PREFACE*

Thirty Years Later

THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT is the first draft of the first half of a book about the history of American legal thought from the early nineteenth century to World War II. I researched and wrote it between September 1973 and September 1975, when I submitted it to the Appointments Committee at Harvard Law School as the principal element in my tenure file. At the time, I saw the manuscript as the "rise" part, and planned to write the second or "fall" part to make a big book.

I kept working on the project until 1979, and then abandoned it. In 1980, Steve Spitzer published the first chapter, under the title "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America: 1850-1940," in volume three of Current Research in Law and Sociology. In 1998, Patricia Fazzone word-processed Cynthia Vergados' 1975 typescript of chapters two through five, and Lisa Clark reformatted the whole manuscript as it appears here (I corrected a few errors of spelling and—horrors—grammar in the process). For this edition, I've added this preface, a bibliography and a rudimentary index.

Through the late seventies and the eighties, *The Rise and Fall* cir-

* Thanks to Lama Abu-Odeh, Chris Desan, Janet Halley, David Kennedy, Karl Klare, Talha Syed and Laura Trachtman. Errors are mine alone.

culated widely in its original typescript form among the younger generation of American legal historians. It was a well known and controversial part of the rejuvenation of American legal history that occurred during this period and, at the same time, one of the several documents that defined a current within the critical legal studies movement of the late seventies through the early nineties. The published first chapter is still cited, typically as part of the "revisionist" scholarship that replaced the condemnatory progressive historiography of the Lochner era with a more nuanced picture.

The Rise and Fall was intended as an intervention in the contemporary debate about how to understand late nineteenth century American law. In this respect, it did indeed involve a sharp "revision" of the picture presented by the progressive historians who condemned the Lochner era as simultaneously reactionary in politics and formalist in legal theory. But the manuscript had a more ambitious agenda. It aimed to be the first structuralist narrative of the path of emergence of the "legal objects," private rights and public powers, that are the building blocks with which modern law is made. It was supposed to be what Foucault called, following Nietzsche, a "genealogy,"[1] in this case, of American law understood as a discourse rather than as a body of rules.

The first narrative claim was that private rights and public powers received their characteristic modern form, the form in which they became the universal building blocks, only in the late nineteenth century. Rights and powers, as we understand them today, are a very recent invention. The second claim was that the jurists who did the work of construction were engaged in an ambitious rationalization project that paradoxically ended in loss of faith both in the coherence of their conceptual scheme and in the existence of a distinctive legal reason. The third was that this outcome left us in "a post-classical age of disintegration," with multiple reconstruction projects, bearing only an oblique resemblance to the legal thought of the pre-Civil War period.

1. Michel Foucault, "Nietzsche, Genealogy, History," in *Language, Countermemory, Practice: Selected Essays and Interviews* (D. Bouchard ed.; D. Bouchard & S. Simon, trans., 1977).

The Rise and Fall was supposed to be an intervention in legal theory as much as in legal history. The goal, shared with, among others, Alan Freeman, Peter Gabel, Al Katz, Karl Klare and Roberto Unger, was to introduce critical theory and structuralism, including the Frankfurt School and (in my case) the work of Claude Levi-Strauss and Jean Piaget, into American jurisprudence and legal sociology.

This Preface discusses the ideas in the manuscript that seem to me still of interest, the context for the writing of it, and its fate. My hope is that the ideas will get a second chance at life through this first formal publication, but even if nothing like that were to happen it is a pleasure to make the work available as an archival item for legal historiographers.

I. A history of American legal thought

The Rise and Fall was to be a history of American legal thought. I thought of such a history as distinct from a history of the doctrines of American law, from an historical sociology of the impact of law in America, and, less obviously, from a history of professional reflection on the nature of law by American lawyers (their philosophy of law or jurisprudence).

Legal thought, for the purposes of *The Rise and Fall,* is the conceptual apparatus, the reasoning techniques, the legal ideals and the key images that the elite bar, including judges, treatise writers and important lawyers, deploy when they make legal arguments or give opinions or declarations about what the law "is" or ought to be. There were two models for the project, each an intimidating masterpiece: Pollock and Maitland's *History of English Law Before the Time of Edward I,* and Rudolph von Jhering's *The Spirit of Roman Law.*[3]

2. Frederick Pollock & William Maitland, *The History of English Law Before the Time of Edward I* (2nd ed., S.F.C. Milsom, ed., Cambridge: Cambridge Univ. Press, 1968).

3. Rudolph von Jhering, *Geist des Romischen Rechts* (Leipzig: Breitkopf und Hartel, 1852-1865), French translation: *L'Esprit du Droit Romain* (O. de Meulenaire, trans., Paris: Chevalier-Maresq, 1887).

Legal thought, in this tradition, is distinguishable from other bodies of thought, say economic and political and social and religious thought, and also "relatively autonomous" from the interests, material and ideal, that impel social actors to take positions about what the law in particular cases is or ought to be. The notion of a history of legal thought is that the conceptual apparatus, reasoning techniques, legal ideals and key images have changed over time in ways that are important for our understanding of our current legal practices.

A. Classical Legal Thought

The approach of *The Rise and Fall* posits that the thought of a period has a certain kind of unity. This is not the unity of a "spirit" of the period, nor the unity produced by the working out of a master idea (we called that approach "idealism"). It is rather the unity that comes from the existence, within the overall consciousness of a period, of a dominant doctrinal "subsystem," within which concepts, reasoning techniques, ideals and images are analogous across legal domains.

The ambition of the book was to discover these analogies in the periods of American legal thought by the close reading and comparison of legal treatises, leading cases, and the reported arguments in leading cases. The claim that there was this peculiar kind of unity by analogy put me in the position of wanting to say something about the conceptual ordering of legal doctrine in all of the areas of law conventionally recognized in a given period (both public law and private law, etc.).

The periodization I adopted was the conventional one for describing three overlapping "Ages of American Law:" the period from the Revolution to the Civil War (pre-Classical legal thought); the late nineteenth and early twentieth century (Classical Legal Thought or CLT); and the "modern" period beginning before WWI and lasting to the present of 1975. But I proposed a new understanding of the periods and their relationship to one another.

According to *The Rise and Fall,* Classical Legal Thought (CLT) differed radically, discontinuously, from the model that

dominated up to the Civil War, but was conceptually similar to the one we employed in 1975. Pre-Classical legal thought got its unity-by-analogy through the ideal of "liberality" (in opposition to "technicality"), the manipulation of a tension between morality and "policy," reasoning to results through the "implication" of a fictitious intent, the right/remedy and vested/unvested distinctions, and the notion of a "relation" as the basis for legal rules in a private law system understood as primarily contractual.

My claim was that, in the second half of the nineteenth century, legal actors dramatically revised the conceptual apparatus, reasoning techniques, ideals and images that had dominated in the pre-Classical period. The Classical subsystem built all legal rules out of a will theory using strictly analogous conceptions of state and federal power and private right. Private law rules were elaborately divided and subdivided around the public/private distinction *within private law.* The preferred reasoning technique was induction/deduction, the ideal was the deployment of democratically validated public power as the framework for private freedom, and the key image was of powers and rights that were "absolute within their spheres."

There were three major changes in the modern period. First, the boundaries between conceptual domains (public law and private law, contract and tort, etc.) were blurred or collapsed. Second, actors within modern legal thought experienced their ideals as contradictory, rather than as diverse but harmoniously distributed across subject matters. Third, there was a dramatic transformation in the dominant technique of legal reasoning, from induction/deduction to balancing.

1. Constitutional law

According to the argument, modern constitutional law thinking is organized into the three domains of the separation of powers, individual rights against the state and federalism. The areas have a deep level of analogy because in each there is the notion that the constitution itself establishes opposing entities–judicial, legislative and executive powers, federal vs. state powers, and state powers vs. individual rights—that are intrinsically in conflict or "con-

tradictory" if taken at face value. It is these that the moderns have to balance in order to resolve the conflict in particular cases of judicial lawmaking.

