

Legal Realism, Critical Legal Studies, and Dworkin

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In this essay Andrew Altman, professor of philosophy at George Washington University, discusses the relationships among legal realists, Hart, Dworkin, and Critical Legal Studies. Beginning with a discussion of the realists' position and the ways Hart failed to answer the realists, Altman goes on to examine how Dworkin responds to the realist position. But, argues Altman, the CLS position cannot be easily met by Dworkin. Beginning with the vision of law as a "patchwork quilt" CLS offers two challenges to Dworkin. The first questions Dworkin's doctrine of a legal mistake; the other doubts his claim that although legal interpretation involves politics and morality it nonetheless provides a "restraint" on judges.

1

In contemporary Anglo-American legal philosophy, little attention has been paid to the work in legal theory carried out in this country during the first half of the century. Indeed, it would be only a slight exaggeration to say that legal theory prior to the publication of H. L. A. Hart's classic *The Concept of Law*, is generally treated as belonging to a kind of prehistorical legal philosophy. Contemporary authors feel it unnecessary to grapple with the theories belonging to this prehistory, as it is widely viewed that such theories have been transcended by the work of Hart and those who followed in his wake.

Nowhere is this attitude toward the legal theories of the first half of the century more evident than in the contemporary treatment of American legal realism. Attention to the realist movement is, to say the least, scanty.

A principal part of the explanation for why most current legal philosophers seem to accept this message lies, I believe, in the apparently cogent critique of realism offered by Hart in *The Concept of Law*. Hart's theory absorbed many of the claims associated with the realist movement. At the same time, he repudiated what were called the "excesses" of realism by invoking a well worked out conception of law as a system of rules. Among those so-called excesses was the idea that the law was shot through with indeterminacy, so that in almost any dispute which reached the stage of litigation the law failed

to dictate any specific outcome. Hart's theoretical strategy was to admit that there was a significant amount of indeterminacy in the law, but to argue that such indeterminacy necessarily occupied a peripheral zone in the work of the legal system. Hart thus domesticated the realist indeterminacy thesis. Subsequently, under the influence of Ronald Dworkin, mainstream legal philosophy became preoccupied with the issue of whether or not Hart had himself exaggerated the zone of legal indeterminacy. The more radical indeterminacy of the realist was consigned to the category of realist excesses which everyone now recognized and repudiated.

In this article, I shall begin by examining the realist indeterminacy thesis. Hart's criticisms of realism, I argue, do not come to grips with the most radical source of legal indeterminacy posited by realism. . . . Dworkin's jurisprudence will then be analyzed as an effort to provide a superior response to realism than that offered by Hart. In assessing the Dworkinian approach, I shall be especially concerned to explore its relations to the only contemporary school of legal thought which has tried to utilize and expand upon the realist indeterminacy analysis, namely, the Critical Legal Studies movement (hereafter referred to as CLS). Although it will prove impossible to resolve the basic disagreements between Dworkin and CLS in the context of this article, I shall try to show that CLS does raise some very serious and unanswered questions about the

soundness of Dworkinian jurisprudence and of mainstream legal philosophy in general.

2

One of the now familiar theses defended by Hart in *The Concept of Law* is that there are some cases in which the rules of a legal system do not clearly specify the correct legal outcome. Hart claims that such cases arise because of the ineliminable open-texture of natural language: all general terms have a penumbral range in which it is unclear and irresolvably controversial as to whether the term applies to some particular. Yet, this penumbral range of extensional indeterminacy is necessarily much smaller than the core extension in which the term's application is clear and uncontroversial. For Hart, then, the indeterminacy of law is a peripheral phenomenon in a system of rules which, by and large, does provide specific outcomes to cases.

The realist analysis of indeterminacy sees it as both more pervasive and deeper than the indeterminacy Hart attributes to the legal order. For the realist, there is no way to confine indeterminacy to some peripheral region of the law. For my purposes here, I shall be concerned mainly with the realist analysis of common-law adjudication. It should not be forgotten, however, that the realists could and did extend their analysis to all types of adjudication found in our legal system, including those involving statutory and constitutional issues.

The realist analysis of indeterminacy can be presented in two stages. The first stage proceeded from the idea that there was always a cluster of rules relevant to the decision in any litigated case. Thus, deciding whether an uncle's promise to pay his nephew a handsome sum of money if he refrained from smoking, drinking, and playing pool was enforceable brought into play a number of rules, for example, rules regarding offer, acceptance, consideration, revocation, and so on. The realists understood that the vagueness of any one of these rules

could affect the outcome of the case. In any single case, then, there were multiple potential points of indeterminacy due to rule vagueness, not a single point as Hart's account sometimes seems to suggest.

The second stage of the realist analysis began with the rejection of a distinction central to the doctrine of precedent, namely, that between holding and dictum. The holding in a case referred to the essential grounds of the decision and thus what subsequent judges were bound by. The dicta were everything in an opinion not essential to the decision, for example, comments about points of law and not treated as the basis of the outcome. The realists argued that in its actual operation the common-law system treated the distinction as a vague and shifting one. Even when the judge writing an opinion characterized part of it as "the holding," judges writing subsequent opinions were not bound by the original judge's perception of what was essential for the decision. Subsequent judges were indeed bound by the decision itself, that is, by the finding for or against the plaintiff, and very rarely was the decision in a precedent labeled as mistaken. But this apparently strict obligation to follow precedent was highly misleading, according to the realists. For later judges had tremendous leeway in being able to redefine the holding and the dictum in the precedential cases. This leeway enabled judges, in effect, to rewrite the rules of law on which earlier cases had been decided. The upshot was that in almost any case which reached the state of litigation, a judge could find opinions which read relevant precedents as stating a contrary rule. The common-law judge thus faced an indeterminate legal situation in which he had to render a decision by choosing which of the competing rules was to govern the case. In other words, while the realists claimed that all cases implicated a cluster of rules, they also contended that in any cluster there were competing rules leading to opposing outcomes.

