be gained by entrenching these contexts further. People usually pursue those particular advantages rather than the general program of empowerment through disentrenchment. To succeed in this pursuit, however, they must grasp and practice a fragmentary version of the theory of negative capability. They must know how to draw out of the recombination of what seemed uncombinable and the loosening of what appeared inexorable the empowerment they desire. Thus, the making of structure-revising structures in history often overrides the simple contrast between intentional and unknowing action.

The development of negative capability is too reversible in its course and indeterminate in its applications to generate any unilinear evolution of types of society. But it does interact with the short-term sequential effects of formative contexts as a major source of historical change. And the formative orders that embody higher levels of negative capability are not so much weaker structures as structures with particular qualities. To discover the arrangements that these qualities require at a particular time and place ranks among the main tasks of programmatic thought and political striving.

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

Somebody might object that even if he accepted the social theory just outlined he need not give normative weight to its

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

He may mean that a social theory like the one just sketched states the conditions for realizing a particular value to which he prefers another value and that it cannot dissuade him from doing so. But this misconceives the nature of controversies about the social ideal. We cannot commit ourselves to a particular value without committing ourselves to the form of social life that gives this value its specific meaning and to the conditions that enable this form of life to emerge or develop in conformity to the ideal that defines it. This is a thesis about the character of normative ideas. And we do not commit ourselves to such a scheme of social existence, and act by anticipation according to its norms, unless we believe that it offers us a world in which we can more fully reconcile our efforts at self-assertion, expressed in the vicissitudes of desire and encounter, with our deepest identity and situation. This is a thesis about the most durable role that normative practice plays in our lives, the role that outlasts the apology for existing arrangements and the defense of conventional morality. This thesis remains true even if — by a favorite paradox of modernist thought — we turn out ourselves to be that which is nothing in particular. In making and rejecting these commitments, we take a stand on the facts about personality and society. To be sure, these facts are many-sided and susceptible to being changed by our view of them. As a result, the choice among views will always be contestable and will always be influenced by normative precommitments. But these two qualifications show the inconclusiveness of normative practice rather than its arbitrariness.

Alternatively, the critic who recalls the distinction between the factual and the prescriptive may be emphasizing the inadequacy of a secular basis for normative judgment. Whatever merit this view may have, it cannot serve in the defense of the traditional fact-value distinction. For the most striking

shared characteristic of the historical varieties of religious thought is to present an imperative of life as built into a vision of ultimate reality. Without this prior relation between vision and imperative, even the simple idea that divine commands should be obeyed would be groundless. Moreover, religion reinterprets (and, the believer would say, deepens) rather than replaces the secular conflict over the proper structure of society. Is social life sanctified by approaching a particular system of division and hierarchy that assigns to each person well-defined roles and responsibilities? Or is it made more godly and open to love by encouraging and expressing the iconoclastic refusal of absolute value to particular structures?

Finally, the critic may mean that nothing in heaven or on earth has a claim to guide our actions. Often this view is couched in the deceptively harmless form of the idea that one normative postulate must rest upon another, a view, however, that quickly leads to the conclusion that all must rest upon unsupported assertion once the chain of normative postulates runs out. If the critic then insists that nothing else could have prescriptive force, we cannot refute him. But neither can he offer us a reason to stop giving normative weight to our basic conceptions of personality, society, or ultimate reality. For no understanding of the world can tell us, one way or another, whether to attach a certain force to certain of our understandings. In particular it cannot do so when the practice it attempts to overrule represents at least as intimate a part of our individual and collective history as does any other mode of inquiry or invention. The valid sense of the contrast between factual and prescriptive claims is the sense in which a thoroughgoing skepticism is irrefutable. The ordinary skeptic, the skeptic who brandishes the standard form of the fact-value distinction, wants to avoid this terminal skepticism without accepting the normative implications of disputes over the nature of personality and society. But he is mistaken.

This counterargument to ordinary skepticism may be made clearer and more persuasive by considering the general view of skepticism that it exemplifies. In the evaluation of claims to knowledge about external reality, many of what seem to be debates about skepticism turn out to be disagreements over the right of one mode of discourse (e.g., social study, the humanities) to make exceptions to criteria of validity that prevail in another area of thought (e.g., natural science). These quarrels are actually over what the world is like and how the mind may best apprehend it. The only true skepticism about knowledge is the radical one — as irrefutable as it is empty

— that denies that controversies over particular truths could ever reveal anything about the world other than the stratagems of our self-deception or that they could even allow us to pursue our practical interests more successfully. It does no good to answer the radical skeptic by protesting that no form of knowledge familiar to us could ever possess the unconditional self-validation that he requires for knowledge. He will merely answer: that's just the point.

