What Should Legal Analysis Become?

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VERSO

London • New York

First published by Verso 1996

Verso
UK: 6 Meard Street, London W1V 3HR
USA: 180 Varick Street, New York NY 10014–4606

Verso is the imprint of New Left Books

ISBN 1–85984–969–5
ISBN 1–85984–100–7 (pbk)

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Unger, Roberto Mangabeira.
What should legal analysis become? / Roberto Mangabeira Unger.
p. cm.
Includes index.
ISBN 1–85984–969–5 (hbk). — ISBN 1–85984–100–7 (pbk).
1. Law—Interpretation and construction. 2. Law—Methodology.
3. Law—Philosophy. I. Title.
K290.U54 1996
340'.1—dc20 96–6000
CIP

Typeset by M Rules
Printed and bound in Great Britain by
Biddles Ltd, Guildford and King's Lynn

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THE ARRESTED DEVELOPMENT OF LEGAL THOUGHT

The genius of contemporary law

To grasp the potential of legal analysis to become a master tool of institutional imagination in a democratic society we must begin by understanding what is most distinctive about law and legal thought in the contemporary industrial democracies. In this effort no contrast is more revealing than the comparison of the substantive law and legal methods of today with the project of nineteenth-century legal science and the law of nineteenth-century commercial economies.

Consider how the law and legal thought of today may look to a future student who tries to identify its deepest and most original character within the larger sequence of legal history. Suppose that we use in this endeavor less the search for recurrent doctrinal categories and distinctions Holmes pursued in *The Common Law* than the reciprocal reading of vision and detail Jhering offered in *The Spirit of Roman Law*. The latter method rather than the former respects the place of law between imagination and power, and connects the self-understanding of legal thought to the central tradition of modern social theory founded by Montesquieu. Viewed in this light the overriding theme of contemporary law and legal thought, and the one defining its genius, is the commitment to shape a free political and economic order by combining rights of choice with rules designed to ensure the effective enjoyment of these rights.

Little by little, and in country after country of the rich Western world and of its poorer emulators, a legal consciousness has penetrated and transformed substantive law, affirming the empirical and defeasible character of individual and collective self-determination: its dependence upon practical conditions of enjoyment, which may fail.

This conception stands out by contrast to the single most influential idea in the law and legal thought of the nineteenth century, an idea developed as much in the case-oriented discourse of American and English jurists, or the aphoristic and conclusory utterances of French lawyers, as in the relentless category-grinding of the German pandectists. According to this earlier idea a certain system of rules and rights defines a free political and economic order. We uphold the order by clinging to the predetermined system of rules and rights and by preventing its perversion through politics, especially the politics of privilege and redistribution.

A consequence of this animating idea of contemporary law has been the reorganization of one branch of law and legal doctrine after another as a binary system of rights of choice and of arrangements withdrawn from the scope of choice the better to make the exercise of choice real and effective. The governing aim of this dialectical organization is to prevent the system of rules and rights from becoming or remaining a sham, concealing subjugation under the appearance of coordination.

Sometimes this binary reshaping takes place by marshalling countervailing rules and doctrines within a single branch of law, as when the doctrine of economic duress and of unequal bargaining power complements and qualifies the core rules of contract formation and enforceability, or freedom to choose the terms in a labor contract is restricted by selective direct legal regulation of the employment relation. At other times the dual structure works by assigning the choice-restricting and freedom-sustaining arrangements to a distinct branch of law, as when collective-bargaining law attempts to correct the inability of individual contract to compensate for the power disparities of the employment relation. At yet other times the dual structure has taken the form of a coexistence of two legal regimes for the governance of overlapping social problems. Thus, fault-based liability may be strengthened rather than undermined by the refusal to extend it to the compensation for the actualization of the risks inherent in a line of business and by the development of insurance systems disregarding fault-oriented standards of compensation.

The binary structure that has reorganized private law in every industrial democracy recurs, on a larger scale, in the relation of governmental regulation to private law as a whole. The entitlements afforded by the welfare state, and the enjoyment by workers of prerogatives relatively secure against labor-market instability and the business cycle, have been understood and developed by twentieth-century lawyers as devices for guaranteeing the effective enjoyment of the public-law and private-law rights of self-determination. If the market economy, representative democracy, and free civil society have certain inherited and necessary forms, these forms must nevertheless be refined and completed so that they may provide the reality as well as the appearance of free choice and coordination to every rights-bearing individual.