It is this second form of indeterminacy which the realist saw as the deepest and

most pervasive. Depending upon how a judge would read the holdings in the cases deemed to be precedents, she would extract different rules of law capable of generating conflicting outcomes in the case before her. In the common-law system, it was left undetermined as to which rules, of a number of incompatible rules, were to govern a case. This type of indeterminacy cuts a much deeper and wider path than the kind Hart was willing to acknowledge. For Hart, the cases afflicted with indeterminacy are the ones in which we know which rule applies but are uncertain over the outcome because the rule contains some vague general term. This second type of realist indeterminacy stems from the fact that the choice of which rules to apply in the first place is not dictated by the law and that competing rules will be available in almost any case which reaches the stage of litigation.

In discussing realism, Hart makes three concessions to realist indeterminacy claims, while at the same time coupling each claim with a major qualification designed to show that actual indeterminacy is far less radical than realism suggests. First, Hart concedes that "there is no single method of determining the rule for which a given authoritative precedent is an authority." But he quickly adds: "Notwithstanding this, in the vast majority of decided cases, there is very little doubt. The headnote is usually correct enough."¹ It is simply question begging, though, for Hart to assert that the headnote usually provides a sufficiently accurate statement of the correct rule. The realist point is that there is nothing that can be thought of as "the correct rule" for which a precedent stands, and so there is no standard against which one can say that a given rule is "correct enough." On the realist analysis, the headnote, or indeed a later opinion, states only one of any number of competing rules which may, with equal legitimacy, be said to constitute the holding of a case. Hart's assertions do nothing to show that this analysis is wrong; they merely presuppose that it is wrong.

Hart's second concession to realism is

that "there is no authoritative or uniquely correct formulation of any rule to be extracted from cases." But then he adds that "there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate."² Hart seems to be saying here that lawyers may disagree on the precise formulation of a rule but still agree on the correct outcome of a case and so be able to accept, for the purposes of the case, a formulation which, in the given instance, straddles the different versions of the rule. This claim may very well be accurate, but it fails to defeat the realist indeterminacy claims for two reasons. It assumes that the problem of being able to extract conflicting rules from the same line of precedents has been resolved, and, as I argued in connection with Hart's first pair of points, that assumption is question begging. Second, even if there is general agreement on the outcome of a case and on some rough statement of the governing rule (and this, of course, ignores the disagreement which will always be found between the attorneys for the litigants), it does not follow that they agree on the outcome because they agree (roughly) on the legal rule which is said to govern the case. In other words, it does not follow that the law determines the outcome. Agreement on the outcome and on the rough statement of the rule used to justify the outcome may both be the result of some more fundamental political value choice which is agreed upon. Indeed, this is exactly what the realist analysis would suggest by way of explaining broad agreement on outcomes and rules. Realism is not committed to denying broad agreement. It is simply committed to the view that the agreement cannot be explained by the determinacy of the law. Thus, Hart's invocation of agreement here does nothing to defeat the realist's indeterminacy thesis.

Hart's third concession to realism is that courts invariably engage in narrowing and widening the rules which precedents lay down. Yet he says that, despite this, the doctrine of precedent has produced "a body of

rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule.³ The problem with this claim, though, is that it misses the crucial realist point regarding the availability of competing rules: let each legal rule be as precise as is humanly possible, the realists insist that the legal system contains competing rules which will be available for a judge to choose in almost any litigated case. The claims made by Hart in his effort to domesticate the realist notion of legal indeterminacy all systematically fail to deal with this crucial realist point. . . .

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To this point, I have portrayed the realists as focusing upon the choice of competing legal rules which judges in common-law cases must make. This may seem to leave the realist open to one of the principal criticisms which Dworkinians have made of Hart: the law is more than just legal rules. It is also the ethical principles and ideals of which the rules are an (albeit imperfect) expression, and it is these principles and ideals which help to guide judges to a determinate outcome.⁴ Indeed, the Dworkinian might try to use the realist indeterminacy analysis to his advantage: if the law were simply a collection of rules, as Hart thinks, it would be afflicted by exactly the kind of deep and pervasive indeterminacy which the realist posits. Yet, if the law were indeterminate to the degree suggested by the realist analysis, it would not be much more than a pious fraud: judges would be "legislating" not only in penumbral cases, but in all cases. Judges would always be creating law, in flagrant violation of their institutional duty to apply preexisting law. The Dworkinian may conclude that we face this choice: either include principles and ideals as part of the law in order to contain (and, perhaps, eliminate) the indeterminacy it would have were it simply a collection of rules or admit that common-law adjudication is a fraud. Although the latter choice is logically possible, as-

sumptions shared by both Dworkin and his positivist critics make it an entirely implausible one from their point of view. The only plausible alternative may thus seem to be the acceptance of Dworkin's important idea that ethical principles be understood as part of the law even when they are not explicitly formulated in some authoritative legal text or clearly identifiable by the application of some noncontroversial, positivist rule for specifying authoritative legal norms in terms of their source. Thus, Dworkin argues that adjudication requires the invocation of principles which take judges "well past the point where it would be accurate to say that any 'test' of pedigree exists. . . ."⁵ Moreover, such principals are, on Dworkin's view, binding on judges and so we must realize that "legal obligation . . . [is] . . . imposed by a constellation of principles as well as by an established rule."⁶ Indeed, it is this constellation of principles which must guide the judge to a determinate outcome when the relevant legal rules are in competition with one another. For instance, the principles could indicate to the judge the proper scope of application of each of the competing rules and thus resolve any apparent conflict by showing that just one of the rules was properly applicable in the case at hand.