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

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

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

B. The Broader Implications: The Terms of Ideological Controversy

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

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

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

Second, together with the appeal to imperatives of technical necessity, the order of private rights serves as a mandate to exercise various forms of disciplinary power that, by their very nature, cannot be fully governed by rigid assignments of right and duty. This thesis holds most clearly for the internal life of large-scale organizations and for the relations within them between superiors and subordinates. In fact, the private-rights order that we now consider to define the very nature of liberal society always operated in conjunction with a far different set of practices and ideas without which it would have been incapable of organizing social life concretely. At first, this complement was provided by the arrangements of a corporatist

and estatist society, arrangements surprisingly important even in societies that seem, like the United States, to have been born full-blown into the age of liberalism. Later, the forms of control and communication in large-scale organizations supplied the indispensable additional element. Thus, at every point in their history, private rights have been associated with forms of organization that largely negate their overt social meaning.

There is yet a third fact that challenges any simple identification between the cause of freedom and the core system of contract and property. It is the availability within present democracies of kinds of right that, unlike this core system, do not depend upon proprietary privilege and therefore do not supply the instruments of dominion or serve as the basis for extralegal forms of control. The most important examples are political or civic rights and welfare entitlements.

Why should the existing system of contract and property appear defensible even to those who acknowledge the truth of these three facts? The answer is that all of the alternatives to it seem tyrannical, inefficient, or both. More precisely, the only alternatives consonant with the circumstances and responsibilities of a contemporary state seem to require the transfer of undivided economic sovereignty, in the form of a unified property power, either to a central state or to the workers who happen to work in a particular enterprise at that time. The criticism of the underlying assumption of a unified property norm and the development of programmatic alternatives have allowed us to assail this negative prejudice. It is on this prejudice, far more than on the crude identification of the existing system of private rights with the possibility of freedom, that the authority of this system largely depends.

C. The Broader Implications: The Method of Political Philosophy

In the English-speaking countries today, political philosophy is dominated by a single style whose unity remains partly hidden by a series of superficial contrasts. The most notorious of these contrasts is the conflict between utilitarian and social-contract theories. The approach that these superficially contrasting views share imagines a choosing self whose concerns can be defined in abstraction from the concrete social worlds to which it belongs. These worlds count either as part of what the particular philosophical method will want to change once it has been allowed to operate or as a partial determinant of the chooser's desires and beliefs. In no significant sense does

history itself become a source of moral insight. Almost invariably the practical result of the method is to show that, though certain features of existing society may be unjust or inexpedient, the basic social order deserves explicit or implicit acceptance. (This could certainly not be said of Bentham's own program: a radical scheme of social reconstruction linked to a specific view of personality and of social transformation. But original utilitarianism was another story.)

The relation of mild reformism to the methods of this political philosophy is not accidental, though it may be loose. This relation becomes clear once you understand the basic problem in this philosophical approach: the problem of what must be done to reach concrete results. There are essentially two ways to escape the danger of indeterminacy within this tradition. The description of the specific forms that these modes of avoidance take in both utilitarian and social-contract theory will show how our work threatens this entire mode of political philosophy.

One way to achieve the required determinacy of implication is to define the wants or intuitions that constitute the primary data of the method restrictively, in fact so restrictively that all of the important conclusions are already included in the characterization of the starting points. Take, first, the utilitarian calculus. The definition of the wants that serve as the raw material of the calculus must be subject to several restrictions in order to provide the calculator with sufficiently precise information. For one thing, complexity, especially in the form of ambivalent or conflicting desires, needs to be kept under control. For another thing, the authority of existing desires must be taken as a given, despite both the large part that established institutional structures may have played in causing them and the fact that what an individual wants is always relative to what he imagines possible. The two restrictive simplifications overlap: one of the most striking sources of complexity and ambivalence in desires is precisely the experience of simultaneously entertaining desires that take a given institutional structure for granted and other, more obscure longings that presuppose either an escape from this structure or its transformation. Thus, in the rich North Atlantic countries of the present day, the individual indulges, through the promises of high and popular culture, fantasies of adventure and empowerment that his ordinary life denies.

Of course, nothing in principle prevents a sufficiently agnostic and formal version of utilitarian theory from taking the structure-denying desires as its givens. But these desires are likely to be disregarded for three reasons. First, such wants

are too fluid in scope and content to figure easily in a utilitarian calculus. Second, desires of different individuals for alternative sets of social relations are far more likely to contradict each other than are desires for benefits within a single set. The result is to worsen the difficulties of aggregation (how to sum up the wants of different individuals) that occupy so large a place in the traditional critique of utilitarianism. Third, those engaged in criticizing a specific form of life are unlikely to be interested in so ahistorical a mode of criticism anyway.

