CHAPTER 2

TOWARD A POSTMODERN UNDERSTANDING OF LAW

The immense promises and possibilities for individual and collective liberation contained in modernity were drastically narrowed as the trajectory of modernity got tied up with the development of capitalism; modern science played a central role in this process. Such functionalization of science, coupled with the latter's transformation into the central productive force of capitalist production, drastically and irreversibly curtailed its potential for emancipatory rationalization of individual and collective life. The scientific management of excesses and deficits, as perceived by the rising bourgeoisie, transformed scientific knowledge into a hegemonic regulatory knowledge that brought about the collapse of emancipation into regulation. Originally conceived as the other of regulation, emancipation gradually became the double of regulation. The hegemony of knowledge-as-regulation meant the hegemony of order as a form of knowing and the conversion of solidarity—the form of knowing in knowledge-as-emancipation—into a form of ignorance, and thus of chaos.

The order sought was from the very beginning the order of nature as well as the order of society. As long as the tension between regulation and emancipation kept its central position in the paradigm of modernity, order was always conceived in a dialectical tension with solidarity, a tension to be superseded in a new synthesis, the idea of a good order. Once the tension disappeared, the idea of good order receded into the idea of order *tout court*. Modern law was entrusted with the task of guaranteeing the order needed by capitalism, whose development occurred in the midst of a social chaos, in part of its own making. Modern law thus became a second-rate rationalizer of social life, as a kind of surrogate scientificization of society, the closest we could get—at least for the time being—to the full scientificization of society, which could only be brought about by modern science itself. In order to perform this function, however, modern law had to surrender to the cognitive-instrumental rationality of modern science and become scientific itself. Moreover, in order to become scientific, modern law had also to become statist, since the triumph of order over chaos was to be guaranteed by the state, at least as long as science could not guarantee it.

In this chapter I will argue in greater detail that the conversion of modern science into a hegemonic rationality and a central productive force, on the one hand, and the conversion of modern law into scientific statist law, on the other, are the two sides of the same historical process that accounts, both as a cause and as an

effect, for the profound isomorphisms between modern science and modern law. As had happened in the case of modern science, law also lost sight, in this process, of the tension between social regulation and social emancipation that was imprinted in its roots in the paradigms of modernity. The loss was so thorough and irreversible that the recovery of the emancipatory energies called for in this book must involve as radical an unthinking of modern law as the unthinking of modern science undertaken in Chapter One.

In the first section, I analyze the original imprint of the tension between regulation and emancipation in modern law, selecting three of its major moments: the reception of the Roman law, the rationalist natural law, and the theories of the social contract. In the second section, I analyze briefly the historical process by which this tension was eliminated by the collapse of emancipation into regulation, distinguishing among three periods of capitalist development: liberal capitalism, organized capitalism, and disorganized capitalism. Finally, in the third section I plead for the unthinking of modern law. This plea is premised upon the idea that the paradigmatic transition taking place at the epistemological level, as analyzed in Chapter One, is also taking place at the broader societal, civilizational level. I then state the major topics for the unthinking of law in the transition between social (and not just epistemological) paradigms. Some of them are dealt with in greater detail in the following chapters, and for that reason will be here only briefly enumerated.

1. THE TENSION BETWEEN REGULATION AND EMANCIPATION

The Reception of the Roman Law

The historical unfolding of the tension between regulation and emancipation in the legal field, is even older than the one in the scientific field, and can be traced back, as one of its first manifestations, to the reception of Roman law in Europe from the twelfth century on. This phenomenon was so decisive for the future development of law that legal historians are almost unanimous in considering it the single most important factor in the birth of the modern or Western legal tradition; however, they may differ as to the interpretation of its sociological insertion in the European history.[1] Harold Berman, for instance, emphasizes in this period (1050 to 1150) what he calls the papal revolution (the struggle to make the Bishop of Rome the sole head of the church and to emancipate the clergy from the control of emperors, kings, and feudal lords) and the "new canon law" to which it gave rise,[2] while Michael Tigar and Madeleine Levy stress the adequacy of the Roman law to the interests of the rising bourgeoisie.[3] Closer to this latter interpretation, and with a much broader analytic scope in mind, Fernand Braudel cites with approval the historians that describe the period between the tenth and the thirteenth centuries as the true Renaissance.[4]

The reception of the Roman law was indeed an astounding intellectual movement (the "learned law"), which started at the University of Bologne at the end of

the eleventh century, and swept throughout Europe. It represented a process of law creation—the "adoption" of Justinian's *Corpus Juris Civilis*, compiled in the sixth century A.D.—which was independent from the feudal rulers, and indeed at odds with what we could call, without much rigor, the feudal legal system.[5] Indeed, in all its legal, political, social, cultural and economic dimensions, feudal society was very fragmented and pluralistic,[6] "with several temporal and spiritual overlords jostling and fighting for the right to exploit each piece of arable or livable land—and the people on it."[7] As regards law, feudal society comprised a situation of radical legal pluralism, which Harold Berman considers to be "perhaps the most distinctive characteristic of the Western legal tradition."[8] Besides canon law, there was the feudal or seigniorial law, royal law, manorial law, urban law and *lex mercatoria* (law merchant). Since the same person might be subjected to different bodies of law in different types of cases, and there were no clear rules as to the boundaries of the different laws, the "legal system" was thus complex, cumbersome, chaotic and arbitrary.

This, of course, could also be a source of freedom. As Harold Berman points out, "[a] serf might run to the town court for protection against his master. A vassal might run to the King's court for protection against his lord. A cleric might run to the ecclesiastical court for protection against the King."[9] This was, however, a chaotic freedom to be exercised only in emergency situations. It was not the kind of freedom that the rising urban commercial classes longed for. Their freedom was to be exercised on a routine basis, as routinely as their transactions, and was to be secured against arbitrary interference: contractual freedom and contractual security had to be combined as the two sides of the same legal constellation. Such a legal constellation was provided by the "learned law" and by the legal rationalization of social life it propounded.[10] The reception of the Roman law suited the emancipatory projects of the emergent class by developing a form of legal regulation that maximized the interests of that class in a society which the latter did not dominate, whether politically or ideologically. Under the prevalent political and social conditions of Europe until the sixteenth century, the *jus commune*—"a common body of law and of writing about law, a common legal language and common method of teaching and scholarship"[11]—was definitely an "intellectually superior system," at the service of progressive interests.

When Irnerius started teaching on the *Corpus Juris Civilis* at the University of Bologna, in the late eleventh century, Western Europe was undergoing profound political and economic changes.[12] Once the first Crusade of 1096 had definitely reopened the Mediterranean as a European trade route, a large expansion of commerce and of a monetarized economy along both the Mediterranean and the northern coasts of Europe promptly evolved. Moreover, the Italian cities cultivated a republican spirit of autonomy and freedom socially grounded on a cultivated society, for which the local feudal systems, and their untrained, unpredictable and unfair administration of justice, were becoming culturally anachronistic, rather than simply inadequate.

As Wieacker rightly emphasizes,[13] the reception of the Roman law is thus the product of a unique convergence of economic and cultural interests. Such convergence made possible the emergence of an autonomous, humanistic, laic form of legal knowledge and legal reasoning, which put the authority of the *imperium*

romanum and the glamour of the Roman cultural ideal (the *Romidee*) at the service of a new legal, political and societal project. Contrary to the northwest European universities of the time (Paris and Oxford), the Bolognan *studium civile* is not an ecclesiastic hierarchical corporation but rather a *universitas scolarium*, an association of scholars.[14] In accord with the argument on the interpenetration between disciplinary power and juridical power, which I presented in the Introduction to Part One in criticism of Foucault, the "learned law" started as an academic study, that is to say, as disciplinary knowledge, which became juridical power, that is to say, the form of power that Foucault counterposes to disciplinary power, only later on, when it began to be applied as residual law at the end of the twelfth century. From then on, the Roman law combined the two forms of power-knowledge, and that was probably the secret of its remarkable achievements. By the end of the twelfth century, there were at Bologna alone ten thousand students in law, who quickly spread the new learning throughout Europe in their appointments as diplomats, royal counselors, judges, notaries and so on. Alongside the cleric, there emerged the jurist or legist, who was to monopolize the public administration and the judicial system of Europe in the centuries to come.

For several reasons, the tension between regulation and emancipation is constitutive of the reception of the Roman law. I have already suggested that this new regulatory project is at the service of the progressive interests of the social class that is entrusted at the time with a broad cultural and political project of social emancipation. But probably more decisive is the fact that, in the teachings and exegesis of the Glossators and Commentators, the Roman law is a combination of authority (the *translatio imperii*) and reason (the *ratio scripta*).[15] The pragmatic needs of regulation must be subordinated to the rational experience, and the latter, far from being a mere technical artifact for instrumental purposes, is rather the search for new social and political ethics tuned up to the new times and their call for autonomy and freedom. As Toulmin reminds us,[16] as late as the sixteenth century the model of "rational enterprise" was, for the scholars, not science but law. The tension between regulation and emancipation lies in the fact that the regulatory power derives its legitimacy from its autonomy vis-à-vis the factic powers involved in conflicts for whose settlement the regulation is called for. In twelfth-century Europe, this amounted to less than a revolutionary leap. Under the specific conditions of the time, the autonomous juridification of dispute settlements and the centrality of legal reasoning allowed for a regulation that did not lose sight of its emancipatory purposes.

I refer to the specific conditions of the time because, as these conditions changed, the features of the Roman law that had accounted for the tension between regulation and emancipation also changed and became devices through which emancipation got absorbed into regulation. This occurred along a protracted historical process that cannot be analyzed here. I will merely refer to its unhappy ending in the nineteenth century with the German *Pandektenschule* (Savigny, Puchta, Windscheid). Saturated with a positivistic epistemology, the Pandektists transformed the Roman law into a formal, hierarchical structure of legal rules following a strict logical system. The complex combination of authority, rationality and ethics, which characterized the Roman law of the Glossators, was thereby transformed and reduced to a rational, technical formalism, which

was supposedly neutral to ethics and solely concerned with technical perfection, logical coherence, gapless coverage and total predictability. The emancipatory potential of the Roman law, which had brought it into the center of the conversation of European humankind in the twelfth century, was thus lost by converting, in Ihering's words, "the science of law into mathematics." And Ihering adds:

> Institutions and principles which in Rome were, considering the circumstances and customs of the time there, intelligible, became here, on account of the complete disappearance of their conditions precedent, a real curse; and there never was in this world a mode of administering justice with more power than this to shake a people's confidence in the law and all belief in its existence.[17]

Under the new sociological context of capitalist domination, nationalism and imperialism,[18] the type of scientificization of the law allowed for by the Roman law in the nineteenth century, its futile erudition and inscrutable exotericism, shows how, in a period of positivistic hegemony, social regulation is made scientific in order to be maximized and also in order to maximize the oblivion of the social and political ethics that had kept the emancipatory energies alive since the twelfth century. The specific type of tension between regulation and emancipation, which characterized the reception of the Roman law, was part and parcel of the historical project by which the rising European bourgeoisie struggled for economic, cultural and, lastly, political power. Once political power had been conquered, such tension no longer had any historical use; accordingly, the Roman law was reduced to the blueprint of a form of social regulation that, because of its scientificity, became, by itself, the only possible emancipation.

The Rationalist Natural Law

The rationalist natural law of the seventeenth and eighteenth centuries was based on the vision of the foundation of a new "good order," according to the law of nature, by the exercise of reason and observation; its most sophisticated version can be found in the work of Grotius (1583–1645).[19] The new rationality of individual and collective life is a secular rationality, and is to prevail both in domestic and in international affairs. It rests on secular social ethics, emancipated from moral theology. In a courageous formulation, Grotius states, in *De Jure Belli ac Pacis*, that

> among the traits characteristic of man is an impelling desire for society, that is, for the social life—not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his own kind. . . . This maintenance of the social order, which we have roughly sketched and which is consonant with human intelligence, is the source of law properly so called. . . . *What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.*[20] (my italics)

Moreover, the new rationality is universal and universally applicable[21] and its unfolding requires a new methodology in which both reason and experience have a part:

> Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature; proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling which is called the common sense of mankind.[22]

As is well known, the rationalist natural law served to legitimate both the "enlightened despotism" and the liberal and democratic ideas that led to the French Revolution.[23] But the tension between regulation and emancipation as the foundation of a new good order lies precisely in this duplicity. As Tuck rightly notes, Grotius's *De Jure Belli ac Pacis* "is Janus-faced and its two mouths speak the language of both absolutism and liberty."[24] Buckle also distinguishes in Grotius's thought between the absolutist strain and the antiabsolutist strain, and sees the latter in Grotius's concern with the right of property and the right of resistance, a concern usually associated with the political thought of John Locke.[25] In Grotius's theoretical construction of law and politics, the basis of collective life is an impelling desire for society (an *appetitus societatis*), a natural bond disembedded from both the state and the *corpus mysticum*.[26] Thus conceived as *custodia societatis*, law becomes inherent in collective life and in the different social groups in which it is organized. According to the nature of the social group, law can promote hierarchy or equality. Grotius distinguishes three great frameworks of law: the *jus latius patens* of the international society, the *jus civile* created by the states, and the *jus arctius* developed in smaller groups. The third one is differentiated into the *jus rectorium*, which regulates relations of hierarchy between parents and children, masters and servants, administrators and administered; and the *jus equatorium*, which regulates relations among equals, among fraternal and voluntary associations.

This concern with systematization and rationalization, which is typical of seventeenth- and eighteenth-century jusnaturalism, has its roots in the legal humanism of the fifteenth and sixteenth centuries, and in its project has its roots in Cicero's ideal of reducing law to an art or a science (*jus in artem redigendo*) by means of revealing the abstract reason contained in Roman law (the *recta ratio* or *ratio juris*). This concern with *methodus*, with *schemata*, with *ratio* is combined in the seventeenth century with the enthusiasm for the new science of Galileo and Descartes, a combination that is indeed an early manifestation of the complicities between modern science and modern law.[27] One generation after

Grotius, Leibniz proposed in 1667 a "new method" of jurisprudence, ultimately based on mathematics, the *jurisprudentia rationalis*.[28] Some decades later, Giambattista Vico proposed another "new science," proudly geometrical in nature, which developed the argument presented in a previous treatise on *Diritto Universale* ("universal law").[29]

Vico's theories are particularly important for my argument, because in them the tension between regulation and emancipation is played out with such sophistication that both the similarities and the differences in the ways modern science and modern law experience it become quite clear. Vico sets out to do for the human past what Newton had done for nature, that is, to discover the principles of history (*Historia nondum habet sua principia*, history does not yet have its principles).[30] However, Vico is acutely aware that the science of history or of society cannot be developed according to the same principles and methods as the science of nature. Vico criticizes the Cartesian naturalism and rationalism for their incapacity to attain true wisdom and equity in social affairs (*aequitas civilis*), which is the ultimate objective of the study of human culture and history. The alternative principles, adequate for such a study, are found by Vico in philology and jurisprudence. Concerning philology, Vico says:

> The mental vocabulary of human social institutions, which are the same in substance as felt by all nations but are diversely expressed in language according to their diverse modifications, is exhibited to be such as we conceived it. . . . These philological proofs enable us to see in fact the institutions we have meditated in idea as touching this world of nations, in accordance with Bacon's method of philosophizing, which is "think and see" (*cogitare videre*).[31]

As regards philology, Kelly rightly emphasizes that, for Vico, "if mathematics was the language of the book of nature, as Galileo had taught, philology was indispensable for anyone who hoped to penetrate the book of humanity."[32] Language is a symbolic expression of social reality and social transformation through which we can "enter" inside a given culture and/or society and reconstruct it imaginatively (what Vico called *fantasia*). And as regards jurisprudence, it was scientific, as jurists had argued for centuries, "both because it dealt with things in terms of cause and effect and because it was universal, though, unlike natural philosophy, it had as its goal human welfare."[33] Vico saw himself as discovering a *jus naturale gentium*, thereby continuing the work of Grotius, whom he considered the "jurist of mankind." Basically, Vico considered that the evolution of law and jurisprudence was the most revealing indicator of the evolution of civilization. In this he was also a pioneer. He anticipated Emile Durkheim's theory on the evolution of social division of labor and its relationship with the evolution of the forms of law by more than a century, when he argued that repressive law prevailed in societies dominated by mechanical solidarity, while restitutive law prevailed in societies built upon organic solidarity.