Yet, which principles are legally binding? Dworkin's answer is that they are those which belong to the "soundest theory of the settled law."⁷ The settled law consists of those legal rules and doctrines which would be accepted as authoritative by the consensus of the legal community. The soundest theory is the most defensible ethical and political theory which coheres with and justifies those legal rules and doctrines. The coherence does not have to be perfect, for Dworkin allows that the soundest theory may characterize some rules and legal outcomes as mistakes, but coherence with most of the settled law is demanded. In principle, the soundest theory is to encompass every area of law: every branch of the common law, all statutes, the whole body of administrative law, and the entire range of constitutional law. Of course, Dworkin recognizes

that no merely human judge could ever formulate and defend such a theory. But his character, Hercules, is intended to show us that, in principle, such a theory could be formulated and defended by a sufficiently great intelligence.⁸ Even though the fictional, judicial Hercules has powers far beyond those of mortal judges, Dworkin tells us that mortal judges are committed both to the logical possibility of such a character and to the task of trying to arrive at the outcome he would arrive at were he to be hearing their cases. Mortal judges thus can and do appeal to principles in reaching determinate outcomes, and, in doing so, they are giving force to preexisting legal obligations, and not simply making a political choice among competing legal rules....

In this section, I have raised the possibility that Dworkin's jurisprudential project succeeds where Hart failed in defeating the radical realist indeterminacy thesis. However, it would be premature to make a judgment regarding the success of Dworkin's project in this respect, for scholars in the Critical Legal Studies movement have picked up and elaborated realist ideas in a way that seriously threatens the foundations of Dworkinian jurisprudence.... Yet, neither side seems to do anything more than make very superficial, highly polemical points against the other. The interchange of ideas between Dworkinians and CLSers is one which I have constructed with the deliberate aim of avoiding the superficial polemics which have thus far characterized the few occasions on which the one side has deigned in print to deal with the position of the other.

4

CLS scholars accept the Dworkinian idea that legal rules are infused with ethical principles and ideals. Moreover, they take such principles as seriously as Dworkinians in that they conceive of the articulation and examination of such principles to be one of the major tasks of legal theory. Thus, Dun-

can Kennedy has analyzed the role in the form and content of legal doctrine of what he characterizes as "individualist" and "altruist" ethical conceptions. And Roberto Unger has examined the normative principles which he takes to be embodied in the common law of contracts.⁹ Yet, one of the main themes of CLS work is that the incorporation of ethical principles and ideals into the law cuts against Dworkinian efforts to rescue legal determinacy. The operative claim in CLS analysis is that the law is infused with irresolvably opposed principles and ideals. Kennedy writes that the opposing ethical conceptions which inform legal doctrine "reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future."¹⁰ While the realists stress competing rules, CLSers stress competing, and indeed irreconcilable, principles and ideals. Yet, the basic theme is the same: the judge must make a choice which is not dictated by the law. In the CLS analysis, the choice is one of several competing principles or ideals to be used in guiding her to a decision. Different choices lead to different outcomes. Thus, from the CLS perspective, the jurisprudential invocation of principles only serves to push back to another stage the point at which legal indeterminacy enters and judicial choice takes place.

The Dworkinian response would be to deny that legal indeterminacy follows from the fact that the law contains principles which pull in opposing directions. One of Dworkin's major points in his account of principles is that they have differing weights. Thus, even if we have a case in which two competing principles appear applicable, for example, "A person should not be held liable unless she was at fault" versus "As between two innocents, the one who caused the harm should pay," Dworkin will argue that, in all likelihood, one of those principles will carry greater weight in the case at hand and it is that principle which

determines the correct legal outcome. Dworkin does allow for the possibility that there may be a case in which the weights of all applicable principles are exactly equal, leaving the legal outcome truly indeterminate, but goes on to claim that such cases will be extremely rare in any developed legal system.

It must be noted here that Dworkin's conception of the soundest theory of the settled law assumes that there is some metalevel principle for determining the appropriate weights to be assigned to the different principles which may be applicable in a given case. This assumption becomes clear once we see that Dworkin's conception of the soundest theory rejects intuitionism, according to which relative weights are intuited in each case without there being any higher order standard in virtue of which each principle has its particular weight. Dworkin's position is that there is a legal fact of the matter regarding the weight of a given principle in a given case, and this fact is determined by the weight that principle receives according to the standards of the soundest theory of the settled law. Moreover, this rejection of intuitionism is firmly rooted in a commitment to the rule of law ideal. That ideal requires that legal decisions be the outcome of reasoning that can be reconstructed according to principles which can be articulated and understood. To use a term which has been popular among legal theorists, judicial decision must be "principled." This means that the judge cannot simply appeal to his inarticulate sense that a particular principle is weightier than some competing principle in the case before him. He must believe that there is some higher order principle which makes the one weightier than the other, and he must at least try to figure out and articulate what that higher order principle is.

Now, one line of CLS attack against Dworkin is to argue that there is no discoverable metaprinciple for assigning weights. Duncan Kennedy suggests this line in discussing the possibility of using moral theory to justify legal doctrine. Kennedy admits that, in the context of the fact situation of a particular case, opposing principles do not neces-

sarily carry the same weight: "we are able to distinguish particular fact situations in which one side is more plausible than the other. The difficulty, the mystery, is that there are no available metaprinciples to explain just what it is about these particular situations that make them ripe for resolution."¹¹ Actually, Kennedy's point should be put in a less sweeping way: no one has come up with such metaprinciples, and it is implausible to think that it can be done. When put in these terms, the CLS position becomes an essentially reactive one which awaits Dworkinian efforts and then reacts against them: Dworkinians put forth their rational/ethical reconstructions of the law (or some portion of it), complete with metaprinciples for assigning weights to principles, and then CLSers and others attempt to show that the reconstruction is inadequate and incoherent. The burden of production thus seems to be on the Dworkinians. What have they produced?