The same technique of restriction may enable social-contract theory to escape the indeterminacy into which it would otherwise fall, though there the device may take on more subtle forms. The heart of the modern contractarian view is the conception of an ideal situation of choice. Any decision about the principles of distributive justice and social organization made in such a circumstance will be right because the circumstance is constructed to avoid the partiality of people to their own interests or even to their own visions of the good. According to the tradition, this partiality constitutes the chief threat to justice. The main obstacle to the working out of a contractarian view is, again, its indeterminacy. The ideal choice situation will not be characterized with enough determinacy to yield concrete results unless the characterization reaches a certain level of detail, enough detail to require the very choice among alternative conceptions of the good and alternative principles of social organization that we wanted the contractarian method to make on our behalf.

The subtle contractarian frankly admits that content cannot be deduced from empty form. He defends the features imposed upon the ideal choice situation as the justified result of an earlier interplay between our existing moral intuitions and critical reflection about them. We bring out the general principles implicit in these intuitions and then discard or correct the beliefs that seem, once we have thought things through, to be out of line with the main body of our moral beliefs. The grounds for decision that we allow people in the ideal choice situation — the knowledge and the concerns with which we credit them — can be validated as expressions of the results of this earlier moral self-examination. The contractarian machinery is then demoted to spinning out the implications of choices that have an independent basis. But the definition of the moral intuitions that constitute the data of moral reflection presents the same difficulty as does the definition of wants in utility theory. For the moral-learning process to work and reach determinate conclusions, the contract theorist must de-

fine moral intuitions as restrictively as the utilitarian defines wants, in the same ways and for the same reasons. He must do at the prior stage of analysis what he would otherwise have to do at the subsequent one: anticipate his conclusions in his starting points while claiming for the latter an authority that this anticipation undermines.

There remains another route by which the philosophical approach that utilitarian and social-contract theory exemplify may seek to avoid the dangers of indeterminacy. It is to identify the ideal method, whether utilitarian calculus or contractarian choice, with the existing institutional arrangements of the democracy or the market. These arrangements become the procedure on the march for defining the dictates of the right as well as the content of particular rights: whatever decisions they generate will be fair by definition. The earlier response to the problem of underdetermination — the restrictive definition of wants or intuitions — already contains implicitly an important element of this tactic: a disregard for the moral consequences of the fact that wants and intuitions may either result from established social practices or vary with assumptions about the transformability of these practices. Nevertheless, stated as a distinctive and self-sufficient solution, this second device has great attractions of its own. It seems to increase the experimental and popular quality of the method and to avoid the dogmatism and elitism inherent in the appeal to a technique that claims to determine what is right quite independently of the utterances of the market and the democracy.

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

As a result, the entire weight of the prevailing approach to the problems of political philosophy is forced upon the other, even more overt and direct stratagem of containment: the restrictive initial definition of wants and intuitions. This re-

strictive definition in turn loses some of its persuasive force as the nature of the social context of choice — its distinctiveness, its influence, its transformability — becomes clearer.

D. The Broader Implications: Freedom and Structure in Modernist Experience

The constructive significance of the ideas presented here for political and moral philosophy can be brought out most clearly by considering their bearing upon one of the central issues of modernist experience and thought. By modernism I mean the movement in art and theory that, from the early decades of the twentieth century, attacked the hierarchies of value and the constraints upon personal and collective experimentation that distinguished Western bourgeois society, sometimes to replace them with other, preferred constraints and hierarchies, but more often with the aim of permanently weakening all those structures of practice or belief that remain impervious to criticism and transformation in the course of normal social activity. According to the modernists, freedom requires, indeed represents, a struggle against arbitrary compulsion. Yet if the central tradition of modernism is to be believed, nothing lies on the further side of blind constraint — of the repetitious and obsessional element in both personal and collective life — but a confrontation with the empty and anguishing sense of freedom itself. Every escape from this sense is an escape into the freedom-destroying embrace of an unjustifiably restricted form of personal and social existence, the prostration of the personality to an idol that it mistakes for its own indefinite or even infinite self.

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

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

The first answer might be called Aristotelian, a category in which I mean to include many ideas uncommitted or even opposed to Aristotle's own metaphysic. The Aristotelian response is the one that sees the purpose of the struggle against

arbitrary constraints as the realization of an objective ideal of social or personal life that lies on the further side of the unjustifiable limits, waiting to be made actual. The main trouble with this solution is its failure to reckon seriously with the experiences — more than mere theoretical assumptions though less than uncontestable discoveries — that have given rise to the modernist problem just described. The Aristotelian solution confers on a particular vision of society and personality — projections of a specific social world — a universal authority that they in fact lack. Short of some transcendent reality, the only thing to which the personality can give final authority is itself. But no particular society or culture has the last word on the longings or capabilities of this self. The Aristotelian solution also reduces history to the role of an arena in which an independently acquired moral insight should be applied. History, however, is much more than this: it is the process through which we discover the extent of our freedom and correct earlier views about the relation of the self to the social or mental worlds that it inhabits and constructs.