The supreme achievement of this sustained exercise in correction is to make the individual effectively able to develop and deploy a broad range of capacities. He can then form and execute his life projects, including those most important ones that he may need to imagine and advance

through free association with other people. Class hierarchies may nevertheless have persisted with barely diminished force. The majority of the people may be an angry and marginalized although fragmented mass of individuals, who feel powerless at their jobs and hopeless about their national politics, while seeking solace and escape in private pleasure, domestic joys, and nostalgic traditionalism. According to this mode of thought, however, these burdens of history and imperfection merely show that we must patiently continue the work of securing the effective enjoyment of rights.

The theme of the dialectic between the realm of free economic and political choice and the realm of that which is withdrawn from choice for the sake of choice is all the more remarkable because it fails to track any specific ideological position within the debates of modern politics and modern political thought. It merely excludes positions that from the vantage point of those who inhabit this imaginative world may seem extremist. It excludes the old nineteenth-century idea that a particular scheme of private and public rights will automatically secure economic and political freedom if only it can be protected against redistributive interventionism. It also repels the radically reconstructive idea that no real and widely shared experience of individual and collective self-determination will be possible unless we revolutionize the present institutional system by substituting, for example, "socialism" for "capitalism." Yet while the spirit of contemporary law may seem to antagonize only unbelievable or insupportable alternatives, it generates, in detail, endless practical and argumentative work for the analyst and the reformer. Thus, it resembles, in the generality of its scope and the fecundity of its effects, the bold conception that preceded it in the history of law and legal thought: the project of a legal science that would reveal the in-built legal and institutional content of a free society and police its boundaries against invasion by politics.

The limit of contemporary legal thought

There is nevertheless a riddle in the career of this idea. Until we solve this riddle, we cannot correctly understand the genius – and the self-imposed poverty – of contemporary legal thought, nor can we fully appreciate the extent to which the development of law remains bound up with the fate of democratic experimentalism. When we begin to explore ways of ensuring the practical conditions for the effective enjoyment of rights, we discover at every turn that there are alternative plausible ways of defining these

conditions, and then of satisfying them once they have been defined. For every right of individual or collective choice, there are different plausible conceptions of its conditions of effective realization in society as now organized. For every such conception, there are different plausible strategies to fulfill the specified conditions.

Some of these conceptions and strategies imply keeping present institutional arrangements while controlling their consequences: by counteracting, characteristically, through tax-and-transfer or through preferment for disadvantaged groups, their distributive consequences. Other conceptions and strategies, however, imply a piecemeal but cumulative change of these institutional arrangements. These structure-defying and structure-transforming solutions may in turn go in alternative directions. They may mark the initial moves in different trajectories of structural change.

Thus, the reach toward a recognition of the empirical and defeasible character of the rights of choice should be simply the first step in a two-step movement. The second step, following closely upon the first, would be the legal imagination and construction of alternative pluralisms: the exploration, in programmatic argument or in experimental reform, of one or another sequence of institutional change. Each sequence would redefine the rights, and the interests and ideals they serve, in the course of realizing them more effectively. I have already given an extended example of what such reforms and arguments might look like when I suggested, earlier in this book, how we may move from a familiar, structure-preserving policy debate to one challenging and changing the institutional and imaginative presuppositions of the debate. However, contemporary legal theory and doctrine, and substantive law itself, almost never take this second step. Theirs is a striking instance of arrested development.

The failure to turn legal analysis into institutional imagination – the major consequence of the arrested development of legal thought – has special meaning and poignancy in the United States. For surely one of the flaws in American civilization has been the effort to bar the institutional structure of the country against effective challenge; to see America's "scheme of ordered liberty" as a definitive escape from the old history of classes and ideologies; to refuse to recognize that the spiritual and political ideals of a civilization remain fastened to the special practices and institutions representing them in fact. Experimentalism has been the most defensible part of American exceptionalism; yet only under the pressure of extreme crisis have Americans brought the experimentalist impulse to bear upon their institutions. Those American thinkers have been the

greatest who, like Jefferson and Dewey, tried to convince their contemporaries to trade in some bad American exceptionalism for some good American experimentalism. Those periods of American history have been the most significant when interests became entangled in ideals because both ideals and interests collided with institutional arrangements.