A thesis of *The Rise and Fall* was that this situation came about through the "disintegration" of CLT, which had developed over time this very underlying structure of powers and rights, but whose practitioners had believed that it was possible to resolve conflicts (do judicial lawmaking) by distributing questions according to the firm categorical scheme established in the federal constitution and then inducing/deducing the solution from that scheme. The solutions got their analogical character from their deployment, across the domains of constitutional law, of the image of "powers absolute within their spheres," with the sphere of the federal judiciary being the neutral policing of all the boundaries, while respecting the will of the relevant power or right holder when operating within its proper domain.

The period before CLT was, according to *The Rise and Fall*, different, first, because there were multiple ways of dealing with judge/legislator, state/federal and right/power conflict (conflicting theories of the nature of the Union in federalism; quasi-justiciable natural rights, vested rights, and implied limitations for right/power conflict). Judicial reasoning techniques were correspondingly diverse.

"Powers absolute within their spheres," combined with induction/deduction, were an element of the pre-Classical way of thinking only in the Marshallian theory of federalism. After the Civil War, this way of thinking about federalism won out, and then colonized public law as a whole. The "powers absolute" notion was able to win out in the law of rights against the state only because private law thinking had undergone an evolution analogous to that of the law of federalism.

2. PRIVATE LAW

According to *The Rise and Fall*, the classics operated just as dramatic a transformation of private law as of constitutional law. In

the early nineteenth century, legal thinkers lumped most private law rules under the category of property; by mid-century, they had reconceived the system as primarily contractual. The Classics reorganized it yet again, into the modern fields of contract, quasi-contract, tort, trusts, constructive trusts, and the law of status, which included family law. They marginalized property and got rid of the remaining traces of the writ system, of the pre-Classical discourse of liberality versus technicality, morality versus policy, right versus remedy and vested versus unvested, and of "implication" as a reasoning technique.

The transformation of private law thinking was accomplished by the iteration and re-iteration of the public/private distinction to differentiate fields within the private domain, and then to further internally differentiate each field. The upshot was a "will theory" within private law, with the will being either the will of the parties or the will of the state.

There was a strong analogy to the "powers absolute" conception in constitutional law. This analogy permitted the final crucial conceptual development within CLT. The shift from vested rights to substantive due process became possible through the conceptual equation of the rights of individuals vis a vis one another, as defined by the common law, with the constitutional rights of individuals, guaranteed against legislative infringement.

According to the argument of the manuscript, modern thinking about private law is both organized and disintegrated in the same way as thinking about constitutional law. The opposing elements are not explicit constitutional mandates establishing judicial, legislative, state and federal powers, and individual rights. Rather they are opposing orientations to how to deal with a small number of perennial conflicts (formality vs. informality, community vs. autonomy, paternalism vs. self-determination, and regulation vs. facilitation). As in constitutional law, the Classical mode of categorically separating questions and then resolving them inductively/deductively has succumbed to the blurring of boundaries, and the moderns have defaulted to more or less ad hoc balancing from situation to situation.

B. Structuralism and critical theory

The Rise and Fall was an intervention in legal theory as well as in legal history. It aimed to demonstrate that the modes of thought called structuralism and critical theory could be adapted and used in the analysis of law, both law as a technical discourse and law as an element in the social thought of a period.

The point here was not to convert the reader to belief in a theory called structuralism, as one might be converted to orthodox Marxism or to the Freudian psychoanalytic view of the world. Rather it was to take very specific ideas from the literatures of structuralism and critical theory, revise them as seemed appropriate, and use them to illuminate, hopefully, specific aspects of legal discourse.

In other words, the point was to add structuralist and critical techniques to the repertoire available for understanding law as a phenomenon too large and messy and complex to be fully grasped within any one theoretical frame. Of course, there was also the fantasy that these adaptations would be contributions to the literatures proper to structuralism and critical theory, and prove useful in similar endeavors in other fields. In retrospect, there seem to me to have been five distinct ideas in the manuscript that fit this description. Because they are if anything even more exotic today than they were in 1975, I present them here in some detail.

1. LEGAL CONSCIOUSNESS

The structuralist element in the notion of legal consciousness is that of a "subsystem," within consciousness broadly understood. A subsystem is distinct from the larger entity, utilizing a small set of conceptual building blocks, along with a small set of typical arguments as to how the concepts should be applied, to produce results that seem to the jurists involved to have a high level of coherence within and across legal fields. The argument of *The Rise and Fall* was that there was a Classical subsystem within late nineteenth century legal thought that cohered through the notion of powers absolute, the will theory, the iteration and re-iteration of

the public/private distinction, and the inductive/deductive method.

CLT was not "the" legal consciousness of the Classical period, but the dominant subsystem within it. The subsystem was not a theory, explicit or implicit, that Classical thinkers consciously or even unconsciously put into effect. The subsystem came into existence as legal actors applied, to one legal issue after another, a vague general or ideal orientation and a set of evolving tools used when "doing" law.

The subsystem expanded from small beginnings during the pre-Classical period to become dominant after 1870. It did this by what we might call "reworking" of doctrine using the tools at hand. Instead of change mirroring transformations in the "material base" (e.g., from competitive to monopoly capitalism), change was driven by the efforts of litigants representing conflicting interests to restate the law to favor their side, under the supervision of courts with a role commitment to deciding according to rational and universalizable criteria. The model for this process was *bricolage* as described in the first chapter of Claude Levi-Strauss' *The Savage Mind*,[4] a book I read and was blown away by in law school.

Today it seems to me that one of the most interesting aspects of this theory was that the concepts that were used over and over to construct the subsystem changed each time they were extended to a new sub-sub-system. "Judicial interpretation of the law," "a power absolute within its sphere," the "will" of a power or right "holder," "contract," and so forth, started with what I called "core" meanings as applied in narrow areas. Each time they were used in a new area, they changed the way the legal elite understood that new area.

At the same time, the concepts themselves came to mean something different when they were used both in the core and in the peripheral area. This idea was an adaptation of Jean Piaget's concepts of "assimilation" and "accommodation" in his masterpiece, *Play, Dreams and Imitation in Childhood*,[5] which I read as a new

4. Claude Levi-Strauss, *The Savage Mind* (Chicago: Univ. of Chicago Press, 1966).

5. Jean Piaget, Play, *Dreams and Imitation in Childhood* (C. Gattegno & F. Hodgson, trans., New York: Norton, 1962).

parent law student in 1969. This approach to thinking about legal thought seems to me useful in understanding the contemporary global phenomena of juridification, rights consciousness, and economic analysis of law.

Starting around 1900, CLT as a subsystem didn't so much shrink as disintegrate, likewise through reworking piece by piece, morphing little by little into modern legal thought. The legal consciousness of 1945 contained residual elements of pre-Classical legal thought and residual elements of classicism, as islands in a modernist sea. In social theoretical terms, perhaps we could say it had undergone "derationalization," by analogy to Freudian desublimation, leading to what I saw as a pervasive sense that the system was loaded with contradictions, from the most abstract level down to the micro-level, of, say, the law of offer and acceptance.

It was an important aspect of this narrative that it provided no explanation of why one subsystem triumphed over the others. The goal was to provide a description of transformations that had been ignored, along with a mechanics of transformation. I thought that recognition of what changed would be an interesting and important event, even if I had nothing to contribute to the quest for larger causes. I was happy to concede that the agents of transformation had "bad" motives, so long as it was admitted that they permanently changed the way we think now. [6]

Just before I started writing *The Rise and Fall*, I read, at Roberto Unger's and Karl Klare's suggestion, Georg Lukacs'

6. This agnostic aspect of the project was sharply criticized by Mort Horwitz, among others, as both politically and methodologically retrograde. The restriction of ambition was implicit in *The Rise and Fall*, but explicit in "The Structure of Blackstone's Commentaries," 28 *Buff. L. Rev.* 205, 220 (1979): "My focus on interpreting the larger framework ... means that what I have to say is descriptive and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it. My only justification for these omissions is that we need to understand far more than we now do about the content and the internal structure of legal thought before we can hope to link it in any convincing way to other aspects of social, political, or economic life. There are dangers to deferring the task, but I think them well worth risking." See note 19 infra.