The way the tension between regulation and emancipation is played out in the legal field lies, in my view, in Vico's most basic distinction between the certain (*certum*) and the true (*verum*). At the beginning of *Scienza Nuova*, Vico sets forth

the axioms or *degnità* that will orient his research. Among them the following two concern us here:

> *Degnità CXI*: The certain in the laws is an obscurity of judgment backed only by authority, so that we find them harsh in application yet are obliged to apply them just because they are certain. In good Latin *certum* means particularized or, as the schools say, individuated; so that, in over-elegant Latin, *certum* and *commune* are opposed to each other.
>
> *Degnità CXIII*: The truth in the laws is a certain light and splendor with which natural reason illuminates them; so that jurisconsults are often in the habit of saying *verum est* for *aequum est*.[34]

The *certum* is the authority, the arbitrary, the particularized outcome of human will, while the *verum* is the truth, the emanation of reason, the universality derived from the necessity of nature. The two are both facets of the law which, indeed, is a bridge over the chasm that separates them. But such a bridge is a movable one, which gets dislocated as the human experience unfolds. For Vico, natural law is not a fixed normative entity. It is rather:

> the movement of the process of the historical formation of the structures of positive law towards an immanent ideality. . . . The universality of the natural law consists, not in the fact that in all times and in identical places identical positive law should prevail, but that in all the forms of positive law, despite the diversity of material circumstances which dictate the immediate force of the law, the same ideal principle is at work.[35]

This movement is not a circular one, however. The historical trajectory of human experience shows that the latter proceeds from the *certum* to the *verum*, from authority to reason, from the particular to the universal. This trajectory is best revealed by law. At every moment in history, law is constituted by the tension between regulation (authority) and emancipation (reason); but as the human experience unfolds, emancipation wins over regulation. This process takes place—and this is crucial for my argument—because the *verum* is not a mere cognitive reason. The *verum* is the *aequum*. The emancipatory potential of law lies in that its rationality is not distinguishable from universal social welfare, the *aequitas civilis*.

Theories of the Social Contract

Another prominent manifestation of the tension between regulation and emancipation at the origin of the modern legal field was the rise of the theories of the social contract. Among these theories, Rousseau's is the most important for my argument. The idea of a social contract to justify a political obligation is an old one.[36] Lessnoff traces it back to the work of an Alsatian monk, Manegold of Lautenbach, who in the late eleventh century took up the idea of social contract

on behalf of Pope Gregory VII in his struggle with the Emperor.[37] What is new in the theories of the social contract in Hobbes, Locke and Rousseau is that they result from the debate on the rationalist natural law, from which they also depart, of course, and that they see themselves as part of an emerging new social and political order and of a new modern scientific method for analyzing reality.[38] In one way or another, the universality of a new legal and political obligation is connected with the truth claims of modern science. This connection is more problematic in Rousseau than in Hobbes, whose project is to build a "science of natural justice" fashioned according to the method of geometry, "the only science that it hath pleased God hitherto to bestow on mankind."[39] The way Rousseau conceives of the state of nature makes it of little use to found, much less to dictate, a political structure. As a matter of fact, Rousseau, who always criticized the *Lumières* from the point of view of the *Lumières*, does not see himself bound by any scientific naturalist methodology. On the contrary, as already mentioned in Chapter One, in his *Discourse on Sciences*, Rousseau submits modern science to the harshest criticism for its inability to confront the most serious ethical and political problem of the time—that "man is born free, and everywhere he is in chains"[40]—in its own terms, that is, in terms of ethics and politics. For this reason, I believe, Rousseau expresses the dialectical tension between regulation and emancipation at the roots of modernity better than anyone else. This tension is presented at the outset, when Rousseau says, in the opening sentence of the *Social Contract*, that his purpose "is to inquire if, in the civil order, there can be any sure and legitimate rule of administration, men being taken as they are and laws as they might be."[41] The tension is here between certainty and justice, very much in the same way as it is formulated by Vico (the tension between the *certum* and the *verum*, that is, the *aequum*). Justice and certainty are both at the root of a new societal project for which human beings bear moral responsibility. Since human beings are both free from the state of nature and free to exercise moral choice, society is a product of human choice. Given the individuality of human choice, how is it possible to build collective life upon it? In other words, how is it possible to create a political obligation on the basis of freedom?

The idea of social contract is the master narrative through which the Enlightenment tries to respond to these questions.[42] As in many other instances, Rousseau goes beyond his contemporary "contractarians." For him, the problem is not so much how to found a social order upon freedom, but rather how to do it in such a way as to maximize the exercise of freedom. According to him, it would be an absurdity to enter freely in a contractual relationship if the result thereof were to be the loss of freedom (as in the Hobbesian contract). For Rousseau, there is only one possible solution: the general will as a substantive exercise of inalienable, indivisible sovereignty. The general will, as conceived by Rousseau, represents a synthesis between regulation and emancipation and such synthesis is best expressed in two apparently contradictory ideas: the idea of "obeying only oneself" and the idea of "being forced to be free":

> To find a form of association which may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, coalescing with all, may nevertheless obey only himself, and remains as free as before. . . .
>
> Whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free.[43]

Indeed, the two ideas stem from the same basic premise of Rousseau's social contract: through the social contract, the individual will may be good or bad; but the general will cannot be other than good.[44] Individual freedom is always contingent; but it is guaranteed against self-denial by the noncontingent collective freedom it contributes to by association. When people act against the general will they are not morally free; they are rather slaves of their passions and appetites. To be morally free means to act according to self-prescribed laws, the laws that promote the common good as defined by the general will. The general will does not necessarily coincide with the will of all. What generalizes the will is not the number of voices but the common interest uniting them.[45] Through the pair "obey only oneself" and "forced to be free," the foundation of the body politic lies in an horizontal political obligation, from citizen to citizen, in relation to which the vertical political obligation, from citizen to the state, cannot but be derivative.

Under these conditions, the highest exercise of regulation is the highest exercise of emancipation. Law and civil education are the key instruments of such synthesis. Concerning law, its complexity lies in the fact that it combines maximum unavailability with maximum instrumentality. As an emanation of the general will, law cannot be used for any purpose that violates the general will. For instance, law cannot particularize the subjects of its regulations, because law cannot be but as general as the general will from which it proceeds: "law considers subjects *en masse* and actions in the abstract, and never a particular person or action."[46] Conversely, inasmuch as it conforms to the general will, law is an instrument of infinite capabilities and necessarily so, because "the original act by which the body [politic] is formed and united still in no respect determines what it ought to do for its preservation."[47] Thus, contrary to Hobbes, Rousseau conceives of law as both an unconditional ethical principle, and as an efficient "positive" instrument of social ordering and transformation. Such multidimensionality of law corresponds to that of the state. On the one side, the state is all-powerful, because it is empowered by an absolute principle of legitimacy: the general will; but, on the other side, the state is indistinguishable from the citizens, in that they have an inalienable right to enact the laws by which they will be ruled. Thus we have to conclude,[48] Rousseau's political theory leads to the abolition or the withering away of the state.

In my opinion, Rousseau represents the climax of the broad conception of moral-practical rationality originally inscribed in the paradigm of modernity, the conception of a creative tension between regulation and emancipation, which assumes a most distinguished political form in the *Déclaration des droits de l'homme et du citoyen* (1789). Rousseau's vision of a new societal and political principle, as elaborated in the *Social Contract* and other political writings, illustrates, better than any other produced by the Enlightenment, the dilemmatic complexity of a social regulation aimed at furthering rather than suffocating the

emancipatory promises of modernity. Such a social regulation would balance freedom and equality, autonomy and solidarity, reason and ethics, authority and consent, in the name of a full rationalization of both collective and individual life.

In the Introduction to Part One, I argued that the complexity of modern social regulation manifests itself in each one of the three principles that support it—the principle of the community, the principle of the state, and the principle of the market—as well as in the relations that develop among them. Like the other two great "contractarian" political philosophers of modernity, Hobbes and Locke, Rousseau covers all the three principles with his analytical framework, and seeks a dynamic relationship among them. But while Hobbes privileges the principle of the state and Locke the principle of the market, Rousseau privileges the principle of the community.

Having in mind Rousseau's views on associations and on civil religion, it may seem strange to identify him specifically with the principle of the community, and not with the principle of the state. The debate that Rousseau's views have sparked is not to be pursued here. As I interpret Rousseau, the community is for him the whole community to which the sovereignty of the state corresponds. This is the community whose strength Rousseau wants to maximize. Hence his emphasis on the general will and on the inalienability of people's sovereignty. Hence his emphasis on the horizontal and solidary political obligation of citizen to citizen, in relation to which the authority of the state is unequivocally derivative. In order to safeguard this community, it is necessary to eliminate all obstacles that might come in the way of the citizen-to-citizen political exchange, and thus hinder the formation of an undistorted general will.[49] Associations and corporations may become privileged and powerful groups, and swerve the general will in favor of their particularistic interests. Because of the inalienability of the sovereignty of the whole community, Rousseau does not need to conceive such associations as barriers to the tyranny of the state, as Montesquieu did in *L' Esprit des Lois*. Rousseau is, rather, concerned with the possibility that such associations might become corrupt and tyrannical themselves. Since he is realistically aware that it is impossible to do away with the associations, Rousseau recommends their proliferation: "[B]ut if there are partial societies it is best to have as many as possible and to prevent them from being unequal, as was done by Solon, Numa and Servius." And he adds: "[T]hese precautions are the only ones that can guarantee that the general will shall be always enlightened, and that the people shall in no way deceive itself."[50] What Rousseau wants more than anything else is to guarantee the transparency of the general will. Associations can be accepted if they do not endanger such a guarantee; and indeed, in other works, Rousseau allows a wide room for "*ces associations . . . plus petites . . . tacites ou formelles*" (those associations . . . smaller . . . tacit or formal).[51]

While in Rousseau the *contrat social* makes the sovereignty of the state derivative and precarious, in Hobbes the *Covenant* makes it original and absolute. For this reason I consider Rousseau the archetypical expounder of the modern principle of the community, and Hobbes the archetypical expounder of the modern principle of the state. According to Hobbes, the social contract is the device by which people renounce the state of nature—that is, the absolute freedom and equality that necessarily leads to the war of everyone against everyone—and create a civil society based on the absolute sovereignty of the state which, in exchange for freedom and equality, guarantees peace, effective authority and, in the end, the only possible just society. Because the sovereign is absolute, he cannot obey any law, not even the laws he promulgates. On the contrary, people have a fundamental self-interest in obeying the sovereign, at least as long as the sovereign guarantees the safety of their lives.[52]

As in Rousseau, the social contract is established "by everyone with everyone." But while, in Rousseau, the contract represents an act of empowerment that reproduces itself in the body politic it creates, in Hobbes the commonwealth's empowerment exhausts itself in the act of the contract. From then on, the objective of peace demands absolute subjection to the sovereign. While in Rousseau the sovereign is "internal" to the contract, in Hobbes the sovereign is "externalized," since there can be no covenant between subjects and their sovereign. The sovereign is a mortal god, but very little distinguishes him from an immortal one. It is commonly accepted today that, as in Rousseau, in Hobbes, too, the state of nature is a logical device or a theoretical construct to justify the institutionalization of the civil society. Hobbes's "unrelieved grimness of the state of nature," as Weinreb calls it, is probably better seen as a rhetorical truth or as a premise of the argumentation on the foundations of the civil authority. Weinreb indeed concludes that, "when the whole argument is exposed, it is plain that the state of nature is made expressly for the leaving of it."[53]

The process of reductionism that the paradigm of modernity undergoes once its development is conflated with that of capitalism is already present in Hobbes to a much greater degree than in Rousseau or in Locke, as I will show below. Two main reasons account for this. Hobbes is particularly seduced by modern science and values and, above all, by science's potential to achieve incontrovertible order.[54] Though, in general, seventeenth-century rational philosophy is anxious to emulate the method of geometry or mathematics and to produce a systematic knowledge that can progress from natural law to "experimental philosophy," Hobbes, more than anyone else, assumes the objective of reaching certainty and incontrovertibility (both in knowledge and in politics). Through different paths, such an epistemology leads to reductionism: politics is separated from ethics; morality becomes a function of self-interest; good and evil are reduced to objects for which there is either an appetite or an aversion.

The seeds of reductionism in Hobbes's vision of modernity lie also in the fact that the tension between regulation and emancipation is, in Hobbes, reduced to a tension between war and peace. Peaceful regulation is the only possible emancipation that is accessible to human beings, whose "natural passion" is war and anarchy. It is true that for Hobbes the objective is still to build a just society, but though he believes, in a rather ambiguous formulation, that "the good of the Sovereign and People cannot be separated," the fact of the matter is that effective authority in Hobbes is by definition a just authority and that, except in the extreme case of risk to self-preservation, there is in his thought no safeguard against tyranny.[55]

It is clear, then, that Hobbes's thinking already carries in itself the seeds of statization as an impoverished form of modern regulation. The same cannot be said of Locke. On the contrary, Locke strongly argues against the idea of

absolute sovereignty and connects the legitimacy of the government with the limits of its purposes: government is legitimate as long as it respects the natural rights, and it exists solely to protect them. Government acts by consent; since unanimous consent is difficult to obtain, it is allowed to govern by majority rule. There are, in fact, two social contracts, one among the people, by which the people decide to abandon the state of nature and found the civil society; and another between the people and the sovereign government, in terms of which the government is entrusted with the regulation of civil society according to the majority rule. Government is thus bound by law, the law being the only guarantee against abuses of power and tyranny. Whenever such guarantee fails, the people have the right to rebel and resist. Anything else would amount "to think[ing] that men are so foolish that they take care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay, think it safety, to be devoured by lions."[56]

The features that distinguish the Hobbesian and the Lockean conceptions of the civil society correspond to those that distinguish their conceptions of the state of nature against which civil society is built. Locke's state of nature is far less grim and violent than Hobbes's. Indeed, it is a state of perfect freedom, of equality and independence and, in general, a state of peace and of goodwill and mutual assistance. Under these conditions, the pressure to leave the state of nature is not as compelling as it is for Hobbes: what we leave is not so grim; what we gain is obviously not so much better.[57] What we gain is basically certainty and a way of solving peacefully those disputes that in the state of nature would lead inevitably to war. Such disputes and uncertainty would above all affect the enjoyment of property. In Locke's own words, "the great and chief end, therefore, of men's uniting into commonwealth and putting themselves under government, is the preservation of their property."[58]

There is an ongoing debate about the concept of property in Locke, its distinct features in the state of nature and in civil society and the characterization of its evolution throughout history.[59] For the purposes of my argument, only three aspects of Locke's vision of property that seem relatively incontrovertible need to be mentioned. First, following Grotius's concept of *suum*, Locke defends a broad concept of property which includes not only material goods but also one's life, body and freedom. However, the concept tends to narrow down to material property when discussed in the context of money economy. Second, Locke grounds property on labor. In his theory of property, labor plays such an important role as a means to acquire property, that Locke can be considered one of the precursors of the labor theory of value: "For it is labour indeed that puts the difference of value on everything. . . . I think it will be a very modest computation to say, that of the products of the earth useful to life of man 9/10 are the effects of labour."[60] The third aspect of Locke's theory I want to emphasize is that, in his view, the historical appearance of money changes the social relations of property drastically, since it allows for the break of the equation between property and capacity to use: "and thus came in the use of money—some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life."[61] Through the use of money, accumulation of property becomes unlimited.[62]

The contrast with Rousseau is striking. Though Rousseau offers a justification of property very similar to that of Locke—property as a product of labor—he modifies it by the ideal of equality. Property tends to accumulate and become unequal; therefore, because "liberty cannot subsist without equality," the state must intervene to secure both liberty and equality: "it is precisely because the force of circumstances tends continually to destroy equality that the force of legislation should always tend to its maintenance."[63] On the contrary, for Locke, by tacitly agreeing in the use of money, "men have agreed to a disproportionate and unequal possession of the earth."[64]

Locke's treatment of modern property has led me to see in it the founding formulation of the principle of the market as one of the regulation pillars of modernity. It is true that this principle is more thoroughly developed later on by Adam Smith, who does criticize Locke for his mercantilistic view of wealth. The wealth, says A. Smith, does not consist in money but rather in commodities, the consumption of which is "the great cause of human industry."[65] However, in my view, this conception of wealth and the conception of social relations it calls for would not be possible without Locke's groundwork: labor as the source of property; property as potentially unlimited and legitimate, in spite of inequality, if "acquired according to the laws of nature"; the state legitimated above all by the certainty it can confer to the relations of property. All these ideas lie at the roots of modern market relations as universalized by capitalism. Moreover, Locke's theory brings to its highest tension the modern contradiction between the universality of civil laws founded on consent and according to the laws of nature, on the one hand, and the legitimacy of a social order upset by tremendous social inequality and class divisions, on the other.[66] Through this tension the dialectics of regulation and emancipation is present in Locke, probably less so than in Rousseau, but certainly more so than in Hobbes. Locke's main goal is to provide a rational vision of a just, free and happy society. That is why government is to be limited and laws based on consent. Similarly, the rationality of property imposes certain limits on its use. Property must be protected as a guarantee against slavery and political oppression; for that reason, it cannot be used in such a way as to endanger the very social prosperity it is aimed at guaranteeing. It cannot, for instance, be abused or destroyed when there is no rational need for it. Locke's rational contextualization of property is so elaborate that some authors have recently defended that property in Locke is a "right of use only."[67] Be it as it may, Locke's "possessive individualism" is limited both by the idea that the productive capacity of labor assures general though unequal prosperity, and by the idea that, when the inequality leads to extreme necessity, the needy have a *right* to charity.