Complex Enforcement at the Threshold of Structural Change

Structural but episodic intervention

What force arrests the development of legal thought in the move from the discovery of the institutional indeterminacy of free economies, societies, and polities to the exploration of their diversity of possible institutional forms? We can shed an oblique but revealing light on this riddle by reconsidering it from the perspective of what has come to be known in American law as the problem of complex enforcement and structural injunctions.* Although the procedural device has developed more fully in the United States than anywhere else, the opportunity it exploits in the relation of law to society is fast becoming universal. The new mode of procedural intervention seems like a natural extension and instrument of the central idea of contemporary law. Nevertheless, the incongruities of its theory and practice make the arrested development of this idea all the more startling.

Alongside the traditional style of adjudication, with its emphasis upon the structure-preserving assignment of rights among individual litigants, there has emerged a different adjudicative practice, with agents, methods, and goals different from those of the traditional style. The agents of this alternative practice are collective rather than individual, although they may be represented by individual litigants. The class-action lawsuit is the most straightforward tool of this redefinition of agents.

The aim of the intervention is to reshape an organization or a localized area of social practice frustrating the effective enjoyment of rights. The characteristic circumstance of frustration is one in which the organization or the practice under scrutiny has seen the rise of disadvantage and

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* See Lewis Sargentich, "Complex Enforcement," 1978 (unpublished, on file in Harvard Law Library).

marginalization that their victims are powerless to escape. Subjugation, localized and therefore remediable, is the paradigmatic evil addressed by the reconstructive intervention.

The method is the effort to advance more deeply into the causal background of social life than traditional adjudication would countenance, reshaping the arrangements found to be most immediately and powerfully responsible for the questioned evil. Thus, the remedy may require a court to intervene in a school, a prison, a school system, or a voting district, and to reform and administer the organization over a period of time. Complex enforcement will demand a more intimate and sustained combination of prescriptive argument and causal inquiry than has been characteristic of lawyers' reasoning.

The basic problem in the theory and practice of the structural injunctions is the difficulty of making sense of their limits. Once we begin to penetrate the causal background of contested practices and powers, why should we stop so close to the surface? The evils of unequal education for different races, for example, may soon lead an American structural reformer in one direction to question the legitimacy of local financial responsibility for public schools and in another direction to challenge the institutional arrangements, such as subcontracting and temporary hiring, that help reproduce an underclass by segmenting the laborforce. The more circumscribed corrective intervention is likely to prove ineffective. If causal efficacy is the standard of remedial success, one foray into the structural background of rights-frustration should lead to another. Once we start to tinker with relatively peripheral organizations such as prisons and asylums and to reshape them in the image of ideals imputed to substantive law, why should we not keep going until we reach firms and bureaucracies, families and local governments? As we deepened the reach and extended the scope of intervention, the reconstructive activities of complex enforcement would become ever more ambitious, exercising greater powers, employing bigger staffs, and consuming richer resources.

The missing agent

None of this, of course, will happen. It will not happen because no society, not even the United States, will allow a vanguard of lawyers and judges to reconstruct its institutions little by little under the transparent disguise of interpreting the law. The mass of working people may be asleep. The educated and propertied classes are not. They will not allow their fate to be determined by a closed cadre of priestly reformers

lacking in self-restraint. They will put these reformers in their place, substituting for them successors who no longer need to be put in their place.

The deepening of the reach and the broadening of the scope of complex enforcement would soon outrun the political legitimacy of the judiciary and exhaust its practical and cognitive resources. Moreover, in the name of the mandate to intervene the better to secure the effective enjoyment of rights, judges would usurp an increasing portion of the real power of popular self-government.