"Reification and the Consciousness of the Proletariat,"[7] and found it highly suggestive. Lukacs showed analogies across the whole range of "bourgeois thought," from physics to law to politics to economics to art. *The Rise and Fall* tried to show a similar analogical pattern within "bourgeois legal thought."

But the general conception was quite different from his, and cannibalized other theorists along with Lukacs. To begin with, what emerged through this semi-conscious process was most definitely not the Lukacsian conception of a "legal form" whose logic derived from and mirrored the logic of the commodity form, understood to be the essence of capitalist relations of production. CLT was always "emergent" and "relatively autonomous" from other domains.

As in Lukacs and in Herbert Marcuse's *Reason and Revolution: Hegel and the Rise of Social Theory*,[8] another big influence, there were "contradictions." In my conception, consciousness functioned to "mediate the contradictions of experience," rather than, as in the neo-Marxist formulation, to mask the internal contradictions of the capitalist mode of production. In other words, my approach was modernist rather than Marxist in that as in many other respects.

2. The phenomenological approach to legal reasoning, by analogy and by deduction, to produce a conception of the "mode of integration" of a subsystem.

The Rise and Fall adopted a phenomenological approach to reasoning by analogy, through the notion of "horizontal integration," which refers to the extent to which legal thinkers *experience* results within one doctrinal complex as relevant to results in another. What makes this approach phenomenological is that it is not about whether there really "is" an analogy, but only about whether a legal reasoner "feels" or "sees" or "intuits" that there is one. What makes a doctrine part of a sub-system is that it is

7. Georg Lukacs, "Reification and the Consciousness of the Proletariat," in *History and Class Consciousness: Studies in Marxist Dialectics* (R. Livingston, trans., Cambridge: MIT Press, 1971).

8. Herbert Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (Boston: Beacon Press, 1968).

experienced as close enough to the other members so that one moves easily by analogy from it to the others and back again.

The phenomenological approach to deduction was a much more innovative idea, because it involved getting rid of the concept of legal "formalism" that had dominated discussions of late nineteenth century legal thought since Roscoe Pound wrote "Mechanical Jurisprudence"[9] in 1908. The idea of the blocking level in Chapter 1 and Chapter 5 of *The Rise and Fall* is that all thought deploys concepts that are understood to permit deduction, and other concepts that are meaningful but too vague or abstract to permit anything like that kind of logical rigor. The blocking level is the level of abstraction below which concepts have felt deductive "operativeness," and above which they are experienced as no more than indicators, or just as convenient labels for items without intrinsic logical connection.

The blocking level can vary over time within a given discourse, so that one period's "deduction" is another period's "abuse of deduction" or "formalism." In the phenomenological approach, there is *no outside perspective* from which to judge that a period experiences operativeness in concepts that are "really" so vague or incoherent as to be useless, or, conversely, that a period failed to grasp the "underlying logic" of legal relations.

The move to operativeness and the blocking level turns "formalism" into a relative term. In other words, in the traditional mode, most extremely stated by Felix Cohen in "Transcendental Nonsense and the Functional Approach,"[10] there is an objective criterion for deciding when there has been an abuse of deduction. The vice of CLT, according to Cohen, was that virtually all its concepts were *in fact* meaningless. In my version, all systems are deductive but they vary in the level of abstraction at which deduction is experienced as convincing. This is a phenomenological criterion because we distinguish systems according to how the participants experience them rather than according to whether they really are or are not using deduction correctly.

9. Roscoe Pound, "Mechanical Jurisprudence," 8 *Colum. L. Rev.* 605 (1908).

10. Felix Cohen, "Transcendental Nonsense and the Functional Approach," 1935 *Colum. L. Rev.* 809 (1935).

The combination of felt horizontal integration, through the experience of analogy across legal fields, with felt vertical integration, when very abstract concepts were understood as governing large numbers of doctrines within fields, produced the broad and tight "integration" of CLT. The "disintegration" of CLT occurred in the vertical dimension. In other words, the abstractions, which had allowed Classical thinkers to place cases firmly within spheres and then to reason deductively about the consequences, lost their operative power. Everything was still analogous to everything else, but the analogies no longer led to necessary conclusions. What was left was balancing.

In retrospect, 1975 may have been the year when this claim achieved its maximum plausibility. Starting at some point in the nineteen sixties, the blocking level in American legal thought seems to have begun to "go back up." The first indication was in some Warren Court opinions, but the most striking change occurred in the nineteen seventies in the Burger Court's federalism decisions, and then spread everywhere. As a child of post-realism, I find both the deductive civil libertarianism of the Warren Court and the deductive federalism of the Burger and Rehnquist Courts absurd. But I don't doubt that the writers experienced the concepts that seem to me mere invitations to balancing to be fully operative. I have the same reaction to our contemporary legal version of international human rights discourse.

In private law, the right wing reconstruction projects of law and economics and libertarianism are self-consciously deductive. As Jay Feinman[11] has pointed out, we may now be entering a phase of reintegration of the schema as a whole, as conservatives put together individualist private law with takings and due process jurisprudence in a kind of "second time as farce" revival of CLT.

I see the conception of the mode of integration of a legal consciousness as a contribution to the critical theory enterprise that might be called "modeling the organic." In other words, it is supposed to let us think a body of thought as indeed a "body" or "whole," by virtue of analogies among the parts, along with expe-

11. Jay Fineman, "Un-making Law: The Classical Revival in the Common Law," 28 *Seattle Univ. L. Rev.* 1 (2004).

rienced horizontal and vertical integration, ideals, and a tool kit for new cases. The idea is to explain, without departing from Weberian methodological individualism, how a subsystem can be a unity without anyone having designed it.

I can't remember where I got the idea of a phenomenological turn, but the later chapters of *The Savage Mind* clearly influenced the picture of continuity and change of a structure over time, and my understanding of phenomenology was wholly derived from *Reason and Revolution.*

3. THE NOTION OF "NESTING"

As I've already mentioned, *The Rise and Fall* depicts the emergence of a new organization of private law through the iteration and reiteration of the public/private distinction *within the private.* So contracts and trusts are private vis a vis torts, quasi-contract, constructive trust and status. But within contract, the consideration doctrine is public, offer and acceptance private. In family law, the decision to marry is a contract, and so private, but its terms are fixed by the state, and so public. Within tort law, the fault principle is private; strict liability represents the will of the state.

The plausibility of this picture of the dynamic of Classical private law was recently confirmed for me by Stephen Siegel's study[12] of John Chipman Gray's treatises on perpetuities and restraints on alienation. Gray reorganized the chaotic masses of real property law around a simple opposition between the will of the parties and the policy-driven will of the state, represented by the rules against perpetuities and restraints on alienation. (See p. 148-52 below.)

"Nesting" is a name for this phenomenon: the system is organized around an opposition (here, public vs. private); the opposition then reappears within one or both terms of the initial ordering (here, e.g., contract vs. tort). The notion of a fractile order is analogous, as is the move in Classical rhetoric called "chiasmus," but I encountered this way of understanding a socially constructed order in the later chapters of *The Savage Mind,* in which Levi-

12. Stephen Siegel, "John Chipman Gray and the Moral Basis of Classical Legal Thought," 86 *Iowa L. Rev.* 1513 (2001).

Strauss applied it to the kinship and plant classification systems beloved of anthropologists. In later work, I've applied it to patterns of legal argument as well as of legal classification.[13]

Once one discerns a nesting pattern within an aspect of a body of thought (for example, classification or argument), it appears dramatically more integrated than it would if classification or argument were ad hoc adaptations to the "reality" of what was being classified or disputed. Finding a nesting pattern, like identifying the felt sense of analogy across domains or the felt sense of compulsion through deductive argument, allows one to model a giant mass of rules as organic without making it in any sense transpersonal.