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

The point at issue has decisive consequences for both political and personal life. The existentialist thesis shows in a leftism that exhausts itself in acts of frenzied destruction because it has no real alternative to put in place of the forms of governmental and economic order against which it rises. It manifests itself as well in the belief that instituted social forms and authentic human relations can only wage war against each other. This belief contributes decisively to the most common perversion of cultural-revolutionary practice: the sacrifice of larger solidarities to a desperate self-concern on the part of

people unable to connect their personal experiments in subjectivity and association with a remaking of the terms of collective life.

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

Consider how the approach defended here differs from the Aristotelian conception. The proposed social ideal and its programmatic development do not amount merely to a choice among one of several personal or social ideals of the same kind, the same at least with respect to the constraints they impose. A crucial premise of the constructive ideas developed earlier in this argument is that social and mental worlds differ, among other ways, in the manner and the extent to which they enable the self to experience in ordinary life its true freedom. The dimensions of this freedom are the ones singled out by the equivalent definitions of the social ideal described in the course of my earlier discussion of the constructive outcome of our critique of objectivism. They include the success with which social life makes available in the course of ordinary politics and existence the instruments of its own revision and thereby overcomes the contrast between activities within its structure (the reproduction of society) and activities about its structure (the transformation of society).

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

E. The Broader Implications: The Agenda of Social Theory

The major traditions of systematic social theory inherited from the nineteenth and early twentieth centuries employ one or another variation of two basic conceptual schemes. One of these schemes is the idea of a sequence of well-defined social worlds — modes of production, systems of class conflict, forms of social solidarity, phases of rationalization. Everything important that happens in history can be understood either as an outcome of the regularities that distinguish each of these fundamental stages of historical life or as an incident in the more or less conflictual transition from one to the other. This is the conception that has proved most central to Marxism and to many of the other, less influential social theories that have provided the left with its theoretical instruments. The other conceptual scheme, more prominent in certain aspects of economic and organizational theory, has been the idea of a list of possible social worlds, each of which becomes actual under certain subsidiary conditions. What both these versions of generalizing social theory have shared is the idea of a metastructure of history or society that can serve as the source of lawlike generalizations. In one case, the metastructure governs the evolution of the social worlds. In the other case, it determines the limits and identities of the worlds that are possible, and describes the terms on which each of them becomes actual.

This entire tradition of social thought mixes unjustifiably two distinct ideas. One is the recognition that history and social life are in some fundamental sense structured and discontinuous. At any given time, related sets of preconceptions and institutional arrangements shape a large part of the routine practical and conceptual activities that take place while remaining themselves unaffected by the ordinary disturbances that these activities produce. Thanks to these formative contexts, societies differ in significant ways. Thanks to them, history is discontinuous: changes of a formative structure contrast sharply to shifts within it. The recognition of this shaped quality of social life stands in opposition to the perspective of naive historiography, which simply sees one event happening after another and unavoidably trivializes both the stakes in social conflict and the distinctions between historical circumstances. However, this tradition of social theory conflates the plausible if indeterminate thesis of structure and discontinuity with another, far more dubious claim: the invocation of a higher-order structure that governs the lower-order ones and establishes beforehand their identities. The resort to this

bolder hypothesis can be explained though not justified by the fear that without it there would be no way to understand how and why the structures change, no ultimate basis for the unity among the constituent elements of each of them, and more generally no secure foundation for a "science" of history or society. As a result, the way would be open for a return to the standpoint of naive historiography.

Contemporary social theory and social science are often said to have already rejected the metastructural idea. In fact, however, systematic, and particularly radical, social thought continues to live in a demimonde of inconclusive rebellion against that idea. One proof of this is the loaded use of concepts like capitalism or the market economy as if they designated a well-defined social world, structure, or system, all of whose elements presuppose each other and stand or fall together. Such concepts have no secure basis — perhaps they even make no sense — apart from some larger view that presents each of these supposedly integrated social worlds as a stage in a sequence or as an option in a denumerable list of possible societies. Another sign that contemporary social thought continues to live off diluted versions of the tradition just described is its failure to recognize clearly as its own central problem the basic riddle to which the more thoroughgoing rejection of the metastructural assumption inevitably leads.