So what should the judges do, and what do they do in fact? They have sometimes seemed to want to do as much as they could get away with: better some penetration of the structural background to subjugation than none; better marginal social organizations than no organizations at all. The difficulty arises from the disproportion between the reconstructive mission and its institutional agent. Complex enforcement is both structural and episodic. The work of structural and episodic intervention seems required if we are to ensure the effective enjoyment of rights and execute the mandate of substantive law. It is a necessary procedural complement, not a casual afterthought, to the genius of contemporary law. But who should execute such structural and episodic work in contemporary democratic government?

No branch of present-day presidential or parliamentary regimes seems well equipped, by reason of political legitimacy or practical capability, to do it. The majority-based government of the parliamentary system, or the executive branch of the presidential regime, cannot reinterpret rights and reshape rights-based arrangements in particular corners of social life without danger to the freedom of citizens. Moreover, they would soon find themselves distracted and demoralized by countless forms of petty anxiety and resistance. The administrative agencies or civil service might have more detachment and expertise but correspondingly less authority in the choice of a reconstructive direction or in the exercise of a power free to forge singular solutions to localized problems. Legislatures and parliaments would become both despotic and ineffective if they were to deal, in an individualized and episodic manner, with structural problems and institutional rearrangements. The judiciary lacks both the practical capability and the political legitimacy to restructure, and to manage during restructuring, the deserving objects of complex enforcement. Its unsuitability to the task will be all the more manifest if the frustration of rights enjoyment by intractable disadvantage turns out to be a common incident of social life, and if the cure

demands an increasingly invasive reach into the background of practices and institutions.

The truth is that no part of present-day government is well suited, by virtue of practical capacity or political intervention, to undertake the job of structural and episodic reconstruction. The mission lacks – as every novel and serious mission in the world does – its proper agent. The best response, then, is to forge the new agent: another branch of government, another power in the state, designed, elected, and funded with the express charge of carrying out this distinctive, rights-ensuring work. Such a move, however, would demand the very openness to institutional experimentalism in which contemporary law and contemporary democracies have proved so markedly deficient. It would require us, as lawyers and as citizens, to complete the move from the accomplished first step of insistence upon the effectiveness of the enjoyment of rights to the missing second step of institutional reimagination and reconstruction.

In the absence of such an extension of the cast of available agents, any of the existing, somewhat unsuitable agents might accept or refuse the work, and then, having accepted it, push it as far as it wanted or could. In the United States, the judiciary, especially the federal judiciary, has been this incongruous, sometime, and half-hearted agent. In other countries it could be any other power in the state. From this marriage of the indispensable work to the unsuitable agent there arises the implicit theory of the structural injunctions in American law. This theory requires us to split the difference between two persuasive and incompatible propositions: the maxim that we must carry out the mandate of substantive law whether or not we have available the right agents and instruments, and the contrasting maxim that the implementation of law must take place under the discipline of institutional propriety and capability.

Thus the problem of complex enforcement sheds a double light upon the arrested development of contemporary legal thought. It shows how fidelity to law and to its imputed ideals may drive, unwittingly and on a small scale, into the institutional experiments that we have refused straightforwardly to imagine and to achieve. It also demonstrates how our failure to take the second step disorients and inhibits our small-time reconstructive work. This chapter in the history of contemporary law wonderfully illustrates the combination of self-concealment and self-disclosure in a ruling vision.

THE SPELL OF RATIONALIZING LEGAL ANALYSIS

Legal thought and social democracy

Why have law and legal doctrine failed to make the move from their characteristic focus upon the effective enjoyment of rights to the recognition and development of transformative institutional opportunity? Why have they worked in the belief that individual and collective self-determination depend upon empirical and defeasible conditions without turning more wholeheartedly to the legal analysis and construction of the contrasting practices and institutions capable of fulfilling these conditions? Why, therefore, have they not gone on to identify in these small and fragmentary alternatives the possible beginnings of larger alternatives: different institutional pathways for the redefinition and transformation of representative democracy, market economy, and free civil society? Why, in other words, have they failed to extend their rejection of the nineteenth-century idea that free polities and economies have a predetermined legal form, constitutive of freedom itself, into a more thoroughgoing rebellion against institutional fetishism?