4. The Ontology of Rights and Powers

The most exotic of the ideas in *The Rise and Fall*, and perhaps for that reason the idea that has had least resonance, is that of the *construction of the legal object*. *The Rise and Fall* argues that the judicial, legislative, commerce and police powers, and individual rights, all changed their nature after the Civil War, because they became "multi-dimensional" entities. The state police power was understood as "essentially" the same thing in relation to the federal commerce power that it was in relation to the individual right of property. An individual's right of property, in turn, was the same thing in relation to legislative power that it was in relation to the property right of another individual. The judicial power was the same whether adjudicating federal vs. state power, legislative power vs. individual right, or individual right vs. individual right.

The Rise and Fall claimed that, before the Civil War, each of these relations was understood as distinct from all the others. It was not that pre-Classical thought was less organized, just that its elements were embedded in the pre-Classical whole according to its distinct organizational mode, rather than in the Classical mode.

13. Duncan Kennedy, "A Semiotics of Legal Argument," 42 *Syracuse L. Rev.* 75 (1991) (same article with European Introduction: 3 *Collected Courses of the Academy of European Law*, Book 2, 309-365 (Amsterdam: Kluwer Academic Publishers, 1994)); see also, Jack Balkin, "Nested Oppositions," 99 *Yale L.J.* 1669 (1990).

xxii Once the process of unification of the power or right in all its external relations had occurred, CLT was dramatically more integrated than it had been. Conclusions about the nature of the commerce power reached in a commerce power vs. police power case could be deployed, mutatis mutandis, in a case pitting the commerce power against freedom of contract.

As throughout *The Rise and Fall*, this point is phenomenological rather than logical. The Classics brought about this particular ontology of rights and powers through their working and reworking of the materials, and then experienced it as a truth about rights and powers. The manuscript takes no position about these truth claims. It simply asserts that modern "sophisticated" legal thinkers no longer experience them in that way. The "we" the book addresses sees strong analogies between a given right/power conflict and a conflict between that power and some other power. But "we" feel no necessity flowing from the treatment of the power in its encounter with the other power to its treatment in the encounter with the right.

This idea is an adaptation of Piaget's theory, in *Six Psychological Studies*[14] (another book for young parent law students), of the developing infant's "construction of the object" by unifying the data obtained through sight, touch, smell, sound, etc. The "aha" moment is when the infant grasps all the data as pertaining to a single "thing." Whereas Piaget was a "genetic epistemologist," i.e., believed that the infant got it right as to the truth of the object, *The Rise and Fall* was persistently phenomenological. In other words, the truth of the object for CLT was no longer its truth for the moderns. The idea of an ontology of rights and powers seems to me still very useful in understanding phenomena like the emergence of European quasi-federalism.

5. REASON DIES WHILE GIVING BIRTH TO LIBERALISM

In its last chapter, *The Rise and Fall* presented an interpretation of the significance for legal thought of the narrative as a whole. Here it is:

14. Jean Piaget, *Six Psychological Studies* (A. Tenzer & D. Elkin, trans., New York: Random House, 1967).

> The irony was that the very success of the enterprise of subsuming all legal relationships under a single small set of concepts eventually destroyed belief that it was the concepts themselves that determined the outcomes of their application. When the abstractions had performed their task of integrating legal thought, it became apparent that while pre-Classical particularity had been irrational, the new unity was merely linguistic—a verbal trick—rather than a substantive reconstruction. We came gradually to see that there were an infinity of possible results that might all plausibly find expression in the new conceptual language, and, what was worse, might all claim to be derivations of the abstract governing principles. The concepts, then, could be nothing more than a vocabulary for categorizing, describing and comparing, rather than the elements in a method for deriving outcomes. The famous principles, taken together, appeared either self-contradictory or so vague as to be worthless as guides to particular decisions.
>
> It was only for a relatively brief moment, that during which the process of abstraction and unification was proceeding apace but had not yet achieved its disillusioning total triumph, that it was possible to believe in the objectivity of the new method. But it does not follow that the emergence of the new language was without long range influence on results. The work of destruction was in itself of massive impact on what could be thought about the legal order. Because the old way of thought was swallowed whole and digested by Classicism, we are without anything more than an indirect, quasi-antiquarian access to it. We attempt the construction of operative categories and integrating schemes in a world dominated by the death of the Classical organism, rather than in the naively pluralist world in which Classicism itself arose. (p. 251)

The manuscript contained no attempt to tie its claims into a yet grander narrative transcending legal theory. But there was an implicit conception, worked out explicitly in the next phase of the project, in an article entitled "The Structure of Blackstone's Commentaries."[15] The story, which still seems right to me, was

15. Supra note 6.

that "reason dies while giving birth to Liberalism." The way we think about justice in a system with a state has a particular form, which we can call Liberalism with a capital L, to indicate that it includes both the typical liberal and the typical conservative ideas of the time. The article proposed that the crucial features of this very general structure within which we think about justice and the state are the organization of rights and powers in the integrated whole of CLT, and the idea that there is a sharp distinction between legal reasoning and general political discourse.[16]

The Rise and Fall was supposed to be a history of the last stages of the emergence of this way of thinking, that is, the stage at which the various relatively inchoate approaches typical of seventeenth and eighteenth century Liberalism got organized into a tight and coherent ordering of the legal universe. Each of the steps in the evolution of the modern structure required a vast labor of critique of previous solutions, and the proposal of new ones. According to the manuscript, we should understand it as an epochal accomplishment of jurists working on the project of determining justice through reason. Nothing could be wronger than to dismiss CLT as just right wing self interest combined with the jurisprudential error of "formalism."

According to the larger theory, we should also see the Liberal way of thinking as contingent, in the sense that it is only one possible way of ordering experience so as to address the problem of justice in the state, and there is no warrant that the concepts and operations we deploy from within Liberalism are true mirrors of the intrinsic properties of the elements of the problem. This was the point of applying phenomenological and Piagetian structuralist ideas to concepts like induction/deduction, police power or contract.

That the Liberal ordering is "socially constructed" is not to say that we can change it by recognizing it as such. *The Rise and Fall's*

16. The structure of rights and powers represented majority rule (the legislature), individual rights (constitutional guarantees) and the rule of law (the separation of powers) in a context that constitutionalized both national and local self-government (federal and state powers). See Duncan Kennedy, *A Critique of Adjudication* [fin de siecle] (Cambridge: Harvard Univ. Press, 1997) Chs. 2 & 3, for an elaboration of this understanding of Liberalism.

"death of reason" narrative is that "our" modern situation is one in which we no longer believe that the structure mirrors reality, and have concluded that from within it the best one can do is balance conflicting considerations that reflect our contradictory ideas and emotions. This outcome is the result of the work of mutual destruction carried on by Liberal legal thinkers of all political persuasions as they "cleared the ground" of their rivals before proposing their own versions of the project.

In the modernist view (in opposition to the Marxist view), the critical project *within Liberalism itself* has led us to lose any hope of an "outside" to which we could resort in order to have a better way of doing official justice through reason. Reason is *felo da se,* dead by its own hand ... meaning dead as a way to solve the problem of justice in the state, not, of course, dead, as a way to critique attempts to solve the problem through reason, or as a way to figure out the situation within which we have to decide politically, or as a way balance one's checkbook.

I didn't come across the death of reason slogan until the appearance of *The Essential Frankfurt School Reader*[17] in 1978. I am quite sure that the notion got a great deal of its power for me from its resonance with the particular kind of post-realism that characterized the senior members of the Harvard Law School faculty I most respected. I had known three of them somewhat as a child–Mark Howe, Louis Jaffe and Ben Kaplan—and got to know Jack Dawson when I returned to Cambridge as an Assistant Professor.