The analysis of the three founders of modern politics shows the breadth and the complexity of both the regulatory and the emancipatory claims of modernity, as well as the dialectical tensions between them. Hobbes, Locke and Rousseau, each one in his own way, illustrate how the all-encompassing symmetries of their projects—state of nature/civil society; sovereign/citizens; freedom/equality; natural law/civil law; consent/coercion—are bound to collapse once translated into real life. Indeed, each one of these founding fathers anticipates the possibility of this outcome, and their theories taken together can be seen as an attempt at preventing it from occurring. Herein may well reside one of the factors accounting

for the widely acknowledged inconsistencies, incoherences, and contradictions in their theories as well as for the discrepant interpretations they warrant. But the breadth and complexity of the legal-political construction of modernity and, in particular, the tension between regulation and emancipation inherent to it are all the more evident when Hobbes, Locke and Rousseau are viewed together as distinct parts of a single intellectual constellation. Indeed, each one of them symbolizes an archetypal dimension to a global revolutionary project. The principle of the state (Hobbes), the principle of the market (Locke), and the principle of the community (Rousseau), are all constitutive of a new, paradigmatic social ordering, which will measure up to the emancipatory claims of this intellectual constellation, if and only if the three principles develop in a balanced way.

Hobbes, Rousseau and Locke are best understood as part of a large project for the rationalization of social life, as a look into their conceptions of rationality and of law easily illustrates. As regards their conceptions of rationality, though the three philosophers see themselves as rational thinkers and agents, and bear witness to the birth of reason and Enlightenment out of the darkness of religion and tradition, they differ as to the types of rationality they privilege in their rational reconstruction of society, both in the way it is and as it should be. Hobbes's rationality is most prominently the cognitive rationality of science, of geometry and mathematics. Rousseau's rationality is the moral-practical rationality, and, to a certain extent, also the aesthetic-expressive rationality. Locke's rationality is a combination of moral-practical rationality and common sense. This diversity shows the richness and complexity of the emancipatory energies of modernity. But it also shows the tension among possibly conflictual claims. For instance, while Hobbes seeks the positivity and the incontrovertibility of a superior knowledge, Rousseau delights in dramatizing his moral outrage before injustice and stupidity, and warns against the loss of wisdom that may result from too much reliance on scientific knowledge. Locke, on his part, tries to reconstruct wisdom out of common sense in such a way that he tends to blend positivity with conventionality and accessibility. While Hobbes and, to a certain extent Locke also, distinguish politics from morals, Rousseau refuses to accept such a distinction. While for Rousseau the community is indispensable to secure the individual's moral life, both Hobbes and Locke have an individualistic faith in the individual. These tensions can only be fully understood as struggles among different dimensions of the same intellectual constellation.

The same can be illustrated with a look into their conceptions of law. For Hobbes, law is a product of the will, of the sovereign's will, and it is therefore utterly positive in nature and instrumental in scope. The end of the political commonwealth is "peace and defense of them all, and whosoever has the right to the end, has right to the means."[68] Among those means, Hobbes includes "the whole power of prescribing rules" and "the right of judicature; that is to say, of hearing and deciding all controversies, which may arise, concerning law, either civil or natural." For Locke, law is a product of the consent by which the commonwealth delegates to the state the right to pass and enforce laws. Indeed, what the state of nature lacks is "an established, settled, known law, received and allowed by common consent to be the standard of right and wrong and the common measure to decide all controversies between them."[69] Finally, for Rousseau, law, more than

consented to, is self-prescribed, since the community does not alienate to the sovereign the right to pass laws. That is why Rousseau's citizen does not obey but himself and cannot be forced to do anything except to be free (whenever his will fails to measure up to the general will).

The complexity of the paradigm of modernity lies, thus, in the fact that law is potentially sovereign's will, consent and self-prescription all at once. It may vary from extreme instrumentality to extreme unavailability, but, in any case, law is the exercise of regulation in the name of emancipation. Particularly in Hobbes and Locke, in the last instance civil laws derive their universality and legitimacy from their correspondence with the natural laws. The weaknesses, the passions, the self-interest of human beings require that the natural laws be sustained by civil laws. Hobbes, Locke and Rousseau anticipate, each one in his own way, the antinomy between the universality of this legal-political paradigm and the particularistic life-world in which it will be implemented, a society increasingly dominated by capitalism, by class divisions, and by extreme inequalities. The "solutions" for this antinomy that the three of them offer are very different. Rousseau confronts it frontally by refusing to separate freedom and equality, and by delegitimating social differences based on property. Hobbes suppresses or hides the antinomy by reducing all individuals to a position of extreme and equal powerlessness vis-à-vis the sovereign. Finally, Locke accommodates the antinomy, not by exerting himself in trying to be consistent, but rather by justifying both the universality of the legal-political order and the inequalities of property.

None of the founders' approaches is reductionistic in itself, but we can easily identify in each one of them the seeds of possible reductionisms. In the last instance, the tension between regulation and emancipation that runs through this powerful intellectual constellation is experienced by the founders of modern political thought as an anxiety of justification. They see themselves entrusted with the task of justifying the new social and political order that is emerging under their eyes, but they anticipate and indeed witness the fact that the new order has both a bright side of unprecedented promises and a dark side of irreversible excesses and deficits. The anxiety of justification lies, on the one hand, in their not being prepared to justify what they consider morally wrong, and, on the other hand, in their knowing that, in order to be successfully rescued from its reactionary enemies, the new order must be justified as a whole.

II. LEGAL-POLITICAL MODERNITY AND CAPITALISM

In the legal and political field, the "test of reality" for the paradigm of modernity takes place in the nineteenth century. This is also the period in which capitalism becomes the dominant mode of production in core countries, and the bourgeoisie emerges as the hegemonic class. From then on, the paradigm of modernity is tied up with the development of capitalism. Following the tradition that originated in Hilferding and was developed by Offe and others, I distinguish three periods in this development.[70] The first period, the period of liberal capitalism, covers the whole nineteenth century, though the last three decades have a transitional char-

acter; the second period, the period of organized capitalism, begins at the end of the century and reaches full development in the interwar period and in the two decades after World War II; finally, the third period, the period of disorganized capitalism, begins at the end of the 1960s and is still with us.

It is not my purpose here to give a full description of each period, but rather to mention those characteristics that will enable me to trace the trajectory of the paradigm of modernity throughout the three periods. My argument is that the first period already showed that the sociocultural project of modernity was too ambitious and internally contradictory. The second period fulfilled some of the promises of modernity, but failed to fulfill others, while trying, by a politics of hegemony, to minimize the extent of its failures and to make them socially and symbolically invisible. The third period represents the consciousness of a threefold predicament: first, whatever modernity has accomplished is not irreversible and, to the extent that it is not excessive, it must be defended, but it can only be successfully defended in postmodern terms; second, the as yet unfulfilled promises will remain unfulfilled as long as the paradigm of modernity dominates; and finally, this deficit, besides being irreversible, is much greater than the second period was ready to admit.

As we move from the first to the second and third period, the paradigm of modernity, as if animated by a laser beam effect, narrows the scope of its accomplishments at the same time that it intensifies them. Such a process of concentration/exclusion is also the process by which the tension between regulation and emancipation, which was constitutive of modern legal thinking, is gradually replaced by an automatic utopia of legal regulation entrusted to the state.

The First Period

The constitutional state of the nineteenth century is heir to the rich intellectual tradition described in the previous section. As it took possession of its inheritance, however, the state minimized its ethical claims and political promises so as to make them fit the regulatory needs of liberal capitalism. The sovereignty of the people became the sovereignty of the nation-state in an interstate system; the general will became the majority rule (found among ruling elites) and the *raison d'état*; law was uncoupled from ethical principles and became a docile instrument of institutional building and market regulation; the good order became order *tout court*.

This complex historical process cannot be fully described here. In general, ignited by the contradictions of capitalist development, the tension between regulation and emancipation exploded. The liberal state then sought in this chaos the justification for the design and implementation of a mode of regulation that would reduce emancipation to either anomie or Utopia, and thus, in either case, to social dangerousness. The social delegitimation of emancipation occurs more or less at the same time in law and politics, on the one hand, and in science and technology, on the other: the sociopolitical chaos and the epistemic chaos referred to in Chapter One (ignorance from the point of view of knowledge-as-regulation) are thus intimately interconnected. Indeed, the isomorphism between the legal-political and epistemological transformations is underlined by the common philosophy that gradually permeates them: positivism.[71] The rise of positivism in the epistemology of modern science and the rise of legal positivism in law and jurisprudence belong together as ideological constructs aimed at reducing societal progress to capitalist development and at immunizing rationality against contamination by all noncapitalistic irrationalities, be they God, religion or tradition, be they metaphysics or ethics, be they emancipatory ideals or utopias. Thus trimmed, modern rationality can then be made to coexist with and indeed accommodate the irrationalities of capitalism, provided that they are presented as empirical (legal or scientific) regularities.

Positivism is the philosophical consciousness of knowledge-as-regulation. It is a philosophy of order over chaos both in nature and society. Order is regularity, logically or empirically established through systematic knowledge. Systematic knowledge and systematic regulation are the two sides of order. Systematic knowledge is the knowledge of observed regularities. Systematic regulation is the effective control over the production and reproduction of observed regularities. Together they constitute the positivistic effective order, an order based on certainty, predictability and control. Positivistic order is thus Janus-faced: it is both an observed regularity and a regularized way of producing regularity. This explains why it can be found both in nature and society. Through positivistic order, nature can be made predictable and certain so that it will be controlled, while society will be controlled so that it can be made predictable and certain. This captures the difference but also the symbioticism between scientific laws and positive laws. Modern science and modern law are the two sides of knowledge-as-regulation.

While the science of nature is of nature as it is, the science of society is both of society as it is and as it ought to be. In society, the gap between the *is* and the *ought* can be determined scientifically (the laws of societal evolution) but, for the time being at least, it cannot be filled by the sole recourse to science. It requires an act of will which, however, can be scientifically constructed. Modern law is such an act of will, and the agent of such will is the modern state: Max Weber's legal-rational state.

Scientism and statism are the main features of modern rational law as it developed in the West during the nineteenth century. According to Max Weber, only the Occident knows the state in the modern sense, with a professional administration, specialized officialdom and law based on the concept of citizenship. Only the Occident knows rational law, made by jurists and rationally interpreted and applied.[72] Unlike other forms of political domination, such as the charismatic and the traditional ones, the formal legal domination is not simply associated with a certain form of law; it is constituted by rational law. "It is, however, with respect to 'legal domination' that the form of law is not merely a characteristic of a particular type of political order, but is its central and determining feature."[73] Legal rational domination is legitimated by the rational system of state-enacted universal and abstract laws, presiding over a bureaucratic and professional administration, and applied throughout society through a form of justice based on logical formal rationality.

Weber's *Rechtsstaat* internalizes the Janus-faced positivistic order, and appears both as a person and as a machine. The metaphor of the state as a person, as an

artificial person, is used by Hobbes and later on by Hegel.[74] The state conceived as a monumental, self-originating and self-empowered subject is the agent of supreme political will. On the other hand, the state is conceived, in Poggi's words, "as a machine whose parts all mesh, a machine propelled by energy and directed by information flowing from a single center in the service of a plurality of coordinated tasks."[75] The same mechanical metaphor underlies the constitutional image of "checks and balances," and is also present in the conception of the state as an artificial contrivance, functionally specific and exercising its power in a depersonalized way. Indeed, the two metaphors, person and machine, are not as far apart as one might think, since, in the nineteenth century, the archetypal mechanicism of modern science converted the human being, the person, into a living machine (an organism). But, though twins, the two metaphors remain autonomous, and this autonomy turns out to be quite expedient for capitalism. The state-as-a-person guarantees both the externality of the state vis-à-vis the relations of production and the credibility of the state's pursuit of common interest, while the state-as-a-machine guarantees the certainty and predictability of its operations, and above all, its regulation of market relations.

Both the will of the state-as-a-person and the energy of the state-as-a-machine were provided by formal rational law. As the law was reduced to the state, the state was reduced to law. The two processes were, however, not symmetrical. On the one hand, the state reserved for itself a certain excess vis-à-vis its own law, as witness the areas dominated by the *raison d'état* in which the legal boundaries were quite fuzzy. On the other hand, and more importantly, while the reduction of law to the state turned the law into an instrument of state, the reduction of the state to law did not turn the state into an instrument of law: law lost autonomy and power in the same political process in which the state gained them.

As the law became statist it became also scientific. On the continent, the most striking scientificization of modern law was brought about, in the field of private law, by the German *Pandektenwissenshaft* already mentioned. The scientific legal formalism of the German Civil Code of 1900 is its most accomplished achievement. But the *Pandekten* was simply the extreme manifestation of a much broader process of scientificization of the modern law, aimed at transforming law into an effective instrument of official social engineering. As law became fully politicized as state law, it became a scientific law as well, thereby contributing, by its scientific reconstruction of the state, to the depoliticization of the state itself: political domination was legitimated as technolegal domination. The hyperpoliticization of law was the precondition for the depoliticization of the state. Inside the state, law became autonomous, as part of the same historical process by which, inside capitalism, the state became external to the social relations of production. This play of mirrors is indeed constitutive of the modern legal field. The division between public and private law creates a real difference between the law that binds citizens to the state, and the law that is at the disposal of and is disposable by citizens in the relations among themselves. This real difference is obtained through the illusion that private law is not state law.

Thus conceived, the technical instrumentality of autonomous state law is virtually infinite in its scope. The functional specificity of the modern state does not refer to the number of functions the state may perform, but rather to the mode of

performance. The minimal state of liberal constitutionalism contains in itself both the seeds of the benevolent welfare state of civilized capitalism and the seeds of the fascist state of barbarian capitalism, as well as those of the Stalinist state of antisocialist socialism. None of these state forms could do away with the positivity of law as a potentially inexhaustible instrument of domination, no matter how perverted and caricatured such positivity became in the last two state forms mentioned. In sum, scientism and statism fashioned law in such a way as to convert it into an automatic utopia of social regulation, indeed isomorphic with the automatic utopia of technology engendered by modern science. This means that, though modernity conceived of law as a second-best (and probably provisional) principle of social ordering when compared to science, once reduced to the capitalist state, law itself became a scientific artifact of the first order. From then on the automatic utopianism of technology grew together with the automatic utopianism of legal engineering, and indeed, the two processes have been feeding one another ever since.

It should be borne in mind, however, that the nineteenth century was not just the century of positivism in both science and law. It was also the century that furthered the romantic idealism carried over from the eighteenth century, and that gave rise to the great realist novel; it was the century that saw the emergence of socialism as a political movement, and of a myriad of utopian projects and practices. In their own very different ways, all these phenomena are powerful denunciations of the narrowing down of the scope of modernity, as well as acts of resistance against the stigmatization of emancipation and against the abandonment of the promise of a radical rationalization of personal and collective life. The socialist and utopian projects and movements pointed toward a full and harmonious realization of the ideals of equality and freedom, of autonomy and solidarity, of regulation and emancipation (even if the world contemplated is the phalanstery). On the other hand, romantic idealism represented—though in an elitist form—the utopian vision of the full achievement of subjectivity developed by the Enlightenment. In yearning for the totality, for the origins and for the vernacular, against the atomism, the alienation and instrumentalism of modern life, and by placing aesthetics and poetry at the center of social integration, romantic idealism epitomized the denunciation of and the resistance to the tendency toward exclusion and concentration in the social implementation of the paradigm of modernity.[76] On the other hand, the great realist novel bears witness to a class—the bourgeoisie—that fails to seize the historical opportunity of becoming a universal class and bringing about a radical social transformation,[77] the same opportunity that Hegel had envisaged for the bureaucracy and Marx for the working class. All in all, the period of liberal capitalism sets in motion the social process of exclusion and concentration of modernity, but as the contradictions of the paradigm explode without mediation, it is still possible in this period to formulate and activate, even if in a deviant or marginal form, the radical and globalizing vocation of the paradigm, thereby refusing the idea of irreversibility of deficit in the fulfillment of its promises.

Under these circumstances, the statism and scientism of law—which broadly correspond to the prominence of the principles of the state and of the market at the expense of the principle of the community—developed in a social field full of ten-

sions. On the one hand, the reduction of Rousseau's sovereign community to a dualistic structure of abstract entities—state and civil society; civil society and the individual—was a convulsive one. On the other hand, the principle of the state and the principle of the market often collided over the demarcation of areas of complicity/complementarity and areas of exclusive rule, in a kind of game of complicity and antagonism that has lasted to the present day, and which from the very beginning has been played most prominently in the legal field. If the principle of the market is boosted by the first wave of industrialization, the expansion of commercial cities, the rise of new industrial cities and the expansion of industrial colonialism, the development of the principle of the state is far more ambiguous, mainly because of the contradictory claims of laissez-faire. As Dicey perceptively noted, laissez-faire involved both the idea of the minimal state and the idea of the maximal state.[78] This explains why, above and beyond moments of collision, the two principles belong together and feed one another. The correctness of Durkheim's prediction that the growth of market relations would involve the growth of state relations became apparent in the two subsequent periods of capitalism.[79]

The Second Period

Concerning the core countries of the world system, it may be said, in general, that the period of organized capitalism was truly a positive age in the Comtean sense. Just as a reasonable and mature adult should do (according to Comte), it started out by distinguishing, in the paradigm of modernity, between those promises that can be fulfilled in a dynamic capitalist society and those that cannot. It then concentrated on the former and tried, through socialization and cultural inculcation, to eliminate the latter from the symbolic universe of social and cultural praxis. In other words, this period began by acknowledging the idea that the deficit of unfulfilled promises is both inevitable and irreversible, and then went on to eliminate the idea of deficit itself. In the legal field, this period was characterized by an unprecedented hypertrophy of the automatic utopia of social engineering through law, in the name of which the statism and scientism of law were redefined.