The closest thing we have from them to a Dworkinian reconstruction of a portion of the settled law is Charles Fried's effort to reconstruct contract law on the basis of the principle that one ought to keep one's promises and related conceptions from a liberal individualist philosophy....¹²

It is important to recognize here that I am not talking about the theory which Dworkin's Hercules would try to construct, one encompassing the entire body of the law. Rather, what is at issue is a theory for some connected but limited portion of the law, such as the law of contracts. Both CLS and I assume that Dworkinians are committed to the notion that such limited theories can be built by humans, not merely by gods. For if humans cannot construct even such modest theories, the problem of legal indeterminacy will be irresolvable from a human point of view, no matter what may be true from a divine point of view. If the rule of law is to be a guiding ideal for humans, and not just gods, then the problem of legal indeterminacy must be resolvable from a human point of view. Moreover, Dworkinian jurisprudence itself prohibits evasion of the problem of

competing principles by so gerry-mandering doctrine that one never has to harmonize such principles. Dworkin is clear that different parts of the law have to be understood in terms of each other, for example, a statute affecting tort liability will properly play a role in a judge's decision in a common-law tort action. The judge cannot ignore the statute on the ground that it embodies principles in some tension with common-law principles and thus is difficult to reconcile with them. The judge is supposed to (try to) reconcile the tension and not avoid facing it.

CLS scholars would clearly go further than I have so far and reject as wrongheaded even the relatively modest project Fried has undertaken to reconstruct common-law contract doctrine from the promise principle. In addition, CLSers would judge as totally implausible the belief that any coherent Dworkinian theory, complete with metaprinciples, can be developed for any significant portion of the settled law. Yet, the CLS claims in this regard are unpersuasive, given the argument that has been adduced in their behalf to this point. Even if it is admitted that there are difficulties in the way of constructing a Dworkinian theory for any significant portion of the settled law because such a portion will invariably embody principles in tension with one another, surely no argument has yet been given that makes it implausible to believe that such a theory can be constructed. Nonetheless, the points made so far do not by any means exhaust the potential CLS critique of Dworkinian jurisprudence. While CLS rhetoric often does make the invalid leap from the premise that there are competing principles which infuse settled doctrine to the conclusion that there must be pervasive legal indeterminacy, there are within CLS distinct and more powerful lines of reasoning against the viability of the Dworkinian project.

The additional lines of reasoning are premised on the idea that the settled law is the transitory and contingent outcome of ideological struggles among social factions in which conflicting conceptions of justice, goodness, and social and political life get

compromised, truncated, vitiated, and adjusted. The point here is not simply that there are competing principles embodied in settled doctrine, although that is a starting point for the statement of the problem. More fundamentally, the point is that these principles have their weight and scope of application in the settled law determined, not by some metalevel philosophical principle which imposes order and harmony, but by an ideological power struggle in which coherent theories become compromised and truncated as they fit themselves into the body of law. The settled law as a whole, and each field within it, represents the (temporary) outcome of such an ideological conflict. This is, to be sure, a causal claim about the genesis of legal doctrines and principles, rather than a logical one regarding the lack of amenability of such doctrines and principles to rational reconstruction. But the CLS positions can be interpreted as linking the logical claim to the causal one. The position is that it is implausible to believe that any system of norms generated by such a process of struggle and compromise will be capable of an ethically principled reconstruction. Unger summarizes the CLS view this way:

... it would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross purposes, would have to be the vehicle of an imminent moral rationality whose message could be articulated by a single cohesive theory. This daring and implausible sanctification of the actual is in fact undertaken by the dominant legal theories....¹³

This idea that the law is a patchwork quilt, as it were, of irreconcilably opposed ideologies is tied to CLS's version of the repudiation of the distinction between law (adjudication) and politics. Sometimes CLS scholars suggest that the distinction unravels principally because of the fact that controversial normative and descriptive judgments are just as much an ineliminable part of adjudication as they are of politics. Yet, I think

that there is a more important, though related, way in which the distinction is thought to unravel. The idea is this: all of those ideological controversies which play a significant part in the public debate of our political culture are replicated in the argument of judicial decision. In other words, the spectrum of ideological controversy in politics is reproduced in the law. Of course, CLS recognizes that in legal argument the controversies will often be masked or hidden by talk of the intent of the framers, the requirements of *stare decisis*, and so on. The point is that the same ideological debates which fragment political discourse are replicated in one form or another in a legal argument. As a patchwork quilt of irreconcilable ideologies, the law is a mirror which faithfully reflects the fragmentation of our political culture. Such, at least, is a principal CLS theme.

How is it possible to parlay these CLS ideas regarding the patchwork-quilt character of doctrine and the unraveling of the law/politics distinction into a cogent argument against Dworkinian jurisprudence? I think there are two principal lines of argument. The first seeks to show that it makes no sense to think there is any soundest theory of the settled law. The second seeks to show that the Dworkinian theory fails on its own terms to provide a satisfactory account of the legitimacy of judicial decision making. Let us explore each of these lines of argument in turn.