They had no interest in critical theory or structuralism, and certainly didn't think that either Liberalism or reason was dead. But they were producers of the very wide web of analogy, combined with the disintegration of deductive structure into mere balancing, that I saw as the defining characteristic of modern legal thought. *The Rise and Fall* was in a sense an attempt to theorize them, and thereby escape them into a different kind of political/intellectual engagement (or *engagement).*

For this reason, perhaps ... but, an interruption: This whole

17. *The Essential Frankfurt School Reader* (A. Arato & S. Piccone, eds., New York: Urizen Books, 1978).

enterprise of "reading" the manuscript as its imputed author feels fishy to me even as I carry it out, because the text says, often, things I don't remember it saying, and which I certainly wouldn't say today. For example, there is a nostalgia for reason in politics very reminiscent of the Frankfurt School in *The Rise and Fall*'s introductory section. The study of legal consciousness might help us understand judicial activism, and we should care about activism because judges doing it "are carriers of the notion that the ideal of justice is accessible to the reason of people acting in the real situations of political and economic life." (p. 4)

The implication is that we should want "human reason [to be] something more than an instrumental mechanism for the execution of collective or individual decisions reached through the clash of interests, passions or appetites." There is no suggestion that reason is or will soon become any such thing. I think I meant this hedged formula as defining a modernist position in dialogue with Roberto Unger's far more serious demand, "Speak God," at the end of *Knowledge and Politics.*[18]

II. Some Context

The Rise and Fall was to be part of a larger leftist political/intellectual attack on the status quo in American legal scholarship generally. I set out with that agenda, over-confident and irrationally exuberant, without any formal training at all in legal history or in the general techniques of historical scholarship as it is done today. As I mentioned above, my heroes and models were Maitland and Jhering. I read a good deal of the available literature on the history of American law after the Revolution, but by no means all. I hadn't yet read the Commonwealth school, for example, and concentrated on the New Deal era constitutional historians Haines and Corwin, some Dawson, Howe and Milsom, some Pound and some Llewellyn, some Hurst and Lawrence Friedman, the populists Twiss and Jacobs, Fairman, McCloskey and Gilmore, and my contempo-

18. Roberto Unger, *Knowledge and Politics* (New York: Free Press, 1975).

raries, particularly Morton Horwitz, who was, at the time, leading the movement toward a sophisticated politicization of the field.

For me, the great accomplishment of his *The Transformation of American Law* was that it was the first historical work to identify a politics of private law on a par with the by then well recognized politics of constitutional law. *The Rise and Fall* was written in dialogue with this project, but it was quite different. I think I would have said that Horwitz, no less than the progressive historians of constitutional law, tended to fluctuate between too much "instrumentalism," i.e., reducing law to extra-legal material interests (the mercantile interest, the requirements of capitalist economic development), and too much idealism, i.e., treating the law of the period as the working out of an extra- or supra-legal theory (laissez-faire, natural rights, utilitarianism, Classical liberalism, positivism, formalism, etc.).[19] What lost out was legal thought understood, in its own right, as an important form of political/social thought whose development and disintegration speak directly to our current situation.

I was even more out of touch with the general ethos of academic history than I was with the field of legal history. I'd barely taken a course or two in college, and in so much as I was aware of them at all, I was instinctively antagonistic to such ideas as the foreignness of the past, that history is a craft somehow beyond theory, that the archive is the indispensable field work of the historian, and that present-orientedness is an unforgivable professional sin. I was aware that young leftist historians had begun to do "history from the bottom up," and that social history was in vogue. I thought that was an interesting development, but a form of self-marginalization, if you were interested in attacking the

19. By 1979, our positions had begun to converge on the study of legal consciousness and the notion of contradictions, but were more divergent on the causation issue. In "The Structure of Blackstone's Commentaries," supra note 6, at 363, n. 56, I summed up my critique of the progressivist economic causation claims as follows: "It is idealism masquerading as materialism to substitute 'commodities' for 'rights,' and 'development' for 'social policy,' and then play the liberal game of deriving the actual rules of the legal system as necessary consequences." This cryptic idea is unpacked in *A Critique of Adjudication* [fin de siecle], supra note 16, Ch. 11. For an interesting discussion of some of these issues, see Louis Wolcher, "The Many Meanings of 'Wherefore' in Legal History," 68 *Wash. L. Rev.* 559 (1993).

way people at the top used law to support the status quo. Not that we were any more successful in avoiding marginalization.

While I was writing *The Rise and Fall* I happened to have a conversation with an acquaintance who was a senior member of the Harvard History Department. He told me that the department was considering making an offer to Michel Foucault, but had more or less decided not to because he was "a bad historian." I had read a good bit of his *Histoire de la folie a l'age classique.*[20] My glimpse into the Harvard historical mind made me want to laugh, because Foucault seemed to me to vastly transcend the wrongness of any of his particular claims, but also sent shudders up my untenured spine. Eventually I came to see my historical method, such as it was, as close to identical to that Foucault outlined in *Nietzsche, Genealogy, History*[21]. It was also quite close to the Louis Hartz of *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860.*[22]

By 1975, the American liberalism that had dominated the upper end of American culture and politics since WWII was beginning to lose ground, just how rapidly no one could yet see, not to the small but growing radical minority but to resurgent American conservatism, which already subtly mixed free marketism with social authoritarianism. The sixties would turn out to have polarized the baby boomers, with many of them hating the whole thing as much as the cultural and political radicals had loved it.

Those of us who polarized to the left were just coming to realize to what an extent liberal hegemony had marginalized or invisibilized the literatures of Marxism, structuralism and critical theory generally. Among the people I had read only a little or not at all in 1975 were Hegel, Marx, Gramsci, Althusser, E.P Thompson, Husserl, Heidegger, Benjamin, Schmitt, Horkheimer, Sartre, Saussure, Lacan, Foucault, Derrida, Rorty, Habermas, Bourdieu. I hadn't even *heard* of many of them and to this day haven't fully caught up with all the stuff mainstream college educators thought not worth teaching us.

20. Michel Foucault, *Histoire de la folie a l'age classique* (Paris: Gallimard, 1972), later translated as *Madness and Civilization: A History of Insanity in the Age of Reason* (R. Howard, trans., London: Routledge, 2001).

21. Michel Foucault, "Nietzsche, Genealogy, History," supra note 1.

22. Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge: Harvard Univ. Press, 1948).

Those of us who thought of ourselves as doing a radical theory project were discovering and sharing these books, starting them, sometimes finishing them, often getting inspiration and even insight from passages we didn't understand very well at all. We made up what Diego Lopez calls a "hermeneutically impoverished context of reception."[23] We took in books by famous living and dead Europeans in an ahistorical jumble rather than as part of a sequence within which there were traditions of interpretation and critique developed in loosely linked milieux at each step along the way. And we "applied" them to our own national situation in ways that would often have astonished their authors.

The Rise and Fall was completely conventional in form, but its ambition was to be not just original, but also legally avant-garde, both politically and intellectually, by combining advanced European "theory" with advanced American jurisprudence. In retrospect, it is striking that all of us took it for granted that there was no European legal theory worthy of the name. *The Rise and Fall* is blind to the extent to which the United States of CLT and sociological jurisprudence was tightly linked to Western Europe, not as an influence but as an influencee. The phrase "powers absolute within their spheres," for example, is a strange translation to public law of a Kantian and Savignian slogan about private law.

In 1975, there were four discernible currents of legal academic politics, each with a characteristic approach to legal theory. These were the legal process school, liberal constitutionalism, law and economics, and a little radicalism. The legal process was into post-realist, centrist "reasoned elaboration;" the liberal constitutionalists were into legal "right answers" that made the Constitution a left liberal document. The newly emergent law and economics scholars were hyper-realist about doctrine (simply dismissing it) and naively deductivist about efficiency. The radicals saw law either as the instrument of dominant interests or as determined by the economy, although sufficiently autonomous to be sometimes available for radical defense or offense.

The Rise and Fall drew on each, but was also incompatible with

23. Diego Lopez Medina, *Teoría impura del derecho, la transformación de la cultura jurídica latinoamericana* (Bogota: Legis, 2004).

each. Reason had died while giving birth to Liberalism and we lived in a "post-Classical age of disintegration," prey to contradiction with no basis for action but a balancing technique that was ultimately arational. *The Rise and Fall* wasn't supposed to be political in the sense that the above schools were. Its view that modernism was synonymous with the sense of internal contradiction was supposed to be the registering of a fact of "our situation." But that said, if you accepted it, then you had to decide on your own which way to move politically within the contradictory legal field.