In the first period, the period of liberal capitalism, the autonomy and the universality of law were premised upon the unity of the state, and the unity of the state was premised upon the distinction between state and civil society and upon the functional specificity of the state. Civil society and, above all, market relations were conceived of as self-regulated, and it was up to the state to guarantee such autonomy. The most crucial instrument in the autonomization of market society was private law, complemented by fiscal, monetary and financial measures, aimed in most cases at correcting the imbalances resulting from market failures or imperfections. This latter objective included tasks as diverse as granting land to railway companies; servicing the national debt; protectionism; granting of patents; repression or regulation of trade unions; colonial policies. It also included the laws on the duration of the working day, so brilliantly analyzed by Marx in Chapter Ten of Volume One of *Das Kapital*, and the laws dealing with "the social question," that is, with the set of problems seen as resulting from rapid and autonomous industrialization, such as mass poverty, prostitution, criminality, alcoholism, epidemics, illiteracy, strikes, unemployment, socialist subversion and so on.[80]

This apparently exceptional and unobtrusive intervention of the liberal state brought with itself the potential for "legal absolutism," a potential, however, that operated very unevenly, resulting in an unequal development of the legal field. Private law, the privileged focus of legal scientism and legal positivism, was conceived of as disengaged from any political or social content, and capable of freeing social relations from *ancien régime* bonds and hierarchies. Its objective was to secure the reproduction of a competitive self-balancing market through negative freedoms, expedient but suppletive legal frameworks, and mechanisms for the enforceability of contracts. Administrative law organized the everyday distance of the state apparatuses vis-à-vis the citizenry, and concentrated on the mechanisms that reproduce that distance, mainly through demarcation of clear boundaries for state action. Finally, constitutional law was based on the assumption that individual freedoms had a prelegal origin, and that the state could only guarantee them through narrowly defined, certain and predictable political and administrative processes, which it was the task of constitutional law to establish.[81]

At the end of the nineteenth century, this legal and political landscape changed dramatically, mainly as a consequence of the increasing hold of the capitalist mode of production, not only on economic relations, but also on social life in its entirety.[82] The concentration and centralization of industrial, commercial and financial capital, the proliferation of cartels and monopolies, and the separation of legal ownership from economic control bore witness to the dramatic expansion of the principle of the market, at the same time that they put an end to the competitive self-balancing market. Moreover, the extension of suffrage and the organization of sectorial (often, antagonistic) social interests in employers' organizations and trade unions made the classist nature of political domination all the more visible. As class practices became more easily translated into class politics, trade unions and working-class parties entered the political arena, which until then had been exclusively occupied by oligarchic parties and bourgeois organizations.

Under these conditions, the state/civil society distinction was to undergo a gradual process of transformation, starting with successive dislocations of the demarcation line, and ending by blurring the distinction altogether, with momentous consequences in the legal field that continue to unfold to this day. Two different but convergent developments fueled this process. The first development was the need for public economic management in light of the growing complexity of capitalist economy. On the one hand, the externalities of economic growth based on the increasing inequality among economic agents (not only between capital and labor but also within capital) led to the need for state intervention, mainly through state regulation of the markets. On the other hand, and apparently in contradiction with this, the growth of large corporations, the control that they were able to exert over the economic processes, and the political leverage they thereby accumulated, resulted in the increasing availability of the capitalist state to further corporate interests, from the construction of infrastructures and the socialization of the costs of industrialization, to the production of educational systems designed to meet the big firms' needs for skills and qualifications, full employment policies, and research and development funds.

Though, in its end result, this process contributed to the dislocation of the line demarcating state and civil society, and indeed to the gradual obliteration of the

distinction, there were different social forces involved in it (most prominently the bourgeoisie and the working class) that were mobilized for often contradictory objectives. In addition, the state itself developed an autonomous interest in intervention as a way of securing the reproduction of the big bureaucratic agencies that had been created. Finding its justification in exceptional conditions (the devastation of World War II), in the recognition of market failures (insufficient profitability or investment potential) or in a new political principle (social democracy), such autonomous state intervention sometimes included the nationalization of private industries or even the creation of state enterprises. Poggi is right when he says that "what makes the trend toward the obliteration of the state/civil society line so powerful is precisely the fact that several phenomena, distinctive and even otherwise mutually contradictory, are at one in causing it."[83]

The second development was the political recognition of the social externalities of capitalist development—the politicization of some dimensions of the "social question"—as a result of the expansion of the political process brought about by the enfranchisement of workers and the emergence of strong working-class parties. The politicization of social inequality involved the state intervention both in the wage relation and in collective consumption: job security, minimum wages, workers' compensations, pension funds, public education, health and housing, space management, and so on. These measures were so sweeping and emerged from such an unprecedented social pact (between capital and labor under the aegis of the state) that they led to a new political form: the welfare state. The economic management (Keynesianism) and the social management (welfare state) of capitalism in core countries led to an overall mode of social regulation that has been called fordism.[84] This mode of regulation is based on the convergence of the development of the principle of the state and the principle of the market, so that conflicts between the two principles are seen as provisional, selective and indeed institutionalized. As a result, the emergence of conflict or reciprocal distanciation in one social field is easily combined with a new complicity and reciprocal approximation in another social field.

It can be argued that, in the period of organized capitalism, not only were the principles of the market and of the state strengthened; but so was the principle of the community. The argument here is that the distributive nature of the welfare policies are based on an idea of solidarity that resembles the horizontal political obligation, citizen to citizen, which I have considered to be the nucleus of the *principle* of the community. However, it must be borne in mind that the principle of the community was not recognized in its own terms. Its recognition was, rather, derivative, for it occurred under the aegis of the principle of the state and as part and parcel of the expansion of the principle of the state. As a matter of fact, under the welfare state, the horizontal political obligation was transformed into a double vertical obligation between taxpayers and the state and between welfare clients and the state. In this way, the exercise of autonomy presupposed by the principle of community was transformed into an exercise of dependence on the state.

Nonetheless, it is unquestionable that, in the period of organized capitalism, the legal-political dimension of the paradigm of modernity was thoroughly redefined to accommodate antagonistic claims and to balance interests that in the previous period were considered unbalanceable. Accommodating and balancing implied also reducing emancipatory ideals to realistic proportions and principled options to contingent compromises. Solidarity, justice and equality could be made compatible with autonomy, identity and freedom, provided that each set of apparently incompatible values were brought down to what was realistically accomplishable in a capitalist society. By this process, two "realistic" promises could be fulfilled to a greater or smaller extent in the core countries in this period: the promise of a fairer distribution of material resources and the promise of a greater democratization of the political system. The fulfillment of the first promise was made compatible with the continuation of a class society, while the fulfillment of the second promise was made compatible with the continuation of a bourgeois liberal politics. Through a politics of hegemony it was then possible to convert this particular form of compatibility, which was, in fact, one among many others, into the only legitimate one, even, perhaps, the only imaginable one. Such conversion meant the triumph of reform over revolution, and surfaced both in the gradual but steady marginalization of the Communist parties and in the transformation of the socialist parties into social democratic parties.

The impact of the new mode of social regulation on law was tremendous. The intensified monitoring of the economic and social processes by the state led to the development of new realms of law, such as economic law, labor law and social law, which shared the feature of mixing together public law and private law characteristics, thus further blurring the line of demarcation between state and civil society. But the impact of these transformations on the traditional realms of law were also important, most notably on constitutional law and administrative law. Constitutions evolved from being the design of a bureaucratic state and a narrowly defined political system to becoming the arena of intermediation and negotiation among conflicting social interests and social values. The most characteristic outcome of this evolution was the constitutional recognition of socioeconomic rights, the third generation of human rights, according to T. H. Marshall.[85] Convergently, the administrative law changed from being concerned with the organization of controlled subjection to an authoritarian bureaucratic state to being concerned with the organization of resource allocation and technological regulation undertaken by a facilitating state.

In general, as the state became more and more engaged in the economic and social processes—a transformation that liberal theorists considered to entail the "loss of the autonomy of the state"—state law became less formalistic and less abstract; the weighing and compromising among conflicting interests became more evident (the "materialization" of the law); and the social and political integrative function of distributive law became a main focus of political debate (the "politicization" of the law). Actually, neither the "materialization" nor the "politicization" were new phenomena. They were so perceived only because they now reached far broader social groups and fields of practice than those affected by law in the period of liberal capitalism. The changes were nonetheless enormous. Once law evolved from setting external boundaries on social practice to tooling social practice from the inside, the instrumentality of law was radically intensified. Only then could state law make credible the automatic utopia of legal engineering announced in the first period. The increasing complexity of social

subsystems, and the accrued need for social coordination and integration among them, called for a potentially infinite legal field whereby the excesses and deficits of economic and social development would be, if not eliminated, at least reduced to manageable proportions.

This legal utopia[86] symbolized, above all, a new conception of social chaos and, symmetrical with it, a new conception of order. In the period of liberal capitalism, social relations, and particularly market relations, were conceived as largely self-regulating and hence far from chaotic. As we saw above, chaotic tendencies were observed only at their fringes, and only here was there room for legal boundary setting. In this period, social chaos appeared in the form of the social question; because the political system was too restrictive to allow for the full politicization of the social question, state law was unable to address it except in a very limited way.

For the reasons mentioned above, the situation changed drastically in the second period. The political, social and economic production of chaos became much more visible, represented in wars and imperialism, global crises and predatory practices, gross social inequalities and ostentatious consumption, social rebellion and anomie, social discrimination and waste of resources and so on. The expansion of democratic rule brought about by the working-class parties allowed for a fuller politicization of the chaotic "disfunctions" than ever before. Once chaos entered the political field, it was miniaturized to the size at which legal control could operate efficiently. The legal utopia could then reproduce itself on the condition that the "miniaturizing effect" itself would be kept out of sight through ideological inculcation.

The profound changes in state interventionism and legal instrumentality that took place in the second period had an equally profound impact on the state itself and on its law. An intervention of the state is always an intervention in the state, and the same is true of law. I will mention briefly some of the reflective changes in the legal field. The most decisive ones can be captured in the transformations that occurred both in the statism and the scientism of state law. The epistemological "initial condition" for the effective operation of law as state law in capitalist societies is the unity of the state, its functional specificity and its clear separation from the civil society. As I have noted, this initial condition suffered a profound erosion in the second period; the juridification of social practice was both a product and an agent of such an erosion. The state/law equation was destabilized and, as a consequence, the statism of law became problematic; it became a variable, rather than an inherent feature. In some respects, law became less statist. As the state became a political resource for wider social groups and classes, the transclassism and autonomy of the state became a credible ideology. However, though the state operated through law, the autonomy of the state did not carry with it the autonomy of law-as-state-law. On the contrary, as law became embedded in the social practices it sought to regulate or to constitute, it distanced itself from the state: alongside the use of law by the state there emerged the possibility of law being used in nonstate contexts and even against the state. The strange recoupling of politics and ethics that occurred in this period, in however selective a form, allowed for the reemergence of a social perception of law as natural law, although a natural law *derived from* positive law and emerging at the same time that the

preconstituted, prepolitical freedoms and self-regulations of the first period were swept away by an unprecedented juridification of social life.

From a different perspective, however, law became more statist than ever. The juridification of social practice meant the imposition of relatively homogeneous state legal frameworks, categories and interactions upon the most diverse and heterogeneous social fields (family, community life, workplace, public sphere, socialization processes, health, education and so on). The manipulability of state law presupposed the malleability of the social fields to be legally manipulated. When social practice failed to validate this presupposition, the result was what Habermas calls the "colonization of the life world," that is to say, the destruction of social relations without adequate legal functional equivalents.[87] Whenever that occurred, the legal benevolence of the welfare state became a qualified human good, qualified, that is, by the fact that it could destroy the eventually benevolent dimensions of the social relations to be regulated without guaranteeing the sustainability of the state-legal benevolence, in view of the latter's dependence on the ever-changing reproduction needs of capital.

The uneven development of the statism of state law took place in a political context characterized by such an intense legal activism that it led to that supreme ideology of modern bureaucratic rule: legal and institutional fetishism. Nevertheless, and in apparent contradiction to this, the overuse of law was coupled with the loss, rather than with the increment, of the centrality of law as the source of legitimation for the state. While the liberal state legitimized itself through the formal-legal rationality of its operation, the welfare state sought its legitimacy in the kind of economic development and form of sociability it saw itself promoting. Law was downgraded from a principle of state legitimacy to an instrument of state legitimacy. The seeds of the trivialization of law were thereby being sown.

The transformations in the statism of state law were coupled with convergent transformations in the scientism of state law. The epistemological initial condition for the scientistic reproduction of state law is the relative stability of norms and facts, and particularly of the norm/fact dualism. The erosion of this condition was inevitable in light of the dynamism of capitalist societies in this century and of the central role played by the state. As the state involves itself more and more in the economic and social processes, and as the latter become more complex, differentiated and systemic, the universal, abstract formal law yields to contextual, particularistic, ad hoc law. In some areas in which the technological component of legal regulation is paramount, legal rule becomes expertise rule, with norms *and* facts interpenetrating each other to the point of becoming indistinguishable.[88] Moreover, in the most dynamic and strategic areas of state intervention, the general conditions of state action, to the extent that they can be provided by abstract laws, are almost irrelevant. The implementing institutions need, above all, wide powers of discretion, that is, of recognized capacity to manipulate both norms and facts as they see fit, given the ever-changing social fields and their regulatory needs. Particularly in the field of economic law, there is much room for negotiable legality, an interstitial and ephemeral legality in which the norm/fact dualism collapses altogether. Finally, the areas in which the dualism holds may become so complex that the conventional legal implementation can only operationalize the dualism after it has drastically reduced the ambit of norms and the ambit of facts

to be considered. This is particularly the case when the consequences of technological action are involved (toxic emissions, radiation leeks, Chernobyl, Bophal, deforestation). In such cases, the legally relevant chain of consequences tends to be a ludicrous miniature of the real chain of consequences; as a result, the normative claims of the people affected are accordingly miniaturized.

Throughout the century and in very different ways (*Interessenjurisprudenz*, sociological jurisprudence, neo-jusnaturalism, legal realism, legal responsiveness, legal self-reflexiveness, legal autopoiesis, and so on), legal science has been trying to render a scientific account of such transformations in the legal field. In the third period it has become apparent how all these attempts have failed.

The Third Period

Since the early seventies, the core countries have witnessed a considerable degradation of the fordist mode of regulation coupled with a multifaceted crisis of the welfare state.[89] The changes have been so widely perceived that it is legitimate to speak of a new period, the period of disorganized capitalism. This designation is ambiguous and misleading. It may imply that core capitalism is not organized in the current period. This is far from true. The opposite claim can actually be made that capitalism is today more organized than ever. By disorganized capitalism is meant, first, that the specific forms of organization typical of the second period are gradually being dismantled or reconstituted at a much lower level of coherence; and second, that, precisely because this process is underway, the dismantling of previous organizational forms is much more visible than the profile of the new forms that will eventually replace them. A sign that capitalism is today better organized than ever is the fact that it has gotten hold of social life in its entirety, and has managed to neutralize its traditional enemies (the socialist movement, working-class activism, noncommodified social relations) or benefit from their internal disaggregation. In any case, such organization is still very opaque, and whatever parts of it become visible seem rather provisional, as if merely preparing the way for the institutions, the rules and the processes that will constitute the new mode of regulation. In this very specific sense, it is legitimate to designate our time as a time of disorganized capitalism, a period of transition from one regime of capitalist accumulation to another or, as suggested below, as a period of a much broader transition from one societal paradigm to another.

Basically, in this period the two "realistic" promises that to a certain extent were fulfilled in the core countries of the world system in the second period—the promise of a fairer distribution of social benefits and the promise of a stable and relatively democratic political system—have not been sustained, and indeed are being eroded in many ways (increasing social inequalities, alarming growth of poverty, emergence of "interior Third Worlds," reduction of scope and of resources in the field of social welfare, ideological delegitimation of the facilitative state, new devices of social exclusion and authoritarianism disguised as promoters of autonomy and freedom, "pathologies" of participation and of representation in the political process, new populism and clientelism in politics, and so on). Furthermore, the two political paradigms of social transformation that were available at the beginning of the second period—revolution and reform—appear

to be equally exhausted. The revolutionary paradigm that was rejected in core countries soon after World War I appears to be now undergoing an irreversible final crisis in the peripheral and semiperipheral countries where it was adopted, in very different ways, particularly after World War II. The reformist paradigm, which originally aimed at a socialist social transformation, and gradually settled for the far less ambitious goal of a social democratization of capitalism, was hegemonic in core countries in the second period, but has lost steam in the last two or three decades, and is indeed undergoing as severe a crisis as the social and political forms it promoted (fordism and the welfare state).