5

One possible line of CLS argument is that legal doctrine is so internally inconsistent that it is implausible to believe that there is any single, coherent theory capable of justifying enough of it to satisfy the Dworkinian fit requirement. Consistently applying any of the theories embodied in some significant portion of the law across the entire body of doctrine would, the argument goes, involve such substantial doctrinal reconstruction that it would violate the Dworkinian mandate that any theory invoked to decide cases

fit or cohere with the bulk of the settled law. Thus, ethically principled reconstruction of any substantial portion of doctrine is ruled out by the law's internal contradictions, such contradictions being symptomatic of the law's conception in ideological compromise and struggle and of its tendency to reflect the range of political conflict present in the culture. This means that there simply is no soundest theory of the settled law, and so the Dworkinian efforts to rescue legal determinacy by appealing to such a notion fail.

It may be helpful in clarifying this CLS argument to show how Dworkin's responses to more conventional criticisms of his jurisprudence completely fail to come to grips with the central claim of this argument. A typical conventional criticism will claim that legal indeterminacy survives the Dworkinian efforts to erase it because there are multiple, conflicting theories no one of which can be cogently established as providing an account of the settled law which is superior to that of any of the other theories. In other words, the concept of the soundest theory really has more than one referent, and they provide different answers to questions regarding who should win cases.

Dworkin's response to this type of criticism is in two stages. First, he argues that, although there may be several theories which fit the settled law well enough when one is talking about the settled law of a simple, undeveloped legal system, the probability of that happening in a complex and developed system such as we have is very small. Second, he claims that even if there were several theories which fit well enough, that would not defeat his claims since the soundest theory would be the one from those several which is most defensible on the grounds of political and ethical philosophy. Thus, he concludes that two claims must be sustained in order to defeat his position: that there are multiple theories which fit the settled law well enough, and that political and ethical philosophy suffer from an indeterminacy (or an irremediable subjectivity) which makes it impossible to choose just one of those theories as the most defensible.

However convincing this Dworkinian argument may be against conventional legal philosophers, it does not even begin to join the issue with CLS. For the CLS patchwork-quilt argument is not that there is legal indeterminacy due to the fact that there are several "soundest theories"; rather the argument is that there is indeterminacy because there are none. Or, more accurately, the argument is that there is indeterminacy because of what excludes the possibility of any soundest theory, namely, the internally incoherent character of legal doctrine. This argument makes it completely beside the point whether ethical and political philosophy is indeterminate or subjective. If doctrine is as internally contradictory as CLS claims, then Dworkinian jurisprudence fails to rescue legal determinacy even if there is a uniquely and objectively true ethical and political philosophy.

Dworkin's replies to conventional critics of his jurisprudence are essentially irrelevant here because those critics share Dworkin's assumption that doctrine is by and large coherent. More generally, the conventional critics share Dworkin's assumption that legal doctrine and argument are largely in good logical order, though they believe that indeterminacy has a somewhat broader toehold in the law than Dworkin is willing to admit. CLS dissents from these assumptions.... This state of incoherence is due to the fact that modern ethical thought amounts to an amalgam of fragments of irreconcilable ethical views. Conventional philosophers not only fail to perceive the utter incoherence of modern ethical thought, but operate on the assumption that it is largely in good order.... In a very similar way, the debate between Dworkin and his conventional critics fails to join the issue with CLS. They assume a doctrinal coherence which CLS repudiates, and so the conventional debate takes place in terms which are largely irrelevant to the CLS position.

Duncan Kennedy makes the CLS position on doctrinal incoherence plain in his description of a private law field which he

takes to be representative of doctrine in general:

In contract law, for example, there are *two* principles: there is a reliance, solidarity, joint enterprise concept, and there is a hands-off, arms length, expectancy-oriented, "no flexibility and no excuses" orientation. They can be developed very coherently, but only if one accepts that they are inconsistent. There are fifteen or twenty contract doctrines about which there is a conflict.... That is the structure of contract doctrine, and it's typical. Doctrine is not consistent or coherent. The outcomes of these conflicts form a patch-work, rather than following straight lines.¹⁴

Given the terms in which the CLS position has been stated, it is clear what the Dworkinian reply must be in order to join the issue: that doctrine is not as internally contradictory as CLS claims. The main argument would have to be that any internal inconsistencies in legal doctrine are merely marginal, capable of characterization as "mistakes" without any substantial rupture to the fabric of doctrine. This argument would be supplemented, I think, by one to the effect that CLS exaggerates the degree to which theory must fit the settled law in order to be said to fit well enough. To make out these arguments would not be at all easy. CLS analyses have sought to exhibit the deep and pervasive incoherence of doctrine in such areas as constitutional law, labor law, contract law, administrative law, and criminal law, to name only a few. Indeed, I think it is accurate to say that CLS has, through these analyses, made a much more thorough and stronger case for the incoherence of legal doctrine than MacIntyre has made for the incoherence of ethical thought. Meanwhile, Dworkinians have done little to respond to these CLS analyses. Moreover, Dworkin's most recent efforts to clarify the character of the fit test provide little ammunition against the CLS argument. Let us briefly examine those efforts in order to see why this is so.

Dworkin's recent writing indicates that the fit test is more sophisticated than some of his critics have taken it to be. He tells us that the degree of fit is not just a matter of

adding up the number of precedents and rules for which a given theory accounts. One must also take into consideration such factors as the trend of recent decisions. Two theories may account for the same number of precedents and rules, but, if one accounts for more of the recent decisions and the other for more of the older decisions, then the former has a better fit, according to Dworkin.