One had to do this without the guidance of a theory of law that would reinforce one's normative orientation and at the same time guide the articulation of the ideal into the legal. Nonetheless, the legal had to be acknowledged as a relatively autonomous resistant medium, whatever one's orientation toward operating within it. The implications were antinomian, or anarchist, or "decisonist," by contrast to the legalism of legal process and liberal constitutionalism, and the rationalism (instrumentalist or idealist), of the legal economists and the radicals.

The Rise and Fall treated the willingness of judges to defy legislative majorities and the balance of private power as a valuable, odd aspect of the American political tradition. It rejected the attempt to distinguish the Lochner Court from the Warren Court in a way that would make the first wrong and the second right. They were both "activist;" the difference was which side they were on. In other words, the ms. accepted the analysis of Learned Hand,[24] McCloskey[25] and Bickel,[26] but turned it on its head by celebrating rather than bemoaning counter-majoritarian aggression. (The trouble with the Warren Court was that it didn't go far enough.)

I was concerned that my colleagues' dislike of my New Leftish radical reform activities at Harvard Law School would cause them to deny me tenure. Not that they would have consciously done

24. Learned Hand, *The Bill of Rights* (New York: Atheneum, 1958).

25. Robert McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," 1962 *Sup. Ct. Rev.* 34.

26. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

that; just that it was plausible that they would be unconsciously motivated to manipulate the vague meritocratic standard to do me in. The first draft of the first half of the book was not supposed to be the whole story by any means. There would be plenty of space, and plenty of post-tenure freedom, to develop the political implications in the "fall" part. But I couldn't resist a sally, at the very end of the manuscript. Reading it today, it may seem so oblique that no one was likely to notice it, but I'll bet that those members of the Appointments Committee who managed to slog through all the way to the very end didn't fail to.

The middle aged generation of legal academics in power in elite law schools in the seventies were overwhelmingly liberals or moderates, but also overwhelmingly disenchanted pragmatists, skeptical of any attempt at grand theory of either a descriptive or a normative kind, at the same time that they were very complacent, to my mind, about the basic goodness of elite legal academia and its benign role in American life. The late nineteen sixties were a disaster, in their experience, not just in national politics but also in the academic politics of law schools "assaulted" by the student movement.

The last paragraph of *The Rise and Fall* alluded to "the ironies of generational conflict." It then quoted from Henry James on the consequences of the Civil War for the liberal leaders of the pre-War generation: "their illusions were rudely dispelled, and they saw the best of all possible republics given over to fratricidal carnage. This affair had no place in their scheme, and nothing was left for them but to hang their heads and close their eyes." (p. 264) The first idea was to suggest that CLT was part of the generational reaction James described. But the second implication, which I remember intending, was a parallel between the pre-Civil War and the pre-Vietnam liberals.

III. Contrast with current modes

The Rise and Fall launched two floating signifiers, "Classical legal thought" and "legal consciousness" that to this day bob up and down on the waves of legal discourse. However, the intense inter-

est in all the variants of critical theory that characterized the mid nineteen seventies didn't last long. As for structuralism, it was out of fashion before most of its potential audience had even heard of it. The turn away from critical theory was partly caused by the shift to the right of the whole culture that accelerated after 1980. As in the thirties, it had been briefly possible to study and use Marxism without academic career danger, then the window closed. But two other factors were probably just as important in the particular world of the legal academy.

The first of these was the rise of feminist legal theory and critical race theory. Both pushed hard against the ultra-white-male ethos of the New Left, as well as against the critique of rights we developed in the early eighties. The second was the arrival of post-modernism (also known as post-structuralism), which pushed hard, from the other direction, so to speak, against the super-straightness of that same white male ethos, and against our clinging to structure, as an indispensable moment in critique.

Combining critical theory with structuralism in order to study the evolution of legal doctrine as a species of Liberal theory ran up against the further problem that taking doctrine seriously was reactionary from the point of view not only of feminist legal theory, critical race theory and postmodernism, but also from the point of view of the sociology of law and even of legal realism. The death of reason was not a lot more popular with a left nostalgic for the good old days of the Warren Court and now barely hanging on to a place in the national debate between retreating liberals and steadily advancing right wingers. It wasn't surprising that quite different approaches to Classical Legal Thought emerged and mainstreamed.

A: Langdell's Orthodoxy

Thomas Grey's famous article "Langdell's Orthodoxy"[27] can serve as a useful point of comparison between the methodology of *The Rise and Fall* and the more typical approach to intellectual

27. Thomas Grey, "Langdell's Orthodoxy," 45 *U. Pitt. L. Rev.* 1 (1983).

history of liberal post-realist legal scholars. Grey presents the orthodoxy using different descriptive words, calling it sometimes a "system of legal thought," or a "discursive structure," and a "kind of legal thinking," but more often a "legal theory." It is his "rational reconstruction" (presented with minimal textual evidence) of the theory supposedly held by Langdell and his Harvard-based law professor followers, who were the leading Classical private law doctrinalists.

The core of the theory, according to Grey, was the idea that (private) law is a science, whose goal is to develop legal rules from the inside in the correct way. The correct way is to work to make the system "doubly formal." It should and could consist of a small set of consistent high level principles covering the whole domain of private law, derived inductively from the cases and capable of deductive elaboration into new rules that can be applied deductively to new cases. Grey shows that Langdell restricted the theory to private law, and that he and his followers disapproved of the development of the Classical jurisprudence of contract and property rights against the state.

In my reading, Grey construct is not "a system of legal thought," a "discursive structure," or a "kind of legal thinking." I would describe it as a quite brilliantly developed Weberian ideal type of common law gapless conceptual jurisprudence, differing from Weber's "logically formal legal rationality" because the data used in induction are cases rather than code provisions. Supposing that it was indeed the implicit legal theory of the authors he is describing, it is helpful in understanding what I am calling the legal consciousness of the period, but in a quite limited way.

To the extent we believe that leading Classical privatists held the theory, we can understand better the actual development of the private law part of the Classical subsystem. Under the influence of this ideal, they would have tended to construct concepts (contract, tort, quasi-contract, offer, consideration) intended to be operative at a higher level of abstraction than had characterized pre-Classical legal thought. In other words, Grey's ideal type fits quite well into the structural/phenomenological approach of *The Rise and Fall.* It is a tool to describe an ideal image of "legal sci-

ence" that guided some of the professors who did the concrete doctrinal work that transformed the conceptual ordering of private law. But here is where the limitations come in.

The orthodoxy is not a description of how contract law, for example, changed in the Classical period. Many of the jurists who developed it had nothing to do with the Harvard school, and it is hard to see how the theory could have been responsible in any direct way for the actual transformations of private law. The "orthodoxy" is about the method the scientist was supposed to follow, not about what the conceptual elements in private law were or ought to be (these were the findings of the science). Even if we were to verify that most jurists held to the orthodoxy in theory and practiced private law as it suggested they ought to, we still wouldn't know anything about the body of rules and the conceptual building blocks they were made from.

The approach of *The Rise and Fall* is in almost every respect the exact opposite of Grey's. Its goal was to decenter both Langdell, who appears in the manuscript as a minor contract doctrinalist, and the whole issue of formalism as a supposed jurisprudential theory, in favor of the narrative of conceptual construction and disintegration. It started not with one of the contending legal theories of the time, but with the contrasting conceptual architectures of pre-Classical and Classical legal thought. The legal consciousness approach set out to trace the felt relationship between concepts at different levels of abstraction, by contrast with the "top down" approach of the idealist historians who saw late nineteenth century legal thought as the instantiation of an abstraction (i.e. "formalism").

It argued that the substantive changes in the arrangement of the concepts and in the mode of resolving the contradictions among the elements allowed the classics in the end to put all the elements into a new unified structure, dramatically different from that of the pre-Civil War period, but identical to our own. The unity was phenomenologically compelling, and pre-theoretical. It came into existence through *bricolage*, the step by step reworking of the earlier system. When it disintegrated, a lot more was lost than the jurisprudential theory of a leading light of the period.