The most decisive transformations of the third period seem to be occurring under the aegis of the principle of the market, which appears to be more hegemonic than ever within the pillar of modern regulation, as it generates a surplus of meaning that overflows the principle of the state and the principle of the community, and tends to colonize them to a far greater extent than in the two previous periods. The dramatic growth of the world markets, coupled with the emergence of worldwide systems of production and transnational economic agents, undermines the capacity of the state to regulate the market at the national level. The industrialization of the Third World, the expansion of international subcontracting and franchising, and the ruralization of industry have together contributed to destroying the spatial configuration of production and reproduction in the central countries. While the local endogenous dynamics—often based on complex mixes of agriculture and industry, family production and industrial production—link together, without the intermediation of the national space, the local and the global spaces of the economy, the traditional industrial regions are decharacterized and deindustrialized and, in their place, locality reemerges as a strategic productive factor. The extensive expansion of the market runs parallel to its intensive expansion, as witness the culture ideology of consumerism, with its increasing differentiation of products and particularization of tastes and consequent increase of number of choices, as well as to the increasing commodification of information and mass communication that allows for virtually infinite opportunities for the expanded reproduction of capital.[90]

The principle of the state is also undergoing sweeping changes. The ideology and practice of neoliberalism, combined with the transnational operations of corporations and international agencies, have led to a relative decentering of the nation-state as an actor in the world system. As I will try to show in Chapter Four, this is a very complex process full of contradictory developments, but in general it can be said that the state seems to be about to lose its status as a privileged unit of analysis and of social practice. This relative decentering of the state in core countries has had a decisive impact on welfare policies. Deregulation, privatization, cost-sharing, marketization, community revival are some of the names of a diversified set of state policies with the convergent goal of reducing the state's involvement in social welfare. Because in most countries the degradation of the social performance of the state has not brought about a significant reduction of the bureaucratic weight of the state, the growing weakness and inefficiency of the state appear combined with the growing authoritarianism of a myriad of often ill-integrated bureaucracies, each one exerting its own microdespotism vis-à-vis increasingly powerless, politically incompetent citizens.

On a world scale, the interstate system is also undergoing important changes. The relative decentering of the state, though a general phenomenon, has very different implications in the core, semiperipheral and peripheral states. In a context of growing inequality between the North and the South, the peripheral and semiperipheral states are more and more reduced—both as victims and as partners—to the task of fulfilling the requirements of transnational, industrial and financial capital as these, in turn, are formulated by international organizations controlled by the core states. Such requirements, often packaged in strange mixtures of economic liberalism and human rights protection, erode the already fragile social component of the state to such an extent that the countries in question experience a crisis of the welfare state in discourse and practice, so to speak, without ever having had a welfare state in proper sense.

The always-unfinished principle of the community has, as a result of these changes, receded into greater unfinishedness. In the period of organized capitalism, the conversion of the horizontal political obligation (citizen to citizen), which is characteristic of the principle of the community, into a double vertical political obligation (taxpayer to state; welfare client to state) was the product of a complex political process in which class practices and class politics played a decisive role. In the third period, the combined changes in the principle of the state and the principle of the market have significantly curtailed or decharacterized class practices and class politics. The trend towards a more precarious (some say, flexible) wage relation has been both a cause and an effect of the decline of corporatistic mechanisms (labor laws, industrial courts, collective bargaining, indirect salaries) and of the organizations that mobilized them, mainly trade unions, whose membership has steadily declined. But the class practices and politics have also been affected by significant changes in class structures. The national and transnational segmentation of the labor markets, the increased internal differentiation of the industrial working class, the rise of structural unemployment and underemployment, the expansion of the informal sector both in the core and in the periphery and semiperiphery, the dramatic expansion of the service class, the diffusion of a culture ideology of consumerism even among classes or countries where such ideology can hardly be translated into some practice of consumption, all these factors combined have contributed to decharacterize class practices or to prevent their translation into class politics. As a result, traditional working-class parties have smoothed out the ideological content of their programs and turned into catchall parties. The sweeping political transformation of Eastern Europe and the breaking up of the Soviet Union have contributed to "naturalizing" capitalism and capitalist exploitation, in their most liberal versions to the detriment of their social democratic versions.

Though all these developments have further eroded the conditions upon which the horizontal solidarity called for by the principle of the community might be exercised, it is worth noting that this principle has, in recent decades, undergone a kind of revival, not in the state-centered derivative form typical of the second period, but in a new and apparently more autonomous form. This has been a rather ambiguous process covering a wide range of ideological landscapes. On the conservative side, the idea of pushing back the state has basically meant privatization of social welfare, thus creating new fields for capital valorization. But it has also meant a call for the revival of the *Gemeinshaft*, of the traditional, communal networks of mutual help, reciprocity and solidarity as a way of restoring the collective autonomy that has been destroyed or deemed anachronistic by the state provision of individual safety nets in the period of organized capitalism. On the progressive side, the focus is on the idea that the welfare state, even if it is the most benevolent political form of capitalism, cannot assume the monopoly of welfare provision needed by society. While some currents put the emphasis on the failures of the welfare state[91]—monstrous bureaucracies, market-unchecked inefficiency, rampant corruption, new authoritarianism and social control over dependent citizens, opaque and sometimes unjust solidarity—other currents stress the financial unsustainability of the welfare state, given the paradox that the welfare tasks are most needed in periods (of higher unemployment, for instance) in which the resources are least available (lower tax returns). Both currents, however, coincide in recognizing the limits of the welfare state and hence in calling for a new welfare society.[92] The call is, thus, not backward-looking, to a past that probably never was, but rather forward-looking, to the creation of a third sector, between the state and the market, aimed at organizing socially useful production and reproduction (welfare) through social movements and nongovernmental organizations (NGOs) in the name of the new solidarity inspired by the new risks uninsurable by the market or by the postinterventionist state. But even in the most progressive proposals, unacknowledged conservative elements are recurrently smuggled in (for instance, in proposals for a new socialist welfare society it is often forgotten that most of the socially useful work tends to fall on women).

I will now proceed to analyze the impact of these changes on the statism and scientism of law. Since the changes are as much underway as their impact on the legal field, the analysis is necessarily provisional. Indeed, the transitional nature of the current times creates a specific opacity that reflects itself in the analytical debates, for example, by the interference of false debates within real debates.

One of the most sophisticated and consistent debates centers around the critique of the juridification of the social world brought about in the second period of capitalist development. The critique rests on the following general arguments. With the interventionist state (the welfare state) the political instrumentalization of law was promoted to the utmost, thereby reaching its limits, which are also the limits of the welfare state. Such limits signal disfunctions, incongruences, counterproductive results and unintended consequences that surface in the legal field in many different ways. In the first place, they surface as manifestations of the "colonization" of society: by subjecting contextualized and concrete life histories and ways of life to abstract bureaucratization and monetarization, legal regulation destroys the organic dynamics and the internal patterns of self-production and self-reproduction of the different social spheres (economy, family, education and so forth). Though aiming at social integration, it promotes social disintegration, and in this lies, according to Habermas, the dilemmatic structure of the welfare state.[93] Secondly, such disfunctions surface as the "materialization" of law: the other side of the overlegalization of society is the oversocialization of law; while expanding and deepening its regulatory grip on society, law "is 'captured' by politics or by the regulated subsystems, it is 'politicized,' 'economicized,' 'pedagogized' etc. with the result that the self-production of its normative elements

becomes overstrained."[94] Finally, the disfunctions result in legal ineffectiveness: to the extent that there is a discrepancy between the internal logic and self-production patterns of law and those of the other spheres of social life to be regulated by law, it is likely or indeed certain that legal regulation will be ineffective or counterproductive.

The specific explanations for these three main limits of legal regulation—what Teubner designates as the "regulatory trilemma"[95]—vary widely, as do the legal policy recommendations that derive from them. But, in general, the proposed solutions go in the direction of conceiving colonization, materialization and ineffectiveness as outer limits within which new, more strict and more restricted boundaries for legal regulation must be defined, so that law will operate effectively and autonomously, without decharacterizing itself or the social spheres it regulates. The solutions are variously formulated: proceduralization of law;[96] from regulation to constitution;[97] law as a relational program or reflexive law;[98] law as critical discussion;[99] from law as medium to law as institution.[100] All of them point to a minimal material orientation as characteristic of a postinstrumental law. The broadest and most articulated formulation within this research program is the conception of law as an autopoietic system.[101] While previous societies were organized according to principles of segmentation or of hierarchy, modern societies are organized according to a principle of functional differentiation. Rather than being structured by a center or a functionally dominant system, modern societies are constituted by a variety of subsystems (law, politics, economy, science, art, religion, and so on), all of them closed, autonomous, self-contained, self-referential and self-modifying, each one with its specific mode of operation and code. Structural correspondence among the subsystems is basically the chance result of blind coevolution, while functional interconnections emerging out of the coexistence of such subsystems in the same society are reduced to forms of "structural couplings." Law is one of such subsystems, a system of legal communications operating with its own binary code: legal/illegal. Law regulates only itself. Law is the environment of other social subsystems as the latter are the environment of the law. But whatever "vibrations" or "perturbations" any system may "produce" on any other system as a result of their functional interdependence or coexistence, they are irrelevant as long as they are not transformed into autopoietic responses or reactions.

As regards law, this radical Luhmanian version of autopoiesis has been relatively modified in recent years by Gunther Teubner.[102] Addressing one of the most controversial aspects of the theory, that of the interdependence among subsystems, Teubner proposes a modification of the idea of structural coupling.[103] This is not the place to provide a critical analysis of autopoiesis or of autopoietic law as revised by Teubner.[104] But I cannot help pointing out that it is somewhat surprising, after so many decades of extensive and rich research on the sociology of law, to hear Teubner ask, as major and controversial, a question that, seen in the legal-sociological tradition, is little less than a self-evident state of affairs: "Is not 'interdiscursivity' in law and society much more dense than mere transitory perturbations could ever produce? And do we not find in the coevolution of law and society significantly more elective affinities than the mere coexistence of structural drift would provide for?"[105]

Only as part of a broader program of proceduralization and reautonomization of law will the elaboration on the autopoietic nature of law be object of some critical attention in the following. To my mind, the debate on the proceduralization or reflexiveness of law is to a great extent a false debate. It starts from a conception of the autonomy of law in the liberal state—law as autonomous vis-à-vis the state—that is, in my view, utterly wrong. Indeed, the reduction of law to state law accomplished by the constitutional state in the nineteenth century changed the autonomy of law as autonomy vis-à-vis the state into autonomy inside the state. The autonomy of state law was thereby reduced to its operational specificity as an instrument of state action. The scientism of law as legal positivism was crucial in this process, in that it functioned as a mirror that both reflected and disguised the statism of law. Of course, the changes in state interventionism from the first to the second period had a decisive impact on the operational specificity of law. But, if anything, such changes revealed the adaptability of the legal field to the new conditions of social regulation, which should not be too surprising after all, if we bear in mind that the legal-political paradigm that allowed for legal absolutism and for the global juridification of social life, rather than being an invention of the period of organized capitalism, was indeed laid out in the period of liberal capitalism as the hidden agenda of the constitutional state.

As I tried to show above, the dramatic increase of state interventionism in the welfare state changed the conditions of modern law, both as *state* law and as *scientific* law, but these changes did not signal any general crisis of law in itself. The real crisis occurred in the social fields regulated by law (family, workplace, education, health and so on), when it became clear that the popular classes lacked the political leverage to guarantee the sustainability of the state welfare provisions. The crisis is therefore the crisis of a political form, the welfare state, and not the crisis of a legal form, the autonomous law. The latter had, indeed, disappeared much longer ago, with the consolidation of the modern state. As I will try to show below, modern law, as a much broader concept than modern state law, is certainly in crisis, but such a crisis does not derive from the overuse (compared to what?) of modern law by the state, but rather from the historical reduction of its autonomy and efficacy to the autonomy and efficacy of the state. Proceduralization or reflexiveness are therefore being given the Sisyphean task of devolving to modern state law what it never had.

The false debate lies in the assumption that the operational specificity of law is sufficiently "material" to warrant questioning state law without questioning the state. Of course, such *specificity* raises some *specific* operational problems (for example, justice delays and costs, police brutality, court and prison congestion, underfunded and understaffed legal services, law in books/law in action discrepancy and so on) but beyond the narrow—however important—"operational" level, such problems are not legal-technical problems; they are, rather, political problems. This is particularly evident in two of the limits of the juridification of social life pointed out by the proceduralists or autopoieticists: ineffectiveness and materialization (overstrain). To be sure, cognitive and organizational resources may be mobilized in alternative institutional strategies which, in view of their different technical quality, may either maximize or minimize the effectiveness of the legal regulation. But the regulatory horizon within which such technical options

operate is in no way technically or organizationally determined. It is a political artifact which changes with changes in the political process. The choice among alternative institutional designs is rarely made solely on technical grounds. Considerations about the amount of resources to be allocated or about the broader or narrower participatory elements in institutional development and in decision making tend to be paramount, and such considerations involve the political process as a whole. Therefore, it is hardly convincing to attribute the ineffectiveness of regulatory law to the fact that the latter "overreaches the limitations which are built into the regulatory process."[106] Such limitations do exist; but they are neither structural nor systemic, that is to say, in no way are they dictated by the self-referential organization of the regulating or regulated subsystem. They are strategic, and depend, above all, on political agency and on the availability of technical skills. Indeed, one of the major shortcomings of autopoiesis is its exclusive focus on social systems and its total neglect of agency and of the processes and conditions by which agents make a difference.[107]

It is generally recognized that the current wave of deregulation sweeping across the states and the interstate system is highly selective and that, accordingly, deregulation in one area is usually accompanied by reregulation in another area. In such a highly dynamic process the variations in self-referentiality are to be conceived, if at all, as *explananda* rather than as explanations. The political overdetermination of the levels of effectiveness of legal regulation is particularly visible in periods of rapid social and political transformation. As an illustration, I could refer to the wide variation in effectiveness of the new economic, social and labor laws enacted in the aftermath of the Portuguese revolution of 1974.[108] Though the laws remained basically the same in the following years, the pattern of their effectiveness changed in close relation with the changes in the social and political bloc supporting the economic and social reconstruction of postrevolutionary Portugal.

The political overdetermination of the limits of legal regulation applies both in the case of ineffectiveness of the law and in the case of materialization or overstrain of the law. But it applies in a different form. Ineffectiveness is both a legal and an extralegal phenomenon. What it says about law is meant to refer to what law does to the "world out there." The "world out there," be it grounded in a realistic or in a constructivistic epistemology, is always the other of law. On the contrary, materialization is a legal phenomenon. What it says about law is meant to refer to the internalization by law of the world out there. The symmetry of these two limits is, thus, only apparent. Ineffectiveness has a material extradiscursive existence which can be identified and then variously explained. On the contrary, materialization is an artifact of scientific legal discourse, a mental construction of jurists intended to describe and *at the same time* to explain what, in their view, is the major change of law from the first to the second period of capitalist development. In this case, the limit is a deficit engendered by an engendered excess (*over*politicization, *over*socialization). And as I have been arguing, this excess is but the normal condition of modern law once it was reduced to state law.[109] Why, then, conceive such a normal condition as an excess and not as a deficit? Because the subtext of materialization is a conservative or progressive critique of the welfare state as we know (or remember) it. While in the case of ineffectiveness, this critique is made and disguised by interpellating modern law as state law, in the case of materialization, such critique is made and disguised by interpellating modern law as scientific law.

The third limit to the juridification of social life—the colonization of the life-world, as conceptualized by Habermas—is not on an equal footing with the other two limits. While the debate on ineffectiveness and overstrain is for the most part a false debate, the debate on colonization brings forward the real issue raised, though in a mystified form, by the debate on proceduralism and postinterventionism. The real issue is the debate on the welfare state, on its political and social impact, its extent and its form, its development and its sustainability, in sum, its past and its future. The "colonization of the life-world" is one of the leftist critiques of the welfare state surveyed above.

It has mainly to do with the last two critiques of the welfare state mentioned by Pierson.[110] But neither these nor any of the other critiques can be reconstructed as implying a major role of the legal system in the crisis of the welfare state. It is true that the dominant pattern of welfare provision—bureaucratically organized, based on the dependence-raising clientization of citizens as welfare recipients, geared toward monetarization of social relations and consumeristic practices—was brought about by an institutional constellation in which the legal system played a nuclear role. But it is equally true that, under the conditions of the modern capitalist state, had a different pattern been adopted—participatory, self-reliance-maximizing, solidaristic and geared toward mutualistic socially useful production of goods and services—the legal system would have played an equally nuclear role, no matter how dramatically different the operational and organizational legal schemes might have been. The key question is, of course, whether such a pattern of welfare provision could ever be politically or economically viable under capitalism. If so—as an outrageously hypothetical exercise—modern state law would reveal all its regulatory plasticity (which is the other side of its lack of autonomy vis-à-vis the state) and adapt to the alternative project of *Vergesellschaftung* (societalization).