Dworkin does not indicate how much weight should be given to the capacity to account for recent trends. Nor does he explain why accounting for a trend in new decisions makes for a better fit than accounting for the pre-trend pattern of old ones. Moreover, he ignores the point that the question of what counts as a significant trend and what counts as an insignificant blip or anomaly is not a theory-neutral one. What counts as a trend from the perspective of one theory may count as an anomaly to be ignored from the perspective of another. It does no good to be told here that the soundest theory of the law determines what is a trend and what is an anomaly, since the fit test is supposed to help us figure out which theory is the soundest one. But, more to the point for the doctrinal incoherence issue, the CLS contention is that the patchwork character of law is manifested within the body of recent decisions and not just between recent ones and old ones. There may be trends but there are countertrends as well. Some decisions may introduce or expand new lines of doctrine, but other recent decisions will continue the older lines. By characterizing the former as "trends" and giving their line of doctrine greater weight, Dworkin is merely picking out one line of doctrine for favored status from among several conflicting lines. His aim does seem to be to reduce doctrinal dissonance, but he provides no argument for giving greater importance to trends than countertrends and so he does not succeed.

Even if Dworkin were able to provide some convincing argument for according greater importance to trends, it is not at all obvious that he would thereby solve the problem of doctrinal incoherence. His re-

cent writing explicitly states that there is some threshold level of fit which any theory must satisfy in order to be the soundest theory of the law. Presumably, this threshold would require a theory to account for most, but not all, of the doctrinal materials. However, CLS analyses suggest that doctrinal incoherence is so deep and pervasive that, even if one grants that accounting for certain doctrinal lines (the trends) gives somewhat better fit than accounting for others (the countertrends), any coherent theory will prove incompatible with such a broad range of doctrine as to make implausible the notion that it has satisfied the threshold. These analyses do not conclusively establish the point, but they do raise a strong *prima facie* case to which there has been only the most meager response by conventional legal philosophers of any stripe, Dworkinian or otherwise.

It seems to me, then, that the patchwork-quilt line of argument presents unmet and serious challenges to the viability of the Dworkinian jurisprudential project, as well as to other conventional legal philosophies. Even if this CLS argument is met by some cogent conventional response, however, there is an independent line of CLS argument against another key Dworkinian position. Let us now turn to that position.

6

Dworkin is concerned to defend the legitimacy of judicial decision making that invokes controversial principles of ethical or political philosophy. The Dworkinian judge is licensed to rely on such principles because, as Dworkin well realizes, it is inevitable that a judge who, in a hard case, seeks to enunciate and invoke the principles embodied in the settled law will fail to find principles on which everyone can agree. If the judge is to guide her decision by the principles she thinks are embodied in the law, then the reliance of adjudication on controversial principles is inescapable, at least for many cases. In this sense, Dworkin is willing to ac-

knowledge that adjudication is "political."¹⁵ Yet, he thinks that such an acknowledgment does nothing to impugn the legitimacy of the adjudication.

Dworkin's arguments in favor of the legitimacy of such admittedly "political adjudication" are not entirely clear. Let me suggest the following as the principal Dworkinian argument on this point. The invocation of controversial ethical or political principles in adjudication is constrained by the judicial duty to decide a hard case according to the dictates of the soundest theory of the settled law. Thus, the "political" reasoning and choice of the judge take place within much narrower confines than if she were a legislator deciding what sort of legislative enactment was best. As Dworkin says in his discussion of a judge deciding an abortion case, it is one thing for her to decide whether political philosophy dictates that government should acknowledge a right to an abortion, and it is quite another for her to decide whether the settled law of our legal/political system is best accounted for by a theory incorporating a conception of dignity which entails such a right. The former decision is, of course, appropriate for a legislature, not a court. Yet, it is the latter decision, not the former, which the Dworkinian judge is under a duty to make, and it is a decision which is made within much narrower confines than the former. Thus, it is misguided to think that the kind of "political adjudication" endorsed by Dworkinian jurisprudence constitutes an illegitimately broad exercise of judicial power and is tantamount to judicial legislation. Such adjudication is inevitably controversial, but it is substantially constrained by the duty under which judges, but not legislators, act.

Certain CLS claims regarding the law/politics distinction can be parlayed into an argument against this Dworkinian defense of the legitimacy of adjudication in hard cases. What makes this CLS argument particularly interesting for current purposes is that it does not hinge on the adequacy of the patch-work-quilt argument examined in the preceding section. Indeed, it can be construed

as granting, *arguendo*, that there is a unique soundest theory of the law which does dictate the correct legal outcomes in hard cases. Let us set the stage for such a CLS argument.

In trying to undo the law/politics distinction, CLS claims that the spectrum of ideological controversy in the political arena is replicated in the legal forum. The claim means that all of the arguments and ideologies which are a significant part of political debate in our culture are to be found, in one form or another, in legal argument and doctrine. It is undoubtedly true that certain ideological viewpoints are foreclosed from the legal arena. Thus, the ideology of Islamic theocracy is to be found embodied nowhere in our legal doctrine. But such ideologies also play no significant role in the internal political debates of our polity.

It is also undeniable that the canons of legal argument place certain formal constraints on the ideological controversies which manifest themselves within judicial decision making. Judges cannot ignore the authoritative texts of the legal culture: the Constitution, statutes, case law, and so on. And legal argument is constrained by the need to phrase itself in terms of the framer's intent, *stare decisis*, and so on. Controversy in the political arena is not bound as strongly by such formal constraints, even though the language of legal opinion does often spill over into the political arena. CLS does not deny any of these distinctive, formal marks of legal argument. What they do claim is that beneath these legal forms one can find all of the significant ideological controversies of the political culture. The substance of the political debates is replicated in judicial argument, even if the form of the debates is distinctive. Legal form fails to screen out or significantly reduce the range of ideological conflict present within the general political culture.