Our critique of objectivism and the constructive sequel to this critique attack at its root the conception of institutional types, which relies upon social-theoretical assumptions from which its exponents claim to be free. Put together with parallel ideas in other branches of social thought, the implications of our work suggest a more basic reformulation of the premises of social theory. These parallel ideas in historical sociology and sociological history discredit the thesis that the division of labor in society has an autonomous dynamic. The same levels of technological capability appear in sharply different organizational settings. Similar sorts of organization flourish against a wide range of social and governmental backgrounds. Thus, for example, the emergence of industrialized economies in Europe and around the world, rather than having presented a tidy set of stages or alternatives, exhibited an open list of variations. Deviant styles repeatedly emerged. Dominant forms achieved their primacy through victories in power politics and culture. These triumphs cannot be inferred from any system of determinant and unfolding constraints, including the constraints of material life.

When these social-theoretical discoveries converge with the critical and constructive implications of our work, the joint

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

This shift in the starting points of social theory may seem on our part an act of intellectual self-destruction. After all, the major theoretical traditions that have served the left until now, like Marxism and structuralism, have leaned heavily on the idea of a metaorder in either its compulsive-sequence or its possible-worlds variant. Nevertheless, the theoretical result can best be seen as the victory of the fundamental intention and method of critical social thought over sets of propositions that only imperfectly applied the method and expressed the intention. From the beginning the intention has been to understand society as made and imagined rather than as merely given in a self-generating process that would unfold independently of the will and the imagination and that would condemn people constantly to reenact a drama they were unable to stop or even to understand. The method of critical social thought mirrors this intention. It is the method that, interpreting the formative institutional and imaginative contexts of social life as frozen politics, traces each of their elements to the particular history and measure of constraint upon transformative conflict that the element represents. This method must wage perpetual war against the tendency to take the workings of a particular social world as if they defined the limits of the real and the possible in social life.

VI. Another Politics

The critical legal studies movement exemplifies a form of transformative action in a limited and preliminary way. As

such it gives an original response to a specific experience of constraint and disappointment, a situation whose most basic features have become ever more common. To clarify and support this claim, I begin by describing the different settings and senses in which we have embarked upon a course of transformative action. Then my discussion steps back to describe the restraining features of our historical situation to which our movement represents a practical as well as a theoretical response. The next step is to describe, in the light of this understanding of the situation, the mode of politics that our response instantiates. Only when the several steps of this analysis have been completed can the relationship between the movement as theory and the movement as practice be understood. Only then can we appreciate the way in which we have gone beyond the loose and sporadic connection between theory (as the critique of formalism and objectivism) and practice (as the merely instrumental use of law and legal thought for leftist ends) that has marked modern leftist movements in law.

A. The Settings of Political Action

The first context of our transformative activity goes to the relation between our substantive ideas and the democratic transformation of social life. The critique of objectivism and its constructive development shake the established terms of ideological controversy. They disrupt the tacit connection between the currently available set of institutional alternatives and any underlying scheme of practical or moral imperatives. They broaden the sense of collective possibility and make more controversial and more precise the ideal conceptions that ordinarily serve as the starting points of normative argument.

At the same time, the struggle over the form of social life, through deviationist doctrine, creates opportunities for experimental revisions of social life in the direction of the ideals we defend. An implication of our ideas is that the elements of a formative institutional or imaginative structure may be replaced piecemeal rather than only all at once. Between conserving reform and revolution (with its implied combination of popular insurrection and total transformation) lies the expedient of revolutionary reform, defined as the substitution of one of the constituent elements of a formative context. Only an actual change in the recurrent forms of the routine activities — of production and exchange or of the conflict over the uses and mastery of governmental power — can show whether a replacement of some component of the formative context has in fact taken place. By affecting the application of state

power, a programmatically inspired deviationist doctrine may provide opportunities for collective mobilization that in turn can lead directly or indirectly to revolutionary reform. This may happen directly through a change in the system of rights that defines the institutional structure of power and production. It may take place indirectly through the encouragement of forms of human association that override and oppose an institutional or imaginative order that they have not yet managed to replace: the creation of counterimages to the dominant models of social life.

The opportunities opened up by expanded doctrine may not be perceived. If they are perceived, the attempts to take advantage of them may fail. We would fall into an error that we criticize in our adversaries if we imagined our conceptual activities as a substitute, even a substitute source of insight, for practical conflict and invention. But although the immediate conceptual or practical venture may be defeated, the institutional ideas and the social arrangements that embody or prefigure them remain, as the fragmentary scheme of an enacted ideal, to be taken up again and improved at a later, more favorable occasion.

Another, parallel setting of transformative activity is our conception and practice of professional technique. The received view presents the practice of law as the defense of individual or group interests within an institutional and imaginative framework that, at least for the specific purposes of this defense, must be taken as a given. The sole apparent alternative appeals to an idea of the collective good, or of the public interest, that lacks any precise content and appears as the mere denial of service to private interests. The theoretical significance of this counteridea is to affirm, by its hollowness and negativity, the very order that it pretends to escape. Its practical meaning is to justify less mercenary forms of legal practice as an exculpatory afterthought — in the activities of the bar, if not in the careers of individual lawyers — to the routines of mainline lawyering.