In sum, what is at stake in the overlegalization of social life or, as I prefer, in the legal utopia of social engineering through law, is a political evaluation of a specific state form, the welfare state, that emerged in the postwar period in a small minority of countries, the core countries of the world system; thus, the crisis of the regulatory law says relatively little about the sweeping changes in law, economics and politics that are occurring in the world system as a whole in the current period of transition between regimes of accumulation or, more broadly, as suggested in the following section, between societal paradigms.

What the crisis of the regulatory law says, though in a mystified form, is nonetheless important. It says that, once at the service of the regulatory needs of the constitutional liberal state and of hegemonic capitalism, modern law, thereby reduced to scientific, state law, has gradually eliminated the tension between regulation and emancipation that originally constituted it. In this long historical process I have distinguished three main periods, each one of them representing a different pattern of relations between regulation and emancipation. In the first period, emancipation was sacrificed to the regulatory needs of the states and largely confined to antisystemic movements. In the second period, state regulation

in central countries tried to integrate such antisystemic emancipatory projects as long as they could be made compatible with capitalist social production and reproduction; far from being a genuine synthesis between regulation and emancipation, this meant an outright subordination of the emancipatory projects to the regulatory ones. In the third period, this false synthesis has evolved into the reciprocal disintegration of both regulation and emancipation; far from benefiting from the disintegration of regulation, emancipation, transformed in the previous period into the double of regulation, cannot but disintegrate as well. Ultimately, the crisis concerns the reconstructive management of the excesses and deficits of capitalist societies, which, from the nineteenth century on, was entrusted to modern science and, in a subordinate but equally important position, to modern law. The way out of this crisis is the most progressive task of our time. It involves the radical rethinking of both modern science and modern law, a rethinking so radical, indeed, that it may be conceived of as *unthinking*. The unthinking of modern science was carried out in Chapter One. The unthinking of modern law will be carried out in the next section and in most of the following chapters.

III. UNTHINKING LAW

From the Epistemological to the Societal Transition

The role played by law in the reconstructive management of the excesses and deficits of modern capitalist societies indicates that, though ideally and in the long run, the commands of law would be mere emanations of scientific findings on social order and social change, in the short run, law's coercive power and potential for normative integration would still be called upon to guarantee that the scientific management of society progressed as unencumbered as possible by social conflict and social rebellion. The paradigmatic crisis of modern science is thus likely to involve also the paradigmatic crisis of modern law.

This does not mean, however, that the conditions of the paradigmatic transition in science are the same, or equally visible, or operate in the same way as those of the paradigmatic transition in law. This is for two reasons. First, even if it is true that there is a certain epistemological complicity and a circulation of meaning between modern science and modern law as a result of the surrender of the moral-practical rationality of law and ethics to the cognitive-instrumental rationality of science, the isomorphism thus produced is limited in its range and derivative in its epistemological content. As a functionally differentiated social field, law has developed a specialized, professionalized self-knowledge that defines itself as scientific (legal science), thus giving rise to the disciplinary ideology I call legal scientism. Legal scientism, I argue, has developed in tandem with legal statism. Legal positivism is the most elaborate version of this double binding ideological development. But the double binding of legal scientism and legal statism also reveals the extent to which the epistemological isomorphism with modern science is limited by its pragmatic efficiency. Legal knowledge was made scientific to maximize the operationality of law as a nonscientific instrument of social control and social facilitation. This is why the Baconian knowledge/power sequence did not

apply in science as it did in law. While in science, knowledge would engender power, in law, from the nineteenth century on, (state) power would engender (professional) knowledge. This explains why legal positivism claimed an operational capability that could not be matched by the knowledge of social order and social change still to be developed by the barely emergent social sciences. This mismatch is indeed endemic to modern state legal culture. From legal positivism to autopoiesis, the ideological assumption has always been that law should ignore, as irrelevant, the social scientific knowledge of society, and upon such ignorance should build an epistemological claim of its own ("pure law," "self-referential law," "epistemic subjectivity of law").

Here lies the second reason why the theoretical conditions of the paradigmatic transition in modern science do not apply in the same way in the field of law. Since the epistemological claims of law are derivative and, indeed, based on a deficit of scientific knowledge about society, the theoretical conditions of legal knowledge are subordinated to the social conditions of legal power and, in a sense, must be deduced from the latter. The autonomy, universality and generality of the law are premised upon their embeddedness in a concrete, particular state, whose interests they serve, be they conceived of as autonomous or as class-bound, as general or as particularistic.

But if, for these reasons, law is relatively opaque as to the theoretical conditions of the current paradigmatic transition, it may prove to be particularly revealing of its social and political conditions. Moreover, what modern law may reveal of the paradigmatic transition is also likely to reveal the marginality rather than the centrality of law in such a transition. If a paradigmatic transition is, by its very nature, an ample and engaging conversation of humankind, one of its critical aspects may very well be how marginal law has become, in such a conversation, both as a voice and as a topic.

I argued in Chapter One that one of the major difficulties of the debate on the paradigmatic transition lies in the epistemological status of the knowledge that feeds the debate. This is particularly obvious when the debate is about the epistemological conditions of such transition themselves, as dealt with in Chapter One. Since the formulation of the debate tends to owe more to the outgoing paradigm than to the incoming one, what we say in the debate tends to be less "transitional" than what we say about the debate. This discrepancy creates opacity and frustration. A similar though less dilemmatic difficulty tends to develop once the debate is about the social and political conditions of the paradigmatic transition. To begin with, the identification of such conditions is a product of a form of scientific knowledge that is being fundamentally questioned itself. I am speaking of sociology, economics and political science, the three main social sciences that emerged in the nineteenth century with the aim of uncovering the laws of orderly social change. As Immanuel Wallerstein has recently emphasized, the social construction of these sciences represented the triumph of liberal ideology for which the centerpiece of social process was the careful delimitation of three spheres of activity: those related to the market (economics), those related to the state (political science), and those related to all activities not immediately related either to the state or to the market, that is, personal life, everyday life, family, church, community, crime, and so on (sociology).[111] Since they were developed to consolidate the

then-unproblematic hegemony of the paradigm of modernity, these sciences were not likely to provide, either as an epistemological project or as a social project, reliable guidance in the analysis of processes of social transformation that admittedly will transcend the boundaries of modernity. It is thus wise to follow Wallerstein's advice, which urges us to unthink the social sciences.[112] In Chapter One I outlined a possible intellectual utopia (the emergent paradigm) that might guide us in such an unthinking. The same must be done in relation to law. But before undertaking such a task, the social and political conditions of the paradigmatic transition must be carefully considered.

I have argued that the final crisis of modernity is more visible as an epistemological crisis (a crisis of modern science) than as a societal crisis (a crisis of world capitalism). The historically contingent coupling of modernity with capitalism underlies the four main readings of social transformation in our time. According to the first reading, capitalism and liberalism have triumphed and their triumph means the highest possible realization of modernity (the end of history *à la* Fukuyama; centrist social democracy). According to the second reading, modernity is an as yet incomplete project and there is in it the intellectual and political potential to conceive and bring about a noncapitalist future (Habermas, probably Jameson, conventional Western Marxism, leftist social democracy). According to the third reading, modernity has collapsed at the feet of capitalism, whose sociocultural reproduction and expansion will assume, from now on, a postmodern form (conservative postmodernism, Daniel Bell, Lyotard, Baudrillard, Vatimo, Lipovetski). Finally, according to the fourth reading, modernity is collapsing as an epistemological and cultural project and such a collapse opens up a range of possible futures for society, a noncapitalist, eco-socialist future being one of them (oppositional postmodernism). My contention is that the last reading captures the perspectives for social transformation at the end of the century better than any other. The emancipatory postmodern knowledge that I have been calling for aims at unveiling, inventing or promoting the progressive alternatives that such a transformation may entail. It is an intellectual utopia that makes a political utopia possible.[113]

It is not my purpose to outline here in detail the terms of the possible transition between social paradigms. It is usually believed that paradigmatic transitions last for a long time, several decades, often more than a century. This was the case of the scientific revolution or of the transition from "feudalism" to capitalism. Such transitions occur when the internal contradictions of the dominant paradigm cannot be managed with recourse to the mechanisms for conflict management and structural adjustment developed by the paradigm in question. In normal times, such internal contradictions manifest themselves as excesses and deficits, and the tensions, the crises and the conflicts ensuing therefrom are resolved by the intellectual, institutional and organizational resources of the paradigm. When this ceases to occur, the cumulative effect of unresolved excesses and deficits engenders a global delegitimation of the adjustment resources, and the internal contradictions become socially visible and are eventually converted into topics of social and political struggle. When the internal contradictions become part of purposive social struggle they lose their structural rigidity, and the type of determinism that the paradigm has generated is drastically attenuated. That is why paradigmatic

transitions, once set in motion, are indeterminate, move towards uncertain outcomes and open up to alternative futures. That is why they also expand the "free will" enormously, that is to say, the capacity for social innovation and transformation.[114] Moreover, such active social consciousness is reinforced by the fact that in periods of paradigmatic transition, similarly to what occurs in Prigogine's periods of bifurcation, small changes may produce large systemic fluctuations (contrary to what occurs in normal, subparadigmatic times or crisis, in which big changes usually produce very small systemic fluctuations).

The time of paradigmatic transition is a highly contested time, mainly because it comprises multiple temporalities. To begin with, since paradigmatic conflicts (internal contradictions) coexist with subparadigmatic ones (excesses and deficits), the transition in itself is an inherently contested phenomenon. The temporal framework of those for whom there are only subparadigmatic conflicts is by force narrower than that of those for whom such conflicts are surface manifestations of an underlying paradigmatic conflict. Even those who agree that there is a paradigmatic transition may disagree as to the identification of the outgoing paradigm or as to the nature, the duration and the direction of the transition to come. Moreover, because the secular trends, which are the temporality of transition, have to be reduced, in the process of consciousness-raising, to the time of the human lifecycle, if the paradigmatic struggles are to be efficacious, it may be necessary to conceptualize such struggles as paradigmatic struggles (internal contradictions) but to conduct them as if they were subparadigmatic (excesses and deficits). The paradigmatic struggle is thus a utopia whose efficacy may lie in the intellectual and political resources it provides to the subparadigmatic struggles. In my view, this accounts for the opacity but also for the vibrancy, for the misunderstandings but also for unexpected convergences, that characterize *ab ovo* the paradigmatic transition, both as an intellectual and as a societal and political enterprise.

I subscribe to a much broader conception of the paradigmatic transition. According to it, the transition we are undergoing is not only (or not so much) between narrowly defined modes of production but between forms of sociability in the widest sense, including economic, social, political and cultural dimensions. The intertwining of the sociocultural project of modernity with capitalist development in the nineteenth century conferred on capitalism a social and cultural thickness that reached far beyond the economic relations of production. This fact was somewhat overlooked by Marx and, for that reason, his vision of the paradigmatic transition shares with liberalism more than he would ever be prepared to admit. Marx shared with liberalism:[115] the belief in the liberating potential of modern science; the dualism nature/society that underlies modern science and the epistemological claims grounded therein; the idea of a linear evolutionary process that will finally come to an end (though for Marx the end was still to come), beyond capitalism or industrial society (Spencer), or positive age (Comte) or organic solidarity (Durkheim); the idea of progress, even though discontinuous (through revolutions); the belief in continuous technological development and infinite growth; the idea of capitalism as a progressive civilizing factor, no matter how brutal the oppression of the colonies and the destruction of nature might have been. In the broader perspective I am putting forward, the period of paradigmatic transition we are undergoing started with the epistemological collapse of

modern science, and will eventually call into question all the preceding views. For this reason it will entail a civilizational transformation. Though owing much to Marxism, this conception of the paradigmatic transition considers the conventional Marxist transition as subparadigmatic in the end.

I submit, therefore, that the paradigmatic discussion of modern law, together with that of modern science, will highlight the terms and possible directions of the transition toward a new societal paradigm. In the following I will enumerate the main topics of such a discussion, which will be elaborated upon in the following chapters.

The State or the World System?

The confluence of the promises of modernity with the virtualities of capitalist development brought about by liberalism was made possible by conceiving of social transformation as an *ensemble* of national processes, occurring in national societies, and promoted or controlled by nation-states. The nationalization of social change and the symmetry between society and state were as basic to the social sciences emerging in the nineteenth century as to the changes affecting modern law around the same time.

Today, it begins to be widely accepted that this conception of social transformation misrepresented the dynamics of capitalist development in fundamental ways. The unprecedented intensification of transnational interactions in the last two decades has strengthened the alternative conception put forward by historians and social scientists, such as Fernand Braudel and Immanuel Wallerstein, for whom the national societies had to be understood as parts of a much larger historical system whose internal division of labor and internal dynamics accounted for the social transformation identified at the level of national societies. I. Wallerstein, in particular, has convincingly argued that we live in a world economy, the modern capitalist world system, which emerged around 1500 and which, by its inner logic, expanded to cover the entire globe, absorbing in the process all existing "minisystems" and "world empires." By the late nineteenth century—at the time of the climax of nationalist visions of society—there existed, for the first time ever, only one historical system on the globe.[116]

Once the world system becomes the privileged unit of analysis, the understanding of its global logic, development and crises is crucial to understanding local manifestations as they occur throughout the interstate system. For instance, the welfare state—as much as its crisis—is one of such manifestations, and one of its most striking features, usually neglected in nation-state centered analysis, is that this political form developed in a tiny portion of the interstate system and within a relatively short time-band (the cyclical rhythm). Assuming that the world system is the privileged unit of modern historical development and, hence, the privileged unit of analysis, the debate on the paradigmatic transition must take place at the level of the world system. This means, on the one hand, that the paradigmatic crisis is unfolding without being much affected by national solutions for its local manifestations; on the other, that any of the possible outcomes of the transition will be generated at the level of the world system. Herein lies the first topic of a paradigmatic debate on law: the absorption of modern law in the modern state was a contingent historical process which, like any other historical process, had a beginning and will have an end.

The constitutional state of the nineteenth century was conceived as the perfect machine of social engineering. Its formal, mechanical and artificial constitution endowed it with a strength and a plasticity never before obtained by any previous political entity. The strength was both external and internal; exercised externally by military and economic strength against foreign states and competitors in the worldwide accumulation of capital; exercised internally, basically by law, against the internal enemies of normal and orderly social change. The plasticity derived from virtually unlimited institutional and legal manipulability, and lay in the state's capacity to adjudicate between both normal and abnormal means and normal and abnormal ends of social change. These striking capabilities converted the state into the natural unit—homogeneous spaciality and homogeneous temporality—of social change and social intelligibility. This naturalization of the state entailed the naturalization of modern law as state law.

The conception of the world system as the space-time of historical capitalism helps to unveil the ideological and pragmatic strategies underlying these twin processes of naturalization of the state and its law. The constitutional state of the nineteenth century existed in an interstate system in which the effective sovereignty was a function of the position of each particular state in the hierarchically structured interstate system. Thus, both the strength and the plasticity of the state were variables rather than structural features. While core countries tended to be externally and internally strong but externally rigid and internally plastic, peripheral countries tended to be both externally and internally weak but externally plastic and internally rigid. This meant that democracy, which combined internal and external strength with internal plasticity, was unevenly distributed throughout the world system. Between tendentially democratic core countries and tendentially undemocratic peripheral countries, there existed a layer of semiperipheral states, inherently unstable, bouncing between democracy and dictatorship. As the specific naturalization of the state varied across the world system, so did the naturalization of law. Moreover, they varied not only across space but also across time, as is illustrated by the political and legal metamorphoses occurring in core countries in the three periods of capitalist development referred to above.

In reality the state never obtained the monopoly of law. The working of the world system, operating at the suprastate level, developed its own systemic law, which was superimposed on the national law of the individual states across the world system. Moreover, side by side with this suprastate law, different forms of infrastate law continued to exist or indeed emerged anew: local legal orders with or without a territorial base, governing specific clusters of social relations and interacting with the state law in different ways, even if denied the quality of law by the state law. This state of affairs had, thus, a double face. On the one hand, different legal orders circulated in society, articulating in different ways with the state law. The latter, however important and even central, was just one of the legal orders integrating the legal constellation of bourgeois societies. The specific constellations varied across the world system, and they were very different in core and in peripheral states, but they always included the combinations of state,

suprastate and infrastate legal orders. On the other hand, the existence of such multilayered legal constellations was denied by a political fiat that attributed the quality of law exclusively to state law.

Both facts (the sociological existence of a constellation of laws and its denial by political fiat) are equally crucial to understanding the relative operational specificity, strength and plasticity of modern state law in different national societies, as I hope to show in the following chapters. At this point in the argument, let it be merely emphasized that the unthinking of law in a period of paradigmatic transition must start by uncoupling law from the state. Such an uncoupling will serve a twofold purpose. First, it will show that not only was law never monopolized by the state, but also that the state never let itself be monopolized by its own law. Much beyond the doctrine of *raison d'état*, the constitutional state operated on a routine basis by both legal and illegal means. The specific mix of legality and illegality (as defined by the state's own legal order) varied across the different areas of state action; it varied, above all, according to the position of the state in the world system. Second, the arbitrary denial of the plurality of legal orders eliminated or drastically reduced the emancipatory potential of modern law. All these points will be elaborated upon in the following chapters.