CLS supports these contentions regarding the range of ideological conflict within legal doctrine and argument by analyses of doctrinal principles and the kinds of arguments found in judicial decisions. Consider again Kennedy's description of the structure

of contract law. Doctrines from the "solidarity" side of contract law, for example, those of duress, unconscionability, and reasonable reliance, are taken to embody the principles of the political left: welfare-state liberals and, to some extent, left-wing egalitarians. Doctrines from the "individualist" side, such as those of consideration, the revocability of an offer until there is acceptance, and the demand that acceptance be a mirror image of the offer, are taken to embody the principles of the political right: free-marketeers and libertarians. The political middle is represented by attempts to mix the two sides of doctrine in varying proportions (attempts which, in CLS eyes, are doomed to logical incoherence for reasons made clear in the patchwork-quilt argument). A hard case emerges when the two sides of doctrine collide in a single fact situation: there was no consideration, but there was reliance; or there was consideration, but it was quite disproportionate in value to what was received in exchange. The CLS view is that such cases implicate doctrinal materials and arguments representing the spectrum of conflicting political viewpoints.

The CLS claim that the range of ideological conflict in the political arena is replicated in legal doctrine and argument can be viewed in two ways. On the first, it is taken as reinforcing the patchwork-quilt argument against Dworkin. To the extent that one documents the claim, one lends support to the idea that doctrine is a patchwork quilt of inconsistent political ideologies of which no single, coherent political theory could ever capture very much. Take Kennedy's account of contract law. The CLS argument can be put this way: to the extent that we have no reason to believe that the political philosophy of a welfare-state liberal can be reconciled with that of a libertarian, we have no reason to think that the opposing doctrines of contract law can be logically reconciled with one another, for those doctrines are the legal embodiment of just those opposing political philosophies (or something close to them). The position is then generalized to cover all fields of law. This way of setting up

the CLS argument is, at bottom, another effort to show that the law is too internally incoherent for there to be any soundest theory of it and thereby to discredit Dworkin's attempts to defend judicial legitimacy by invoking a judicial duty to decide according to the dictates of the soundest theory.

There is, however, another way to view the CLS claim about the range of ideological conflict embodied in legal doctrine. This alternate reading leads to a line of argument whose key contention is that, even if there were a Dworkinian soundest theory, it would impose no practical constraint on judges whose favored political ideology is in conflict with the one embodied in that theory. The theory would exert no effective pull or tug on the decisions of judges who fail to share its ideology. This is because judges who conscientiously attempt to carry out their Dworkinian duty to decide a hard case according to the soundest theory of the law will read their favored ideology into the settled law and see it as the soundest theory. This would happen, the argument goes, because the authoritative legal materials, in replicating the ideological conflicts of the political arena, contain a sufficient number of doctrines, rules, and arguments representing any politically significant ideology that a judge who conscientiously consults the materials would find his favored ideology in some substantial portion of the settled law and conclude that it was the soundest theory of the law.

Of course, no one expects that the true soundest theory of law will have the power to persuade all conscientious judges of its status. However, the Dworkinian argument for the legitimacy of adjudication in hard cases does presuppose that the theory imposes some practical constraint on judicial decision making by exerting a kind of gravitational pull on those judges who recognize their abstract duty to decide according to the soundest theory but who are in fact in ideological disagreement with the principles of the true theory. (Keep in mind that this judicial duty is abstract in the sense that the statement of the duty contains no specifica-

tion of the particular theory which is the soundest one, and so recognition of the duty, by itself, does nothing to insure that a judge's decisions will be pulled in any particular direction.) The pull of the true soundest theory doesn't have to be an irresistible one, but, for the Dworkinian legitimacy argument to work, it must be substantial enough to make a difference to the decisions of conscientious judges who in fact hold to an ideology which conflicts with the soundest theory. Many of the decisions of these judges would have to be different from what they would be if there were no soundest theory, and the difference has to be explainable in terms of the pull of the theory. If the soundest theory were to lack any such pull, then the constraint imposed by the duty to decide according to the soundest theory would be illusory, and the Dworkinian defense of judicial legitimacy would fall apart. The CLS argument is that the constraint is an illusion. Judges holding to virtually any ideology which is of significance in the American political arena will simply read their favored ideology into the settled law as its soundest theory. This can be and is done, even by the most conscientious judge, because each view on the political spectrum is embodied in some substantial portion of the authoritative materials.

It should be noted that the CLS view on this point is not the same as a view often expressed by mainstream critics of Dworkin and against which Dworkin has directed several arguments. That view consists of the idea that in a hard case, the law "runs out" and the judge makes her decision in a kind of legal vacuum. Dworkin has argued quite forcefully that this gives us a false picture of how judges should and characteristically do go about deciding hard cases. It leads us to think that judges first consult the authoritative materials, find that there is no unambiguous answer there, and then proceed to forget the legal materials and decide by some wholly extralegal criterion. Dworkin counters with a picture of judges who search for the most cogent principles and theories which can be thought of as embodied in the

relevant authoritative materials and who decide according to such principles and theories. This is, in Dworkin's eyes, the search for (the relevant portion of) the soundest theory of the settled law.

CLS can agree with Dworkin's important point that judges do not leave the authoritative materials behind when they make a decision in a case where those materials fail to dictate unambiguously an answer to the case. It can also agree with Dworkin that in such cases judges look for the most convincing principles and theories embodied in the materials. The point of the present CLS argument is that, even though judges typically do decide in such Dworkinian fashion and even if there happens to be a soundest theory dictating the correct legal outcome, the existence of such a theory makes no practical difference because a judge will typically see her favored ideology as constituting that theory. The soundest theory is not some brooding omnipresence in the sky, but rather a brooding irrelevance in the sky (assuming it is anywhere at all).

There are two potential lines of response for the Dworkinian to this CLS argument. The first is to deny that the full spectrum of ideological controversy in politics is to be found in legal doctrine and decision and so to hold on to the idea that legal form, particularly the fit requirement, does screen out a significant range of political controversy. This line of response does not appear to me to be very promising. There are a host of CLS analyses of both private and public law, making quite persuasive its contention regarding the extent of ideological controversy within legal doctrine and argument.