For us, law practice should be, and to some extent always is, the legal defense of individual or group interests by methods that reveal the specificity of the underlying institutional and imaginative order, that subject it to a series of petty disturbances capable of escalating at any moment, and that suggest alternative ways of defining collective interests, collective identities, and assumptions about the possible. The same points could be made, with appropriate adaptations, of all forms of professional expertise. More generally still, the devices for reproducing society always contain within themselves

the instruments of its disruption. These ideas inform a distinctive approach to law practice. It is the view of practice as oriented toward precisely the relation between deviationist doctrine and social destabilization that I earlier presented.

As legal analysis approached deviationist doctrine and society came to execute the institutional program described earlier, the character of professional expertise in law would change. The contrast between lawyers and laymen would give way to a situation of multiple points of entry into the more or less authoritative resolution of problems that we now define as legal. If legal doctrine is acknowledged to be continuous with other modes of normative argument, if the institutional plan that decrees the existence of a distinct judiciary alongside only one or two other branches of government is reconstructed, and if long before this reconstruction the belief in a logic of inherent institutional roles is abandoned, legal expertise can survive only as a loose collection of different types of insight and responsibility. Each type would combine elements of current legal professionalism with allegedly nonlegal forms of special knowledge and experience as well as with varieties of political representation. This disintegration of the bar might serve as a model for what would happen in a more democratic and less superstitious society to all claims to monopolize in the name of expert knowledge an instrument of power.

The most immediate setting of our transformative activity is also on its face the most modest: our effect upon the law school world we are in. The nature of our task in the legal academy is best shown by our response to our students; their situation reveals even more unequivocally and immediately than our own or that of our colleagues the moral quality of the circumstance we all share. The conjunction of a biographical approach and an intellectual disappointment define for this purpose the predicament of the serious law student.

For him, coming to law school often means putting aside in the name of reality an adolescent fantasy of social reconstruction or intellectual creation. He does not want merely to have a job. He accepts the spiritual authority of that characteristically modern and even modernist ideal: you affirm your worth, in part, by attempting to change some aspect of the established structure of society and culture, and you create your identity by asserting in some tangible way your ability to stand apart from any particular station within that structure. Yet it also seems important to assume a concrete position within social life in order both to find a realistic version of the transformative commitment and to hedge against its failure. With each move forward, however, the opportunities for de-

viation seem narrower and the risks greater. In exchange for the equation of realism with surrender, the social order promises an endless series of rewards. Nothing seems to justify a refusal of these prizes: the realistic alternatives appear uninspiring, and the inspiring ones, unrealistic. The individual who has undertaken this spiritual itinerary cannot easily regain the faith in a world in which justification comes from the good faith performance of well-defined roles, a world in which the system of roles is itself taken as the outward manifestation of an authoritative moral or even cosmic order. Without either that faith or its successful replacement by the idea of a transformative vocation, work appears as a mere practical necessity, robbed of higher significance or effect. Apart from the pleasures of technical intricacy and puzzle-solving, it becomes solely a means to material comfort and an incident, if you are lucky, to domestic felicity or personal diversion.

In the law schools themselves, the students are told that they will be taught a forceful method of analysis. This method is meant to be applied to a body of law presented, to a limited but significant degree, as a repository of intelligible purposes, policies, and principles rather than as merely a collection of shaky settlements in a constant war for the favors of government. Yet the real message of the curriculum is the denial of all this — the message made explicit in our critique of formalism and objectivism. This implicit lesson differs from our explicit one by its cynical negativity. It teaches that a mixture of low-level skills and high-grade sophistic techniques of argumentative manipulation is all there is — all there is and can be — to legal analysis and, by implication, to the many methods by which professional expertise influences the exercise of state power.

The biographical approach and the intellectual lesson have the same moral effect upon students and teachers alike. They flatter vanity the better to injure self-respect, and pump up their victims only to render them more pliable. Their shared lesson is that the order of thought and society is contingent and yet for all practical purposes untransformable. They preach an inward distance from a reality whose yoke, according to them, cannot be broken. They distract people by enticing them into the absurd attempt to arrange themselves into a hierarchy of smart alecks.