Two cautionary notes are, however, in order at this point. First, the uncoupling of law from the nation-state is a necessary, not a sufficient condition for the recuperation of the emancipatory potential of law. Indeed, as important as the uncoupling as such is the direction that it will take. Second, such an uncoupling is relative, that is, it does not collide with the recognition of the centrality of state law in the interstate system. What it questions is the symbolic expansion of such centrality since the nineteenth century: from representing the central role played by state law in a constellation of different legal orders to representing the exclusive role of state law in a monolithic legal order exclusively ruled by the state. This symbolic expansion has been so widely and deeply accepted by legal-political knowledge and by common sense that questioning it amounts to an unthinking of law.

As in the discussion of the other topics or dimensions of the paradigmatic transition of modern law, the unthinking of law will be initially guided by the suppressed or marginalized traditions of modernity. This will require some archeological excavation. In the case of the uncoupling of law from the state I will draw on the transnational legal culture of modernity dealt with in the first sections of this chapter.

Recoupling Law with the Polity?

The legal-political uncoupling of the national state from the international society was historically concomitant with the uncoupling of the state, as a separate entity, from the whole of national society. Indeed, as the nation was made symmetrical with the state, the state—converted into a formal power structure separated from both the ruler and the ruled—was uncoupled from the nation. This ideological and political transformation can be traced back to the difference between the Romantic and the Hegelian conception of the nation. While the Romantic conception of the nation as a "grand historic individuality" ignored the practical imperatives that the attempt to make nation and state coincide would impose on

the idea of nation,[117] in Hegel the nation is the "rational" counterpart of the state, the social basis of its legitimacy and strength. In order to be the basis for the empowerment of the state, the nation must be dispossessed of any power other than the power of the state *over* it. This dialectics of empowerment-disempowerment was congealed in the state/civil society dualism that was analytically reconstructed by the nineteenth-century social sciences.

Of course, the polar entities of this dualism were never congealed. For instance, there has been a debate on the precise boundaries of the civil society, on whether, for example, the economy was or was not part of the civil society.[118] On the other hand, as we have already seen, the state underwent profound changes from the period of liberal capitalism to the period of disorganized capitalism. Moreover, the terms of the distinction between state and civil society also suffered an evolution that has been analyzed by Keane in its four overlapping stages.[119] What was congealed and hidden was the matrix of the dualism, the idea that the two entities, though reciprocally externalized, belonged to each other and could not be thought of as separate entities—the civil society was the other of the state, and vice versa. In Chapter Six we will see how this dualism was the backbone of liberal political theory, and how it was also adopted by Marxism. To my mind, this dualism has no substance today beyond the fact that it is a widely accepted illusion. I will offer a conceptual alternative, but at this point I will limit myself to summarizing my argument briefly. From the perspective of the world system, this dualism was, from the beginning, a gross misrepresentation of political reality, particularly so in the postwar period, when most of the colonies became independent states. If in some (not all) core countries it could be reasonably argued that civil society had created its state, in the periphery (former colonies), and even in the semiperiphery, the opposite had actually occurred. In the latter case the civil society was thus an even more artificial entity than the state itself. The multiple social processes that were left out of a civil society, so narrowly defined (such as ethnic divisions, local cultures, legal pluralism and so on), were the gauge of the weakness of the peripheral and semiperipheral states in the world system. A political theory based on such a circumscribed part of the global historical process could not but serve the imperialistic hierarchies of the interstate system.

The state/civil society dichotomy obfuscated the nature of power relations in society, and, indeed, law contributed decisively to that effect. The conception of state power as the exclusive legal-political form of power did not imply that there were no other forms of power circulating in society, but it converted them into factic powers with no autonomous legal base and, in any case, without any political character. If one looks at the actual power relations of early nineteenth-century societies, the reduction of political power to state power is less than obvious. And yet, it allowed for the shifting of the global emancipatory promises of modernity to the promise of state democratization, and, for that reason, it was adopted as the only imaginable solution for the power struggles of the time. From then on, a more or less democratic state power could coexist with more or less despotic forms of social power without the democratic nature of the political system being thereby questioned. Similarly, the more or less democratic law of the state could coexist with more or less despotic forms of nonstate law without the democratic nature of the official legal system being thereby questioned.

The state/civil society dichotomy set in motion a dynamic relation between the two concepts that can be characterized, in general, as the relentless reciprocal absorption of one by the other. Marx saw very early on that civil society could reproduce itself in the form of the state, in this lying the capitalist nature of the state, but his reliance on the liberal conception of the state as an artificial contrivance prevented him from seeing that, conversely, the state could also reproduce itself in the form of civil society. Only much later did Gramsci identify this other side of the reciprocal absorption. Gramsci elaborated on this phenomenon through his concept of hegemony and, in particular, through the concept of polity or of the integral state (*lo stato integrale*), the combination of "civil society" and "political society," which encompassed for him the global political constellation of capitalist societies.[120] The reciprocal absorption entails two different processes—the reproduction of the civil society in the form of the state, and the reproduction of the state in the form of civil society. What, to my mind, characterizes the capitalist core state in the period of disorganized capitalism is its expansion in the form of civil society. Therefore, most of the recent proposals to empower the civil society are fundamentally flawed. To empower civil society as a process of disempowering the state amounts to forgetting that state and civil society are two faces of the same political constellation, that the state reaches far beyond its formal apparatuses, and finally that the political relations operating outside those formal apparatuses might indeed be more despotic than those operating inside them.

Once reduced to the legal dimension of the state, law was trapped from the beginning in this play of mirrors. Since the constitutional state was bound by law, the latter could be effectively used against the state, as was assumed by the conception of civil and political rights. To this extent, law represented the empowerment of civil society vis-à-vis the state. But, on the other hand, such exteriority of law vis-à-vis the state was indeed a state effect whose efficacy required that all the other legal orders circulating in society and really exterior to the state be denied existence. Moreover, the most fundamental distinction within state law, the one between private law and public law, was both the reflection and the subversion of the state/civil society dualism. Private law, though supposed to regulate social relations in the civil society according to the lawful interests of the parties, was as much an expression of state power as public law. In order to address the political dilemmas that thus prevent modern law from being unequivocally anchored in the polity (national, local and transnational polity), it is imperative to abandon the state/civil society framework, and to invent new analytical tools that permit us to address the global political constellation of contemporary capitalist societies without subterfuges and to develop more efficacious political strategies than those generated by the state/civil society dualism. This task will be undertaken in Chapter Six.

At this juncture, I just want to point out once again that the intellectual Utopia of unthinking conceptual orthodoxies, so deeply rooted in our political common sense, may gain from unveiling and reevaluating some cultural traditions of modernity, which were developed when the tension between regulation and emancipation was lively, and which were suppressed or subverted later on. The semantic history of the concept of the state may be very helpful in this respect.

Q. Skinner has eloquently shown that the concept of the state as an abstract entity, separated both from the ruler and the ruled, is the result of a long conceptual history that goes back to the reception of Roman law in the twelfth and thirteenth centuries.[121] The term state, *status*, meant originally a state of affairs, the condition of a realm or commonwealth. Concepts of classical origin, such as *status reipublicae* or *status civitatum*, were used throughout medieval Europe in advice books for magistrates and in the "mirrors for princes" literature as referring to the duties of magistrates to maintain their cities in a good or prosperous state (the *optimus status reipublicae*, as in Cicero or Seneca). The state is, then, the community or whole, the well-ordered political life. In the Renaissance republicanism of the Italian city-states, the state comes to be identified with the idea of self-government, Dante's *stato franco*, a state or condition of civil liberty.[122] The republican tradition is particularly relevant for our purposes, since the republican theorists, though they distinguish the state from those who control it, make no distinction between the powers of the state and the powers of its citizens.

Legal Utopia or Utopian Pragmatism?

The transformation of the modern idea of progress into the idea of infinite and ever expanding repetition of bourgeois society in the nineteenth century created what we could call a future dilemma: all futures were possible but all of them had to be contained in the same capitalist future. Both the social sciences and the law were called upon to solve this dilemma, and the slogans of "order and progress" and of "normal change" summarized the general thrust of the solutions to be found. The social sciences would discover the regularities and the causes of social transformation, and the law would transform them into effective legal regulations. However, because the social sciences were still to be developed, their logical priority had to yield to their pragmatic subordination to the unpostponable imperatives of social regulation. Halfway between regulatory knowledge (order) and regulatory ignorance (chaos), the state law was available both as an *ersatz* of science and as a preunderstanding of the scientific knowledge of society still to be developed. This double availability of the state law was at the roots of the latter's conversion into a utopia of its own. Paraphrasing Jacques Ellul, we could say that state law, as much as technology, ceased to advance towards anything, and it was, rather, pushed from behind, not tolerating any halt, and indeed making possible a large number of solutions for which there were no problems.[123]

This legal utopia was the engine behind normal change, the idea that social change was a continuous process proceeding by piecemeal and gradual transformations sanctioned by the state law, itself changing continuously, gradually and legally. Concerning its legal dimension, the social credibility of normal change lay in two factors. First, normal change covered a wide variety of legal transformations that were so diversified and fragmented that it was impossible to identify a general trend or a global direction. This opacity was the other side of the plasticity of the state law mentioned above. Second, the effectiveness of law could be not only of an instrumental but also of a symbolic nature.[124] This duality enabled state law to be a normal change of its own and relatively independent of the fate of the specific "normal" change it was intended to produce in social life. Thus,

eventual failures of the instrumental effectiveness of law could be compensated for, at least in part, by the symbolic effectiveness of law.

This legal construction of normal change entailed two major political implications. First, due to the opacity of the global direction, the same reformist policies could be reasonably defended by some social groups as anticapitalist policies and, by other groups, as capitalist policies. This had a decisive impact on the patterns of political mobilization, particularly in the core countries of the world system. For decades the labor movement fought for reforms that the hegemonic sectors within the movement considered as socialist, but that the power bloc considered as part of a minimax game whose end result would be the expansion of capitalism. The second implication was that this legal construction would suit the interstate system as a whole. Its global opacity and its operational plasticity equipped it to serve the most diverse accumulation and hegemonic strategies in the core as well as in the periphery and semiperiphery of the world system. Legal rules and institutions or even entire legal systems could be exported from core states to peripheral states. Such legal transplants were in some cases the result of colonial or postcolonial imposition and, in others, the result of voluntary or semivoluntary adoption. In still other cases, the modern (Western) law would share the official legal field with other local legal traditions, but, in any case, the new legality tended to become dominant in the interactions among state bureaucrats and among business people across the world system.

The expansion of this legal model of normal change throughout the world system was in itself an historical process, as complex, conflictual and nonlinear as any other historical process. While in core countries reformism (the political form of normal change) became hegemonic after World War I, in the periphery and semiperiphery it disputed with social revolution the hegemony over the political field throughout our century. In the sixties, the "Law and Development" or "Law and Modernization" "movement"[125]—imposed or "strongly recommended" to peripheral and semiperipheral states by the core states—highlighted the global scale of this dispute, an historical dispute that only in recent years, with the collapse of the Soviet Union, seems to have been decided—for the time being at least—in favor of reformism.

Curiously enough, this final victory of reformism throughout the world system seems to have occurred simultaneously with its apparently final crisis in core countries, as shown above in my analysis of the third period of capitalist development, the period of disorganized capitalism. This fact alone recommends that we analyse in greater detail this pattern of normal change based on a legal utopia managed by the national state. Table 1 shows the main features of this pattern. The state is conceived of as an ensemble of accumulation, hegemony and trust strategies. The last two are three-layered. Each strategy covers a specific social field, relies for that purpose on a certain form of knowledge, and is targeted at a specific type of subjectivity; in the process, certain legal fields are mobilized with the purpose of furthering some social values by activating specific dichotomic codes. Each strategy is supposed to contribute to normal change in its own way, and normal change is conceived of as a mixture of social repetition and social amelioration. Since this chart is, to a great extent, self-explanatory, I will confine myself to a few general comments.

Table 1 Pattern of Normal Change (State Strategies in the Interstate System)

Dimensions	*Social Field*	*Knowledge*	*Subjectivity*	*Legal Field*	*Social Value*	*Normal Change*	
Strategies						*Repetition*	*Amelioration*
Accumulation	competitive commodification of labor, products and services	science as a productive force	social class, primordial identities (gender, ethnicity)	contract/property law, economic law, labor law, immigration law, regulatory law	liberalism; code: market furthering/ market hindering	sustained accumulation	economic growth
Hegemony							
I	political participation and representation	science as a discourse of truth	citizenship	constitutional law; administrative law; political system law	democracy; code: democratic/ undemocratic	bourgeois rule	expansion of rights
II	social consumption		citizenship, consumership, masses	welfare law, regulatory law, labor law	welfarism, consumerism; code: fair/unfair	social peace	social equity
III	cultural consumption, mass information, mass communication and mass education		citizenship, consumership, masses	media law, education, and information law	literacy and loyalty; codes: loyal/disloyal	cultural conformism	knowledge distribution
Trust							
I	risks in international relations	science as a national resource	nationality	international law	nationalism; code: war/peace	national security; sovereignty	improving interstate position
II	risks in social relations; disputes, crimes, accidents		citizenship	criminal law, administration of justice, torts, contract law	legalism; codes: legal/illegal; fair/unfair; relevant/irrelevant	legal security; law and order	expanding and improving conflict resolution
III	risks in technological and environmental relations; disputes, crimes, accidents		nationality, citizenship	environmental law, torts, criminal law	expertism; code: safe/unsafe; foreseeable/ unforeseeable	expert security	increasing expertise

Though centered on the activities of the national states, this pattern is in fact a transnational pattern that, from the nineteenth century on, provided the logic for state action throughout the interstate system, no matter how "impurely" or selectively such logic may in practice have operated. State activity is a continuous flux of actions and nonactions, decisions and nondecisions, discourses and silences, and only at an aggregate level is it possible to identify the specific combination of strategies that presides over state activity at a given point in time. The combination varies from state to state and from period to period across the interstate system. In Marxist analyses of the state, the accumulation strategies and the hegemony strategies are usually the only ones mentioned. In my view, however, trust strategies are equally important and, I venture to say, nowadays tend to be the most stately and autonomous of all state strategies, those that allow the state, though in itself only a part of society, to act genuinely in the name of society as a whole and to hold the general responsibility for maintaining its integrity.[126] The centrality of trust strategies lies also in the fact that their competent deployment generates the institutional resources upon which depend the efficacy and credibility of both accumulation and hegemony strategies. Since no attention has been given to trust strategies, a brief comment on them is in order.

Niklas Luhmann[127] and Anthony Giddens[128] have recently drawn our attention to the nature and role of trust in modernity. According to Giddens, the dynamism of modernity derives from having separated time from space, thus dramatically changing the conditions under which time and space are organized so as to connect presence and absence. The time-space distanciation has led to the disembedding of social systems, or, in Giddens's words, to "the 'lifting out' of social relations from local contexts of interaction and their restructuring across indefinite spans of time-space."[129] Since the disembedding mechanisms tend to be translated into abstract systems, the consequences for the development of modern institutions are paramount. Among such abstract systems, Giddens sorts out the expert systems. Expert systems are disembedding mechanisms because they remove social relations from the immediacy of context. Since trust is always related to absence in time and space, modernity has dramatically changed the conditions of trust and trustworthiness. Trust is defined "as a confidence in the reliability of a person or system, regarding a given set of outcomes or events, where that confidence expresses a faith in the probity or love of another, or in the correctness of abstract principles (technical knowledge)."[130] Because modernity has replaced the concept of *fortuna* with the concept of risk, the context of trust has thereby expanded tremendously: it covers the risks and dangers of human action, from now on freed from divine injunction and endowed with a vastly increased transformative scope. Giddens concludes that "the nature of modern institutions is deeply bound up with the mechanisms of trust in abstract systems, especially trust in expert systems."[131]

In my view, through its legal system the modern state has become the central guarantor of mass needed trust in modern society. Moreover, state-produced trust reaches far beyond the expert systems into the immense variety of risk management situations as they develop out of social relations among strangers (individuals, groups, foreign states) or among estranged acquaintances or intimates. The more vast the scope of risk-engendering relations, the greater the dependence on state trust and state risk management. The trust in expert systems is premised upon the availability of the state to monitor their activities and to manage the risks connected with their failures or with the unintended consequences of their operations.