The most important reasons for the arrested development of legal thought lie in the history of modern politics. Nevertheless, the simple attribution of the limits of contemporary legal thought to the constraints upon the political transformation of social arrangements is insufficient as explanation on several grounds.

The same period that saw the development of legal thought arrested also witnessed a connected series of radical reforms in the institutional and ideological context of political and economic life: the reforms labeled in Europe as social democracy and described in the United States as the New Deal. These changes had one of their points of focus and support in Keynesianism: a connected series of institutional and ideological innovations, freeing national governments from sound-finance doctrine and thus diminishing the dependence of public policy upon the level of business confidence. These were radical reforms because we cannot understand the force and shape of the major political, economic, and discursive routines of the contemporary industrial democracies – such as the political–business cycle – except by reference to them. They helped set the boundary conditions within which individuals and organized groups would, in the succeeding period, understand and defend their interests.

It is nevertheless true that, like any institutional settlement, the

social-democratic compromise implied renunciation of a broader realm of conflict and controversy. National governments won the power and the authority to manage the economy countercyclically, to compensate for the unequalizing effects of economic growth through tax-and-transfer, and to take those investment initiatives that seemed necessary to satisfy the requirements for the profitability of private firms. In return, however, they had to abandon the threat radically to reorganize the system of production and exchange and thereby to reshape the primary distribution of wealth and income in society.

The refusal of legal analysis to move from the concern with rights enjoyment to the pursuit of institutional change may seem merely the legal counterpart to the foreclosure of broader conflict by the social-democratic settlement. The role of the practical legal reformer would be to continue and to complete the unfinished work of the social-democratic reformation. The task of the legal thinker would be to develop a theory of law that, freer of the nineteenth-century devotion to a predetermined private-law system, would do justice to social-democratic commitments. From this angle the reluctance to pass from the theme of effective rights enjoyment to the practice of institutional criticism appears to be a consequence of the renunciation of broader institutional experimentalism. Such a renunciation represented an essential term of the social-democratic compromise. Not until that compromise gets challenged and changed could we expect legal analysis to continue on the trajectory I earlier traced. As it has been challenged if at all mainly from the right, so the argument would conclude, there is little reason to expect such a forward impulse.

The trouble with this account of the sources of institutional conservatism in the practice of legal analysis is that it relies upon too static and one-sided a picture of institutional settlements and of their relation to legal thought. For one thing, there is no watertight division between the reconstructive moment of crisis and energy and the supposedly barren sequel. Not only have problems and alternatives touching on the design of institutions continued to appear, but it is also often hard to say which of the solutions considered is more faithful to the earlier, foundational compromise. For another thing, institutional change is not just a cause of reimagination; it is also a consequence. If we have indeed renounced a functionalist and evolutionary determinism in our understanding of institutional history, we must grant to our practices of social imagination such as legal analysis some power of productive apostasy and practical presentiment. Finally, the exculpatory picture fails to acknowledge the

self-subversive and self-transformative capacities of a tradition of discursive practice such as that of legal analysis. The history of legal thought over the last hundred years provides – I shall soon argue – a striking example of these capacities. Why have they fallen into disuse?

The method of policy and principle

The failure to move from the moment of attention to rights enjoyment to the moment of institutional reimagination is more than the silent echo in law of political quiescence in society. It reveals the influence of a now canonical practice of legal analysis: one that enjoys increasing influence throughout the world but that has until now found its most elaborate development in American legal doctrine and theory. I shall call it rationalizing legal analysis, giving, for the purpose, specific content to the term "rationalizing." It is a style of legal discourse distinct both from the nineteenth-century rationalism and from the looser and more context-oriented analogical reasoning that continues to dominate, in the United States as elsewhere, much of the practical reasoning of lawyers and judges.

There is no such thing as "legal reasoning": a permanent part of an imaginary organon of forms of inquiry and discourse, with a persistent core of scope and method. All we have are historically located arrangements and historically located conversations. It makes no sense to ask "What is legal analysis?" as if discourse (by lawyers) about law had a permanent essence. In dealing with such a discourse, what we can reasonably ask is "In what form have we received it, and what should we turn it into?" In this book I argue that we now can and should turn it into a sustained conversation about our arrangements.