The jurisprudential theory of the Langdellians was a production within the legal consciousness of the period, rather than its roadmap. Jurisprudence was one textual site among many for the manifestation of the structural traits of the consciousness, and not privileged, as a site, over statements in arguments, opinions and treatises. The jurisprudential theory did not produce the structural transformation of CLT. It would be more accurate to say that it was a partial theorization of what some of the jurists involved were doing in their doctrinal practice, a theory that coexisted with very different ideas about "scientific" method held by other jurists equally important in the construction of CLT.

B. Contrast with "Revisionism"

It may also be useful to contrast *The Rise and Fall* with the "revision" of the history of late nineteenth century American law of which it is often considered a part.[28] The revision is, as is the manuscript, a reevaluation of the period that rejects the progressive historiography, according to which it was reactionary and formalist, adopting a bad legal theory that permitted the "abuse of deduction" for nefarious ends. By now, the literature of the revision is large, and it has permanently changed the way those of us who are interested see late nineteenth century legal thought. Though *The Rise and Fall* figures in its genealogy, the approaches of the revision exist on a different plane, so to speak.

The approach of the manuscript was that the consciousness of the period, equally manifested in the majority and dissenting opinions in *Lochner*, was something deeper and broader than any of the political tendencies of the time. *The Rise and Fall* is supposed to be a genealogy of Liberalism, within which liberalisms and conservatisms quarrelsomely coexist. So it is important to the book that powers are emerging and transforming along with rights. Substantive due process in CLT didn't abolish the police power, in spite of progressive rhetoric to that effect, but rather constructed it as a new thing.

28. See generally, Stephen Siegel, "The Revision Thickens," 20 *Law & Hist. Rev.* 631 (2002).

The multi-dimensionality of rights–that they were "the same thing" in public and private law–did not mean that the legislature couldn't change the common law, but rather that the rights, in the conflict of rights and powers, were the same as the rights in the conflict of right and right, and had to be accommodated using the same judicial techniques. There had to be an explanation of apparent inconsistencies between the private law rule and the constitutional requirement.

Specific doctrines resolved the conflicts in ways that favored the right or the left, without thereby making the underlying structure right or left. In *The Rise and Fall*, the "bias" involved in this process comes in because the structure was open, rather than because it was closed. It seemed obvious to me that if you were a Progressive you correctly viewed the U.S. Supreme Court as more often than not your political enemy because the judges were more often than not your political enemies. This was true even if they didn't strike down any more than a large minority of the measures you managed to push through the state legislatures.

Of course, sometimes there were no obvious political stakes, or mixed stakes, so the legal process seemed and seems highly autonomous. And sometimes the positions of the Progressives look much worse from the point of view of today's leftism or radicalism than those of the conservatives, whether "old" or "new." This seemed to be one of the lessons of *Yick Wo v. Hopkins.* [29]

In private law, it was the same. The splitting of contract as will of the parties from quasi-contract as will of the state was followed by the splitting of offer and acceptance as will of the parties from consideration doctrine as will of the state. The regulatory side of private law was formally acknowledged for the first time, rather than denied. The source of "bias" was that the conceptual structure of private law made the will of the parties the core and the will of the state the periphery, as illustrated by the nifty diagram at the end of Chapter 4 (p. 241).

29. 118 U.S. 356 (1886) (holding that a local "health regulation" aimed to shut down Chinese owned laundries in San Francisco violated the equal protection clause).

In *The Rise and Fall*, this was all part of the death of reason narrative. The biases of the public and private law outcomes produced a partly politically motivated assault on the vertical dimension of CLT, combined with a radicalization of the process of analogizing across fields, ultimately leading to disintegration into modern legal consciousness. Just as there is no sense, for me, in denying the conservatism of the authors of CLT, while admiring their tranformative accomplishment, there is none in denying the political progressivism of the attackers who brought us to the next stage of policy analysis and balancing. But the point is derationalization by stages, rather than that the actors had political motives.

The two modes of revision that contrast with *The Rise and Fall* are, first, the search for the true legal principles of the *Lochner* era constitutional cases, and, second, the enrichment of our understanding of the diverse factors, other than the supposed Langdellian orthodoxy, that went into the thought of the leading figures of the period. In the first mode, it indeed appears that there were a variety of threads of principle running through the cases. There were far too many cases that upheld what look to us like unmistakable interferences with freedom of contract, and far too much tolerated interference with laissez-faire, for us to be able to reduce the law as a whole to these slogans.

There is something rather Langdellian about the attempt to sort this chaos by finding a few strong abstract principles, like a ban on "class legislation," for example, or "equal rights." From the point of view of *The Rise and Fall*, the contradictory character of the Classical discourse, the ultimate weakness of its mediating devices, makes the quest seem quixotic, just as attempts to do the same sort of thing for the law of our time seem quixotic. It would seem to me more promising to use the rich new mine of data to investigate the mechanisms by which political conflict is uneasily and inconsistently translated into legal argument. But I recognize that this is far from the tenor of this branch of the revision.

The other approach has been to turn the stick figures of the progressive historiography into convincingly complex characters. They emerge as representatives of the various social, cul-

tural, regional, political, philosophical, religious and legal theoretical currents of their time. The vicissitudes of their personal lives, their mental illnesses, family crises, personal animosities and love affairs get their due as causative in their work. As they should.

In *The Rise and Fall*, CLT appeared to its practitioners "to have synthesized successfully the positivist science of law, natural rights constitutionalism, and classical economics." (p. 9) As for the disintegration of CLT, it occurred "regardless of one's choices between or within the traditions of natural rights/morality and social welfare maximization." (p. 251)[30] For *The Rise and Fall*, nothing turned on whether or not you were an historical school person, a utilitarian, a Kantian, or whatever. Nothing, that is, so long as all one cared about was the emergence of the structure that "rules us from the grave."[31]

In other words, the manuscript aimed at changes understood to be independent of the legal philosophies the individual Classical thinkers held. Field, Bradley, Cooley, James Coolidge Carter, Bishop, Gray, Wigmore and the rest, including Englishmen like Austin, Pollock, Markby and Holland, could be lumped together with Langdell and Beale, not because they were all "formalists," not at all. Rather, they all worked on different bits of the transformation of the larger structure toward rights and powers absolute within their spheres. In retrospect, their contributions still seem to me quite completely independent of their individual placement in the fascinating grids the revision has developed for understanding them as historical figures.

30. I was influenced in this view by Pound's amazing article of 1917, "The End of Law as Developed in Juristic Thought: II. The Nineteenth Century." 30 *Harv. L. Rev.* 201 (1917). In it, he argued that all the schools of nineteenth century legal theory, meaning the historical school, Kantianism, utilitarianism and social Darwinism had turned out to have the same basic idea about modern law: it had evolved from feudalism to the will theory! My revision was to argue that it had evolved to the structure in which private opposed public will. This formulation dispensed with Pound's claim that the nineteenth century evolution had been Romanist and individualist, and therefore maladapted to the socialization of society at the turn of the century.

31. See also "The Structure of Blackstone's Commentaries," supra note 6, at 362, n. 56.

IV. Fate of *The Rise and Fall*

The Rise and Fall did get me tenure. The faculty was raising the standard, and the new generation had been told that we had to produce "substantial writing," though without a publication requirement. After I submitted the manuscript to the appointments committee, I spent two months playing solitaire waiting for their decision, and then decided to start work on an article, which became "Form and Substance in Private Law Adjudication,"[32] finished in the spring of 1976. In that article, besides summarizing the manuscript, I lifted, more or less verbatim, the description of the modern way of thinking about private law from the opening section of chapter 3. But "Form and Substance" reconceptualized the larger conflict within private law as individualsim vs. altruism, whereas *The Rise and Fall* spoke of efficiency vs. equity and rights vs. powers.

The Appointments Committee consisted of Al Sacks (the Dean and co-author of the Legal Process Materials), Milton Katz, Paul Bator, James Vorenberg, Arthur Miller, Frank Michelman and Larry Tribe. I had asked the Dean to take Clark Byse off the Committee, because he was openly hostile, and that they poll my students randomly about my teaching rather than consulting the students they happened to know already, which had been the practice up to then.