The combined deployment of accumulation, hegemony and trust strategies guarantees the reproduction of normal change. Normal change is a pattern of social transformation based on repetition and amelioration. These two dimensions are inextricably intertwined, as the sustainability of any of them depends on the other: there is no repetition without amelioration and there is no amelioration without repetition. The rhythm of change is determined by the unequal weight of repetition factors and amelioration factors, but, in order to be normal, social change must comprise both types of factors. This being so, normal change is paradoxical: to the extent that the prevailing conditions of any given social field are ameliorated, they do not repeat themselves, and vice versa. This paradox, far from being a paralyzing factor, is indeed the inexhaustible source of energy of normal change itself. To begin with, the fact that normal change is both fragmented and deprived of global direction allows for the same individual social process to be viewed by some social groups as repetition and by others as amelioration. On the other hand, the paradox of normal change allows for different temporalities to coexist within the processes of change. Since repetition does not exist without amelioration, and vice versa, the nature of the dominant temporalities is fully indeterminate. In the short run, both repetition trends and amelioration trends can be equally viewed as short-term phenomena or as short-term manifestations of long-term tendencies. Furthermore, only in the long run and retrospectively is it possible to evaluate which of the conflicting views was correct, and to determine whether the long-term trend leaned over to repetition or, inversely, to amelioration. Since the political debate, even when about the long-run trends, never takes place in the long run, the indeterminacy of the different temporalities reinforces the inevitability of normal change, thereby furthering its legitimacy.

This pattern of normal change is based on the following presuppositions: first, no matter how diverse its application from state to state, the pattern of normal change is the transnational political logic of the interstate system. Second, the national steering mechanisms developed and deployed by the state are available and are efficacious throughout the national territory, whose boundaries are also guaranteed by the state. Third, the financial capacity of the state to implement all of its strategies depends above all on the sustainability of economic growth, and hence on the success of the accumulation strategies. Fourth, human aspirations and the well-being of the people can be fulfilled or guaranteed by mass-produced products and services designed according to a commodity form, even if not distributed by commodity markets. Fifth, the risks and dangers whose management is the object of trust strategies occur relatively rarely, and are predominantly small-scale or medium-scale.

The analyses in the preceding sections of this chapter and in Chapter One show the extent to which these presuppositions are being fundamentally questioned in the current period of paradigmatic transition. In view of the increasing and seemingly irreversible polarization and inequality between the North and the South, this pattern of normal change has ceased to capture any of the significant transformations the world system is undergoing at the present time. Both in the core and in the

periphery of the world system the national steering mechanisms are being eroded in the face of the intensification of transnational transactions and interactions. The unsustainability, on a global scale, of commodified consumeristic social welfare, combined with the aggravation of social inequalities, the transformation of cultural values in a postmaterialist direction, and the increased social visibility of forms of oppression up until now kept hidden (oppression of women, children, cultural and ethnic identities, animals and nature) have all contributed to questioning, at a fundamental level, both the quality and the quantity of life engendered by normal change. In fact, normal change is increasingly found to be abnormal. Finally, as a consequence of the growing discrepancy between the capacity to act and the capacity to predict, the risks, particularly those related to high-consequence technological and environmental interventions, have increased dramatically, both in terms of scale and of frequency.

This unprecedented dimension of risk and danger has undermined the credibility of the trust provided by the state. On the one hand, some of the risks and dangers have been globalized; their control is far beyond the capabilities of individual states, and the interstate system was not, in any case, designed to compensate for the regulatory failures of individual states with enhanced, concerted international action. On the other hand, the increased social awareness of risks and dangers has shown the structural limitations of the legal mechanisms used by the state to manage them (criteria of standing, liability, relevant evidence, damages; inaccessible or else expensive, selective, disenchanted and slow court system, and so forth). The cumulative effect of these adjustment failures on the "mechanics" of normal change is enormous. They undermine the amelioration side of social change, thereby straining the equation repetition-amelioration to the point of collapse. Since repetition is not sustainable without amelioration, normal change turns into normal stagnation or normal decay. The already much-diminished tension between regulation (repetition) and emancipation (amelioration) suffers a double collapse: as the last shred of modern emancipation vanishes, modern regulation becomes unsustainable. It is thus by sheer inertia alone that the pattern of normal change seems to reach full hegemony today across the interstate system. A posthumous hegemony, so to speak.

A new paradigm of social transformation is therefore needed. Since normal change rejected revolution as a credible pattern of social transformation, a good starting point (and only a starting point) may be to reexamine the relations between modern law and revolution. While in the preceding section I called for the uncoupling of law from the state, I now call for the recoupling of law with revolution. The two procedures are, indeed, to be carried out in tandem, if the oppositional postmodern reconstruction of law and politics is to be achieved. As will be argued in the following chapters, the uncoupling of law and state may as likely lead to reactionary outcomes as to progressive ones. To strengthen the probability of the latter, the recoupling of law with revolution must also be done as a starting point. It may seem strange to call for the recoupling of law with revolution at a time in which revolution has been thrown into the dustbin of history. My argument is that revolution has been rejected not because it has ceased to be necessary, but because the dominant forms it has assumed since the nineteenth century have themselves betrayed the necessity of revolution. A glimpse at the injustices and oppressions in the world system suffices to conclude that the emancipatory agenda of revolution

is today more necessary than ever. The recoupling of law with revolution that I am calling for has to do with this agenda, not with the specific political forms of revolutionary movements in our century. As with the preceding topics of a paradigmatic discussion of law, the recoupling of law with revolution also requires some excavation into the suppressed or marginalized traditions of modernity.

We are so used to seeing law and revolution as antipodal and antagonistic concepts that the idea of approximating, let alone recoupling them, may sound little less than preposterous. As a matter of fact, the law-revolution polarity is a remarkably recent phenomenon. Harold Berman has forcefully argued that the mutual embeddedness of law and revolution has been at the roots of the modern Western legal tradition since the twelfth century. Berman sets out to correct what he calls "the ideological bias in favor of incremental change,"[132] which has dominated the study of the origins of the Western legal tradition and which, in his view, has blinded us to the first modern revolution. The first modern revolution, he argues, occurred within the Church of Rome between the eleventh and the twelfth centuries, and out of it emerged the first body of modern law, the canon law. Ever since then, violent revolutions have periodically transformed the historical legal tradition in profound ways, and sent it in new directions. The reason why this phenomenon has eluded us lies in the nature of law itself. Indeed, "a radical transformation of a legal system is a paradoxical thing since one of the fundamental purposes of law is to provide stability and continuity."[133] Whenever revolutionary legal change happens, something must be done to prevent it from happening again. So that the new law be firmly established, it will be considered to have changed not only in response to new circumstances, but also according to some historical pattern. This explains why "the myth of a return to an earlier time is, in fact, the hallmark of all the European revolutions."[134] Once established, the new, revolutionary law must be protected against the danger of another discontinuity; further changes must be confined to incremental changes.

The Western legal tradition has therefore been marked by recurrent revolutions out of which new systems of law have emerged which, once established, negate or minimize the occurrence or the impact of the previous revolution. By this process all the major discontinuities in the Western legal tradition remain within this tradition. According to Berman, the term revolution refers not only to the initial violent outbreak by which a new system is introduced, but also to the entire period required for that system to take root, a process that may last for more than one generation. Berman distinguishes six major or "total" revolutions, in the modern tradition: the Russian Revolution, the French Revolution, the American Revolution, the English Revolution (1640–1688), the Protestant Reformation (1517–1555) and the Papal Revolution (1075–1122). In all these revolutions, the fundamental changes in law were interlocked with fundamental changes in other spheres of social life, but in all cases the new law represented an effort to supersede the failure of the old law in responding adequately to changes that were taking place in society before the revolutionary outbreak. In his view, this failure to anticipate fundamental changes and to incorporate them in time is due to an inherent contradiction in the nature of the Western legal tradition: the contradiction between its two basic purposes, the purpose to preserve order and the purpose to do justice.[135]

This reconstruction of the modern law tradition, most elucidating in itself, leads Berman to a gloomy, apocalyptic and rather conservative diagnosis of our time. According to him, in the twentieth century we have been undergoing a revolution of a new kind, which indeed breaks in fundamental ways with the revolutionary tradition of the West. The overwhelming change in all fields of law, in contract and property law as well as in torts and criminal law, in private law as well as in public law, has overturned the complex relation between law and revolution in existence since the eleventh century. While in the past the revolutionary changes in law have always remained within the Western legal tradition, and have therefore been transcended by this tradition, today the opposite is occurring, as law becomes wholly subordinate to revolution. According to Berman, this amounts to nothing less than the global breakdown of the Western legal tradition. It is not difficult to see here a variation of the recent debates on the autonomy of law and legal autopoiesis. Indeed, the autonomy of law is a key prescriptive text in Berman's historical narrative, and so is the idea of a transcendent justice or natural law, swallowed up by the voracious legal instrumentalism of our century.

What must be retained from Berman's analysis is his emphasis on the complex, rich, and contradictory relation between law and revolution as the founding characteristic of modern law. To put it in my own conceptual framework, what the historical research undertaken by Berman demonstrates is the existence of a multisecular tension between regulation and emancipation as the driving force of modern law. What Berman fails to see is that this tension, which commenced in the twelfth century, collapsed, or was drastically reduced, not in the post-1914 period, as he suggests, but rather, after the French Revolution, when the liberal state started the historical process of reducing the proportions of modernity to the proportions of capitalism. The French Revolution was indeed the last revolution jointly accomplished by law and revolution, for it was conducted in the name of a law whose enormous regulatory potential could only come to life in boundary-transcending, emancipatory social practices. In this light, the Russian Revolution is not in continuity with the long modern law tradition, as Berman affirms, but rather, symbolizes its breakdown.

The pattern of normal change developed by the postrevolutionary state of the nineteenth century is not, in my view, just another example of the way the new revolutionary law tries to minimize the impact of the previous revolution and to defend itself against a future revolution; it is, rather, the final example. The immense organizational, political and cultural resources concentrated on the state create an unprecedented institutional contrivance capable of extricating law from revolution once and for all. As law became state law, revolution became lawless. Through its hegemonic strategies, the liberal state purports to convert normal change into the exhilarating beginning of the modern legal tradition, whereas, in fact, it accomplishes its final breakdown. From now on we will be living in a postrevolutionary period that, because self-declared as final, becomes also counterrevolutionary. From now on revolution will be totally subordinated to law, and not the opposite, as Berman believes. This explains why the Russian Revolution, rather than standing in continuity with the French Revolution, is "forced" to try a new beginning, a model of social transformation that totally subordinates law to revolution. If liberal political and legal theory had expelled revolution from the legal constellation, Marxism, particularly in its Marxist-Leninist version, expelled law from the revolutionary constellation. If it highlights the sharp contrast between liberalism and Marxism, this symmetrical opposition also betrays the underlying complicity between the two. In both liberalism and Marxism, the dialectical relation between law and revolution is lost. At the most, we might say, it stands frozen on one of its legs by political fiat. When Lenin, and later on Wyschinsky, say that "law is one category of the political," they are, in fact, doing nothing more than pushing the liberal conception of law to its utmost, since for both of them, as indeed for liberal theory, politics (and hence, law) is the realm of the state. It is not the Russian Revolution but rather the postrevolutionary state of the nineteenth century that brings the modern Western legal tradition to a collapse. The Russian Revolution is a symptom or an effect of that collapse, not its cause.

This preliminary excavation of legal modernity shows how deep we must dig (deeper than Marxism and liberalism) in order to unearth among the rubble the fragments of the modern dialectics of law and revolution we are heirs to.

CONCLUSION

In this chapter I have argued that the paradigmatic transition, whose epistemological foundations I analyzed in Chapter One, is a broad historical process that is unfolding in multiple social, political and cultural dimensions. Though most visible at the epistemological level—as a final crisis of modern science—it is as an historical process that the paradigmatic transition becomes a topic of utmost sociological relevance. I have also argued that modern law offers a strategic vantage point from which to assess the sociology of the transition, in view of its intimate articulation with modern science in the overall process of rationalization of social life promised by modernity. The task of rationalization, conceived as an dynamic and tense equilibrium between regulation and emancipation, was entrusted to science. The shortcomings of science (such as insufficient knowledge or unintended consequences of knowledge) were to be resolved in the future by a better science, and in the meantime by law. As a second-rate rationalizer of social life, law, in the form of state law, entered a period of infinite growth similar to the one desired for science and for social change in general. I have also argued that the dramatic intensification and accumulation of the negative consequences of this social paradigm have led us to believe that there is something inherently wrong with the form adopted by both science and law to maximize their efficacy in bringing about the convergence of sociocultural modernity with capitalism. In this process, the matrical tension between regulation and emancipation that was constitutive of both modern science and modern law was made to disappear, in different ways but with the same global outcome: the absorption of emancipation into regulation. In this chapter I tried to show how this came about in the case of modern law. After briefly reviewing the legal transformations that occurred in the three periods of capitalist development (liberal, organized and disorganized capitalism), I analyzed some of the recent debates on the "crisis of law," only to find them lacking in their ability to identify the real roots

of the contemporary discontent with law. To offer an alternative view, I then argued that the "crisis of law" is part of a much broader and deeper crisis of the hegemonic pattern of social transformation in course since the early nineteenth century: the pattern of so-called normal change. I briefly characterized this pattern and the central role played in it by state law as a legal utopia, and tried to show how and why the pattern of normal change is undergoing so deep a crisis that it cannot be solved by the adjustment mechanisms available within the parameters of normal change. I was then led to argue that we are entering a period of paradigmatic transition from modern sociability to a new postmodern sociability, whose profile is hardly visible or even predictable. A paradigmatic transition is a long process characterized by an "abnormal" suspension of social determinations, which gives rise to new dangers, risks and insecurities, but also enhanced opportunities for innovation, creativity and moral choice.

In a period of paradigmatic transition, old knowledge is a poor guide. We need a new knowledge instead. We need a science of turbulence, sensitive to the new intellectual and political demands for more realistic and efficacious utopias than those we have lived by in the recent past. The new constellation of meaning does not begin from scratch. It has much to gain from excavating into the past in search of suppressed or marginal intellectual and political traditions, whose authenticity emerges in a new light as their suppression and marginalization is "denaturalized" and even made arbitrary. Above all, the new knowledge is premised upon the unthinking of the old and still-hegemonic knowledge, the knowledge that will not admit the existence of the paradigmatic crisis before all progressive or hopeful solutions have been discarded or made impossible. Unthinking is epistemologically complex because it involves both thorough but not nihilistic destruction and discontinuous but not arbitrary reconstruction. Moreover, because undertaken in the wake of modern science, the destructive side of the unthinking must be disciplinary (law, each one of the social sciences), while its constructive side must be nondisciplinary: unthinking amounts to a new cultural synthesis. Finally, not all of the unthinking tasks can be undertaken at a paradigmatic level of inquiry. Some of them may involve detailed empirical analysis to be carried out in genuine but disloyal compliance with the old knowledge, that is to say, at a subparadigmatic level. The compliance will be genuine, because the research will be conducted according to the theoretical and technical rules of the old knowledge, but it will also be disloyal, because it will be conducted as if nothing new or intelligible could be thought or imagined beyond the old knowledge.

In this chapter I have selected three areas in which the unthinking of law seems most important and urgent: (1) national state versus world system; (2) state-civil society versus *lo stato integrale*; (3) legal utopia versus utopian pragmatism. These three topics were presented as dilemmas because they were indeed so perceived at the beginning of the nineteenth century. The constitutional state saw itself endowed with a powerful resource (the exclusive, unified and universal legal system) to confront such dilemmas efficiently, that is, in such a way as to guarantee the self-reproduction of the state itself. The first dilemma was confronted by the dualism national-law/international-law; the second dilemma was confronted by the dualism private-law/public-law; and the third dilemma was confronted by a pattern of normal change premised upon the infinite availability of law. I then

analyzed the structural flaws or occultations in these legal constructions. The first one omitted the fact that, in view of the nature of the interstate system, international law would inherently be of low "legal quality" when compared with national law. The second one neglected the fact that private law was as public as public law, thus making the dualism coincide in its collapse. Finally, the third legal construction was forgetful of the fact that, once isolated from revolution, law could "normalize" any type of transformation in any conceivable direction, including social stagnation and social decay.

In the effort to unthink law out of these dilemmas and out of the intellectual and political impasses they have led to, I engaged in some digging into modern tradition in search of alternative memories of the future. As far as the first dilemma goes, I found them in the multisecular transnational and local legal culture of modernity; as to the second dilemma, I found them in alternative conceptual traditions of the state, in particular in the Renaissance republican concept of the state as the overall well-being of self-governed society (*optimus status reipublicae*); finally, concerning the third dilemma, I found the alternative memories of the future in the mutual embeddedness of law and revolution in a long tradition of modernity abruptly interrupted after the French Revolution.

These excavations were no more than the beginning of the process of unthinking law. In the following chapters this process will be continued, both in its destructive and in its constructive aspects, and, needless to say, it will be continued after the last chapter by myself and, I hope, by others. The next three chapters (Part Two) will deal mainly with the first dilemma, that is to say, with the unthinking of the state and of state law as a unit of analysis. The following two chapters (Part Three) will deal mainly with the second dilemma, and will present an alternative to those theoretical constructions based on the state/civil society dualism. Finally, the last chapter (Part Four) will concentrate on the third dilemma so as to suggest new constellations of political meaning in which law and revolution cannot be considered separately.

The general thrust of this analytical trajectory is to recuperate for law and politics the same tension between regulation and emancipation that I tried to recuperate for science in the first chapter.