Rationalizing legal analysis is a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles. It is a self-consciously purposive mode of discourse, recognizing that imputed purpose shapes the interpretive development of law. Its primary distinction, however, is to see policies of collective welfare and principles of moral and political right as the proper content of these guiding purposes. The generalizing and idealizing discourse of policy and principle interprets law by making sense of it as a purposive social enterprise that reaches toward comprehensive schemes of welfare and right. Through rational reconstruction, entering cumulatively and deeply into the content of law, we come to understand pieces of law as fragments of an intelligible plan of social life.

Within such a practice analogical reasoning is defined as the confused, first step up the ladder of rational reconstruction. The often implicit purposive judgements guiding the analogist point upward, for their authority and consistency, to more comprehensive ideas of policy and principle. The repeated practice of policy-oriented and principle-based analysis should, so the most ambitious and influential views of the practice teach, lead to ever higher standards of generality, coherence, and clarity in the rational representation of law.

The ideal conceptions representing law as an imperfect approximation to an intelligible and defensible plan are thought to be partly already there in the law. The analysts must not be thought to make them up. They are not, however, present in a single, unambiguous form, nor do they fully penetrate the legal material. Thus, legal analysis has two jobs: to recognize the ideal element embedded in law, and then to improve the law and its received understanding. Improvement happens by developing the underlying conceptions of principle and policy and by rejecting, from time to time and bit by bit, the pieces of received understanding and precedent that fail to fit the preferred conceptions of policy and principle. Too much pretense of discovering the ideal conceptions ready-made and fully potent within existing law, and the legal analyst becomes a mystifier and an apologist. Too much constructive improvement of the law as received understanding represents it to be, and he turns into a usurper of democratic power. In fact, because the apologetic mystification may be so insecurely grounded in the actual materials of law, both these countervailing perversions of rational reconstruction are likely to end in an unjustified confiscation of lawmaking power by the analyst.

In what vocabulary should we think of policy and principle or to what conceptions should we resort in trying to connect policies and principles to one another, and in preferring some to others? The major schools of legal theory in the age of rationalizing legal analysis can most usefully be understood as the contrasting operational ideologies of this analytic practice. Each school proposes a different way of grounding, refining, and reforming the practice. Thus, for example, one school may look to goals of allocational or dynamic economic efficiency while another may start from a view of the proper roles and responsibilities of the different institutions within a legal system. Nevertheless, the same argumentative structure recurs in all these theories: the purposive ideal conceptions of policy and principle, whatever their substance, are partly already there in the law, waiting to be made explicit, and they are partly the result of the improving work undertaken by the properly informed and motivated analyst.

The diffusion of rationalizing legal analysis

The practice of legal analysis theorized in this manner now enjoys immense and increasing influence. It may dominate only a minor part of the practical discourse of lawyers and lower-court judges, preoccupied with preventing conflict, controlling violence, and negotiating compromise. It nevertheless is coming to occupy the central imaginative space in the way in which the judicial, legal-professional, and legal-academic elites talk about law and develop its practical, applied understanding. At a minimum, it preempts an alternative imagination of law from holding this space and exercising this influence.

Given its historical specificity, this style of legal discourse spreads unevenly throughout the world, and takes on in different places characteristics shaped by an earlier history of methods and ideas. It has received its most lavish elaboration in the contemporary United States, for reasons later to be explored, but its worldwide influence grows steadily. In this respect it is an event characteristic of an historical situation in which humanity finds itself united by a chain of analogies, in experiences, problems, and solutions, and anxious reformers of society and culture pillage and recombine practices and institutions from all over the world. It is in this way rather than by the cruel devices through which capital becomes hypermobile while labor remains imprisoned in the nation-state – or in blocs of homogeneous nation-states – that mankind is becoming truly one. Countries in which a more analogy-bound practice of legal reasoning continues to enjoy greater respect (for in all countries such a practice enjoys actual influence), or in which the project of nineteenth-century legal science clings to a life-in-death, soon become theaters for the conflict between the old doctrinalism and the new style of rational reconstruction in law.