The semester wore on. After Thanksgiving, Frank Michelman and Larry Tribe said exactly the same thing: "If I were you, I would be worried, but let me tell you, you have nothing to worry about." I am still grateful to them. Then my closest friends on the faculty, Mort Horwitz and Roberto Unger, each of them recently tenured, went separately to tell the Dean that if I was denied they would leave. Not to be forgotten.

The Committee met a final time between Christmas and New Year's and recommended me, and the faculty voted a few weeks later. A senior colleague, not on the Committee, told me there had never been any question, and that it was just wrong to imagine

32. 89 *Harv. L. Rev.* 1689 (1976).

xl that my case had been controversial in any way, and particularly not in any kind of political way. There was no feedback about the manuscript from Committee members other than Tribe and Michelman, and aside from Horwitz and Unger, the only members of the faculty who seemed to have read it were Abe Chayes, Phil Heymann and Henry Steiner. I was very happy, but also alienated. In that respect, I think my experience was typical of what the tenure process was becoming at all the self-styled elite schools.

The Rise and Fall became the spine of my course, *Legal History: American Legal Thought*. I split it up and distributed it along with two dozen cases and long excerpts from treatises and the like. I kept on writing new pieces, one of them a quite elaborate narrative of the discrediting of CLT as constitutional theory, which I didn't try to integrate into the ms., but just stuck into the course materials at appropriate places, and I developed elaborate outlines of the lectures on federalism before the civil war and corporate law.

It seemed clearer and clearer to me that a serious flaw of the manuscript was that it was written as though we had "always/already" had the public/private distinction, and that what happened in CLT was just a novel and intense deployment of it. "The Structure of Blackstone's Commentaries,"[33] published in 1979, was supposed to be a new first part of a now much larger *The Rise and Fall*, narrating the early stages of reason working to give birth to Liberalism in law, centered on the genealogy of the public/private distinction.

Then, around 1980, I decided I had to work hard and fast on other things, both to "have a career" and to further the critical legal studies project. *The Rise and Fall* was supposed to have a section on the interdependence of late nineteenth century economic and legal thought, and I wrote this as a separate article in 1985.[34] It soon seemed that if I were to publish the manuscript, I would have to completely redo it, and by then I was much more aware than I had been at the outset of the difficulty of the task. It seemed like a life work, and not my life work.

33. Supra note 6.

34. Duncan Kennedy, "The Role of Law in Economic Thought: Essays on the Fetishism of Commodities," 34 *Amer. Univ. L. Rev.* 939 (1985).

An oddity of the situation was that not publishing it did not mean that it disappeared into a desk drawer somewhere. It was read every year by a large class of students, and circulated persistently to law students at other schools. It was cited. The critical legal studies milieu provided an interested audience. The audience it might have reached through a university press was unlikely to be friendly, given its violation of the canons of professional historical scholarship and its structuralist and critical theoretical enthusiasm.

Along with Tom Grey,[35] a number of colleagues, including Mort Horwitz,[36] Bob Gordon,[37] Cass Sunstein,[38] Greg Alexander[39] and Steve Siegel,[40] found the narrative of conceptual transformation useful, though they understood it in various different ways and fitted it into their own diverse undertakings, all quite distinct from the project of the manuscript. The most complex of these adaptations is Horwitz's endlessly fascinating *Transformation II: The Crisis of Legal Orthodoxy.* It melds *The Rise and Fall* seamlessly into a version of the revision of the progressive historiography that aims to retain the element of political/economic "tilt" for CLT, a feat that I would have thought impossible given my effort to make the two incompatible.

Other students and young colleagues entered directly into the effort to reconstruct the structural transformations of legal discourse. In the late nineteen seventies and early nineteen eighties, they wrote and published a set of third year papers, job market

35."Langdell's Orthodoxy," supra note 27.

36. Morton Horwitz,*The Transformation of American Law II, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford Univ. Press, 1992).

37. Robert Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920," in *Professions and Professional Ideologies in America* (D. Geison, ed., Chapel Hill: Univ. of North Carolina Press, 1983).

38. Cass Sunstein, "Lochner's Legacy," 87 *Colum. L. Rev.* 873 (1987). But see David Bernstein, "Lochner's Legacy's Legacy," 82 *Texas L. Rev.* 1 (2003).

39. Gregory Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago: Univ. of Chicago Press, 1997).

40. Stephen Siegel, "Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation," 70 *Va. L. Rev.* 187 (1984).

offerings and tenure pieces that extend *The Rise and Fall*, elaborate it across new legal domains and in many cases correct it. These are listed "in the margin," as they used to say.[41] Each has its own political agenda, and its own slant into the critical theoretical and structuralist approach. Together they make up a rich genealogy of present day legal thought. I am more proud of my association with the effort of their production than with any other aspect of my teaching career. The pieces by Karl Klare, Jerry Frug, Fran Olsen, Joe Singer and David Kennedy seem to me to figure among the best law review articles of the late last century.

In the last five years, I've gone back to intellectual history, developing the same old death of reason narrative, concentrating on the "social" critique of CLT, and on the realists as critics of the social, on the interdependence of European and American legal thought, and on the nineteenth and twentieth century globalizations of legal thought in the context of the world system of Western domination.[42]

Cambridge, Mass., December 2005

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41. Ira Nerkin, "A New Deal for the Protection of 14th Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory," 1 *Harv. CR–CL L. Rev.* 297 (1977); Karl Klare, "The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941," 62 *Minn. L. Rev.* 265 (1978); Gerald Frug, "The City as a Legal Concept," 93 *Harv. L. Rev.* 1057 (1980); John Nockleby, "Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort," 93 *Harv. L. Rev.* 1510 (1980); Kenneth Vandevelde, "The New Property of the 19th Century," 29 *Buff. L. Rev.* 325 (1980); Elizabeth Mensch, "Freedom of Contract as Ideology," 33 *Stan. L. Rev.* 753 (1981); Elizabeth Mensch, "The Colonial Origins of Liberal Property Rights," 31 *Buff. L. Rev.* 635 (1982); James Kainen, "Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State," 31 *Buff. L.Rev.* 381 (1982); Kipp Rogers, "The Right of Publicity: Resurgence of Legal Formalism and Judicial Disregard of Policy Issues," 16 *Beverly Hills Bar Assoc. J.* 65 (1982); Joseph Singer, "The Legal Rights Debate in Analytical Jurisprudence, from Bentham to Hohfeld," 1982 *Wisc. L. Rev.* 975; Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96 *Harv. L. Rev.* 1497 (1983); Ellen Kelman, "American Labor Law and Legal Formalism: How 'Legal Logic' Shaped and Vitiated the Rights of American Workers," 58 *St. John's L. Rev.* 1 (1983); Gregory Alexander, "The Dead Hand and the Law of Trusts in the 19th Century," 37 *Stan. L. Rev.* 1189 (1985); Hagai Hurvitz, "American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts and the Juridical Reorientation of 1886-1895," 8 *Ind. Rel. L. J.* 307 (1986); David Kennedy, "Primitive Legal Scholarship," 27 *Harv. Int'l L.J.* 1 (1986); Gregory Alexander, "The Transformation of Trusts as a Legal Category, 1800-1914," 5 *Law & History Rev.* 303 (1987); Mark Hager, "Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory," 50 *U. Pitt. L. Rev.* 575 (1989); Rudoph Peritz, "The 'Rule of Reason' in Antitrust: Property Logic in Restraint of Competition," 40 *Hastings L. Rev.* 285 (1989); Robert Steinfeld, "Property and Suffrage in the Early American Republic," 41 *Stan. L. Rev.* 335 (1989).

42. "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form," 100 *Colum. L. Rev.* 94 (2000); with Marie-Claire Belleau, "François Gény aux États-Unis," in *François Gény, Mythe et Réalités 1899-1999: Centenaire de Méthode d'Interprétation et Sources en Droit Privé Positif, Essai Critique* (Claude Thomasset, Jacques Vanderlinden & Philippe Jestaz, eds., Montreal: Editions Yvon Blais, 2000); "Two Globalizations of Law and Legal Thought: 1850-1968," 36 *Suffolk Univ. L. Rev.* 631 (2003).