The decisive psychological insight that provides the beginning of our response is the belief that the sense of living in history constitutes an indispensable prelude to every generous impulse capable of extending beyond the closest personal attachments. To live in history means among other things to be

an active and conscious participant in the conflict over the terms of collective life, with the knowledge that this conflict continues in the midst of the technical and the everyday. We teach this by pushing the negative lessons to the extreme point at which they start to become constructive insights. We hold up the image of a form of conceptual and practical activity that exemplifies a way of living in civil society without capitulating to it. Ours may seem a narrow terrain on which to develop and defend so important a lesson. But part of the point to the lesson is that no ideal of conduct or form of insight counts until it has penetrated the specialized areas of conduct and thought. Once penetrated, the separate areas turn out to present significant analogies. Thus, the response has a pertinence that outreaches the small, privileged domain of professional practice and academic life with which it immediately deals. It has a broader application in a world of broken dreams and paper-pushing, of abstractions that have long ceased to be living theory and that, once routinized and mutilated, turn into the guiding principles or the empty slogans of forms of social practice to which they lend the spurious semblance of sense, authority, or necessity.

B. Reimagining Transformative Politics

The transformative activity carried out in these different settings may be understood as a distinctive and perhaps even exemplary reaction to a specific historical circumstance. To grasp what exactly the reaction exemplifies, we need to remember a few elementary aspects of the situation.

One such aspect is the disruption of the imagined mechanism, and the disappearance of the real occasions, of revolutionary transformation. The conventional concept of revolution combines at a minimum the notion of basic if not total change in the formative context of routine social life with the idea of more or less widespread participation in the remaking of a social order that the state has temporarily ceased to control. In the ruling traditions of historical and critical social theory and in the vulgar beliefs that these traditions have inspired, revolution appears as the best hope of real social change, the only clear alternative to the endless reproduction of society through reformist tinkering or to its slow and obscure remaking through the accumulation of an enormous number of largely unrelated decisions and conflicts. In this inherited picture, the core mechanism of revolution is the alliance of a counterelite with an oppressed mass. In the advanced Western countries, however, with their forms of mass-party politics,

their extreme segmentation of the work force, and their more or less shared language of a culture that combines attributes of the high and the popular, the simple hierarchical contrasts that this mechanism presupposes have been irremediably confused. Moreover, the textbook cases of modern revolution almost invariably have depended upon the occurrence of a narrow range of enabling conditions besides the existence of a well-defined and relentlessly expressed social hierarchy. One of these favorable circumstances was the paralysis of the repressive and coordinating apparatus of the state in the wake of war and occupation. Another was the influence of the transformative commitments of those who seized government in the course of a national struggle against a brutal tyranny. But wars in our own historical circumstance must be either too limited or too terrible to have this enabling effect, and brutal tyrannies do not exist in the industrialized West. As the mechanisms and occasions of revolution disappear, we seem to be left with nothing but the petty squabbles of routine politics.

A second feature of the larger situation is the strange coexistence, in the rich North Atlantic countries, of constant revolution in the sphere of personal relations with repetition and drift in the struggle over the uses of governmental power and the institutional structure of society. I suggested earlier a view of the meanings and intentions of this cultural-revolutionary practice. It may be enough to remember here that it wants to free the practical and passionate relations among people from the constraining effect of some background plan of social division and hierarchy and to recombine the experiences and opportunities associated with different social or gender categories. To the extent that it becomes cut off from the practical or imaginative contest over institutional structure, as it has in the career of the advanced Western societies, this cultural-revolutionary practice undergoes a perversion: the unhappy search for gratification and self-fulfillment takes precedence over all other modes of subjectivity or solidarity.

A third characteristic of our historical circumstance is the nature of the gap between the homogeneous social space of citizens and property holders depicted by classical liberal theory and the real nature of social life. The whole of society appears in fact as a vast array of overlapping but nevertheless discrepant sets of prerogatives. These prerogatives, only partly defined by the law, establish a system of social stations. Each place in the system is defined simultaneously by its relation to all the other places and by the degree and character of its access to the favors of governmental power. These favors

include both the direct or indirect distribution of material resources and the making of legal rules that turn transitory advantages into vested rights. Each place in the scheme of social stations serves as a haven within which a distinctive form of life can flourish. Politics, narrowly understood as the contest over the control of the state, are largely played out as a struggle among more or less fragmentary interest groups. This process, however, does not express the underlying character of society. Instead, it helps explain why society, as a relatively quiescent division of labor, should be so different from politics. This is truly a new *ancien régime*. Its great historical accomplishment is to have extended to the masses of ordinary working men and women the experience of rightholding, at least of holding rights that are not just steps in a chain of personal dependence. Its most striking defect is to have fallen short: not to have developed rightholding into active empowerment over the terms of social life and not to have overcome the disparity between the organization of politics, as a contest among fragmentary, crisscrossing interest groups and parties of opinion, and the organization of society, as a system of fixed divisions and hierarchies that makes the individual the captive of a more or less rigidly defined station within a more or less stabilized division of labor.