A familiar difference of emphasis illustrates how, as it spreads through the world, the method adapts to the idiosyncratic compulsions born of the many histories it intersects. In the United States the continuing duality of common law and statutory law has repeatedly suggested the idea that the retrospective, reconstructive, and dynamic interpretation of law under the guidance of connected policy and principle has a broader and more persistent role to play in judge-made law than in the judicial construction of statutes. Only slowly have lawyers knocked these barriers down, claiming in statutory construction the same freedom to keep on reinterpreting and reconstructing that they attribute to the internal development of the common law.

In civil-law countries the path-dependent history of attitudes toward rational reconstruction in law followed a different course. The project of nineteenth-century legal science, which found its most systematic expression in the work of the German pandectists, was understood by its votaries to be the rescue and refinement of the old Roman–Christian common law of Europe. A struggle developed between two attitudes toward codification – codification as the taming of the power of the jurists by democracy and codification as the convenient summation of the jurists' doctrines. Where the first attitude prevailed, as in postrevolutionary France, there was a concerted attempt to uphold literalism in the interpretation of law. This literalism outlived its political roots and helped preempt pandectism, as it helps restrain today the full-fledged inauguration of rationalizing legal analysis. But where, in the late democratizing countries of most of Europe, private and academic jurists retained their law-shaping authority throughout the era of great codifications in the late nineteenth and the early twentieth centuries, codes were imagined by the jurists as the compressed expression of their science. Democratic institutions, where they existed, confirmed and corrected doctrines that predated them. In such a climate the road to rational reconstruction in legal analysis was open. No association between codification and literalism took hold. A long history prepared the reception of today's rationalizing legal analysis.

The antiexperimentalist influence of rationalizing legal analysis

As it spreads through the world, rationalizing legal analysis helps arrest the development of the dialectic between the rights of choice and the arrangements that make individual and collective self-determination effective – a dialectic that is the very genius of contemporary law. The most important way in which it does so is by acquiescing in institutional fetishism. It represents the legally defined practices and institutions of society as an approximation to an intelligible and justified scheme of social life. It portrays the established forms of representative democracy, the regulated market economy, and civil society as flawed but real images of a free society – a society whose arrangements result from individual and collective self-determination. If these forms are never the only possible ones, at least they are, according to this point of view, the ones that history has validated – a history marked by both the intractability of social conflicts and the scarcity of workable arrangements.

Rationalizing legal analysis works by putting a good face – indeed the best possible face – on as much of law as it can, and therefore also on the institutional arrangements that take in law their detailed and distinctive form. It must restrict anomaly, for what cannot be reconciled with the schemes of policy and principle must eventually be rejected as mistaken. For the jurist to reject too much of the received understanding of law as mistaken, expanding the revisionary power of legal analysis, would be to upset the delicate balance between the claim to discover principles and policies already there and the willingness to impose them upon imperfect legal materials. It would be to conspire in the runaway usurpation of democratic power. Thus, deviations and contradictions become intellectual and political threats rather than intellectual and political opportunities, materials for alternative constructions.

A simple parable helps bring out the significance of these constraints for the suppression of the institutional imagination in legal thought and shows how contrasting practices of legal analysis may become self-fulfilling prophecies. Suppose two societies in one of which the institutional arrangements are perceived to be slightly more open to challenge and revision than in the other. In the marginally more open society the jurists say: "Let us emphasize the diversity and the distinctiveness of the present arrangements, their accidental origins and surprising variations, the better to criticize and change them, pillaging arrangements devised for other purposes and recombining them in novel ways." The practice of such a style of legal analysis over time will result in institutions that invite practical experimentalism, including experimentalism about the institutions themselves. Imagine, by contrast, a society in which the institutions seem marginally less open to revision. The jurists may say: "Let us make the best out of the situation by putting the best plausible face upon these arrangements, emphasizing their proximity to a rational and infinitely renewable plan. In the name of this rational reconstruction we may hope to make things better, especially for those who most need help: the people likely to be the victims of the social forces most directly in control of lawmaking." The sustained practice of this method will, however, help close down our opportunities for institutional experimentalism. It will do so both by turning away from actual experiments and by denying us a way of thinking and talking, collectively, about our institutional fate in the powerful and irreplaceable detail of law. Such is the world rationalizing legal analysis has helped make.