A movement able to act transformatively in the circumstance I have described must reject the false dilemmas of conservative reform or textbook revolution. It must find ways to override the contrast between the politics of personal relations and the politics of the large-scale institutional structure. It must take advantage of the highly segmented character of social life — its fragmentation into hierarchically ordered citadels of prerogative — in order to experiment with forms of social life capable of overcoming the very oppositions — between rightholding and empowerment or between the quality of grand politics and the reality of practical social experience — that this segmentation helps strengthen. Our movement exemplifies, very incipiently and imperfectly, one such mode of activity, with the distinguishing opportunities and constraints that come from working through the medium of legal thought and practice.

A group acts in one of the institutional havens or social stations of the system of prerogatives. In its corner of the social world, it pioneers in types of association and action that serve as countermodels to the dominant scheme of social life and that, appropriately revised, can be extended to other aspects of social life. At the same time, it uses some material

or conceptual resource in ways that help shake up these other areas and open them to conflict over the forms of power and coordination. A special feature of our own intended version of this transformative practice is that its immediate subject, the definition of rights, helps draw the boundaries of all of the other social stations and institutional havens.

A group that works in the manner just described strikes at the boundary between the politics of personal relations and the politics of the great powers of society. It deals with detailed fragments of the institutional system that directly shape or limit a set of personal relations. It alters these relations, collectively and deliberately, in ways that prefigure or encourage some partial change of the institutional order. Again, by its very nature, the definition of rights spans the gap between the macrostructure and microstructure of social life.

This transformative effort cannot establish its own aims. It requires guidance, the guidance supplied by some exercise of internal development or visionary insight. There is, however, one significant qualification to this discontinuity between method and goal: the particular programmatic vision sketched earlier has as one of its aims to make social life permanently more hospitable to a transformative activity that, like the very one now being described, also represents a mode of empowerment. The realization of this goal would represent part of the program of making each crucial feature of the social order effectively visible and vulnerable to controversy, conflict, and revision.

Our theoretical ideas are connected at every level to the way we exercise this form of political practice. The ideas provide the opportunity: a practice of rights-definition that constantly raises anew the central problems of what the relations among people should be like in the different spheres of social existence. More specifically, the opportunity is the struggle that takes place over the legal categories and entitlements that define the concrete institutional forms of the market and the democracy. The ideas supply the method: the contentious internal development of a received system of ideals and arrangements that deviationist doctrine illustrates. The ideas generate the animating vision: the conception of a society in which the effacement of the contrast between revolutionary struggles over the established order and routine deals within it has more fully liberated exchange, production, and personal attachments from the vitiating force of dominance and dependence and from the compulsions of an unexamined sense of possibility.

VII. CONCLUSION: THE LESSONS OF INCONGRUITY

The chief objection to this view of the critical legal studies movement may be simply the formidable gap it suggests between the reach of our intellectual and political commitments and the many severe constraints upon our situation. We must still decide what to make of this gap.

First, there is the disproportion between our transformative goals and the established social peace. We have not sought in the deceptions of a social and legal theory that claims to trump politics consolation for our political disappointments. Surrounded by people who implicitly deny the transformability of arrangements whose contingency they also assert, we have refused to mistake the ramshackle settlements of this post-War age for the dispensations of moral providence or historical fate.

Then we face the contrast between the scope of our theoretical concerns and the relatively limited domain in which we pursue them. But every truly radical movement, radical both as leftist and as deep cutting, must reject the antithesis of the technical and the philosophical. It must insist upon seeing its theoretical program realized in particular disciplines and practices if that program is to be realized at all.

Finally, there is the disparity between our intentions and the archaic social form that they assume: a joint endeavor undertaken by discontented, factious intellectuals in the high style of nineteenth century bourgeois radicalism. For all who participate in such an undertaking, the disharmony between intent and presence must be a cause of rage. We neither suppress this rage nor allow it the last word, because we do not give the last word to the historical world we inhabit. We build with what we have and willingly pay the price for the inconformity of vision to circumstance.

The legal academy that we entered dallied in one more variant of the perennial effort to restate power and preconception as right. In and outside the law schools, most jurists looked with indifference and even disdain upon the legal theorists who, like the rights and principles or the law and economics schools, had volunteered to salvage and recreate the traditions of objectivism and formalism. These same unanxious skeptics, however, also rejected any alternative to the formalist and objectivist view. Having failed to persuade themselves of all but the most equivocal versions of the inherited creed, they nevertheless clung to its implications and brazenly advertised their own failure as the triumph of worldly wisdom over intellectual and political enthusiasm. History

they degraded into the retrospective rationalization of events. Philosophy they abased into an inexhaustible compendium of excuses for the truncation of legal analysis. The social sciences they perverted into the source of argumentative ploys with which to give arbitrary though stylized policy discussions the blessing of a specious authority.

When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars, and found the mind's opportunity in the heart's revenge.