A second line of response is to deny that the legitimacy of "political adjudication" in hard cases hinges on whether or not ideological controversy within the law is as wide as it is in the political arena. The idea is that Dworkin's defense of adjudication works, even if the law/politics distinction unravels in precisely the way CLS asserts. In fact, we can find in Dworkin's work two arguments which can be construed in this way. They concern the issue of whether courts have

correctly held that there is a legal right to an abortion under our constitutional arrangements. Dworkin imagines the issue turning on the question of whether the concept of dignity implicit in our legal and political institutions implies the existence of such a right. He then examines the suggestion that legislatures, which reflect the will and ideas of the ordinary person, rather than courts, are the most appropriate forum in which to find the answer to such a question. In other words, the suggestion is the positivist one that in hard cases courts should act as legislatures would.

Dworkin claims that there are two arguments against such a suggestion and, by implication, in favor of the judge deciding the issue by what she thinks the (soundest theory of the) law dictates, and not by what (she thinks) the legislature thinks it ought to be. The first argument is that judges think more carefully about the meaning our institutions give to the idea of dignity when they decide cases than ordinary folks do when they cast their ballots (or politicians do when they vote on legislation). Judges are thus thought to have greater competence in handling such hard cases than legislatures do. The second argument is that a Dworkinian judge will legitimately refuse to defer to legislative judgment, even if she thinks that it does reflect the considered opinion of the ordinary person, when she thinks that the opinion is inconsistent with the soundest theory of the law. This is legitimate because such a judge believes that the law really does have a determinate answer to the hard case before her and that it is her duty to discover and announce it, whatever anyone else thinks. By doing so she is acting no differently from a positivist judge in an easy case, who would certainly refrain from a decision contrary to his legal judgment, no matter what the ordinary person/legislature may think.

Neither one of these arguments provides a convincing response to the CLS position. The first would justify the most far-reaching judicial usurpations on the grounds that judges have thought more carefully about the issue in question than did the electorate

or their representatives. There is virtually no legislative enactment or policy which is safe from such reasoning. The second argument clearly begs the whole question of whether the law is determinate in hard cases. The Dworkinian judge may believe that it is, but, if that belief is incorrect or even unjustified, it can hardly be claimed that her refusal to defer to legislative judgment in a hard case is analogous to the positivist judge's refusal to do so in an easy case. Yet, even granting the law's determinacy, Dworkin's argument presumes that the soundest theory of the law does impose some effective constraints on judicial decision making. For otherwise there will be no practical difference between a legal regime in which judges have no duty to decide hard cases according to the dictates of (the soundest theory of) the law but may decide such cases on the basis of their favored ideology, and one in which they do have such a duty. Dworkin's views commit him to the claim that there is not only a difference between the two regimes, but that the latter sort of regime alone can be legitimated in terms of the principles of liberal democracy.

Let me hasten to add that CLS does not accept an important assumption shared by both Dworkinians and their positivist critics, namely, that the exercise of judicial power, even in hard cases, is largely legitimate and that the issue is over how to account for that legitimacy. For CLSers, the legitimacy of the exercise of judicial power is not something that can be assumed but is deeply problematic. Thus, they are no more persuaded by the positivist's efforts to wrap judicial decision in the cloak of legislative legitimacy than they are by Dworkin's invocation of the duty to decide by the soundest theory of law. From the CLS perspective, the positivist injunction to decide according to the will of the legislature leaves as much room for judges to make their favored ideology the basis of decision as does the Dworkinian injunction to decide according to the soundest theory. My principal point here, though, concerns Dworkinian jurisprudence. Dworkinians must show that the soundest theory

of law is not only a logical possibility, given the tensions existing within doctrine, but that it can exert an effective practical constraint on judges who hold conflicting ideological views. CLS's law/politics argument raises serious doubts about whether the theory, even conceding its existence, would exert any such constraint, and thus far Dworkinians have done little to assuage such doubts.

7

In this article, I have not aimed at providing the last word on the points of contention between CLS and Dworkinian jurisprudence. I have tried to locate some of the more important issues within a frame that recognizes the influence of legal realism on contemporary legal thought. CLS has picked up and elaborated upon the realist contention that the law largely fails to determine the outcome in cases which are brought to litigation. Among the important advances of the CLS analysis over that of their realist forerunners are: the effort to take seriously and to analyze the conflicting ethical visions and principles which infuse legal doctrine; the painstaking attempts to display doctrinal inconsistencies and incoherencies; and the effort to show how debates in the political arena are replicated in unsuspected corners of private-law doctrine. I believe that these are substantial advances on the realist position and that

they can be parlayed into powerful arguments which are thus far unmet by Dworkinians or indeed by conventional legal philosophers of any stripe. It is well past the time when legal philosophers can justifiably ignore the body of work associated with the Critical Legal Studies movement.

NOTES

¹ Hart, *The Concept of Law*, p. 131.

² Ibid.

³ Ibid., p. 132.

⁴ Dworkin, *Taking Rights Seriously*, pp. 25–26, 36, 44–45, 67–68, 71–80, 82–90, 96–97, 105ff.

⁵ Ibid., p. 67.

⁶ Ibid., p. 44.

⁷ Ibid., p. 67–68, 79, 283, and 340.

⁸ Ibid., pp. 105ff.

⁹ Kennedy, "Form and Substance in Private Law Adjudication"; Unger, "Critical Legal Studies Movement," *Harvard Law Review* 96 (1983): 561, 616–46. Also see Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1978): 205. Morton Horwitz, *The Transformation of American Law: 1780–1860* (Cambridge, MA: Harvard University Press, 1977); and Mark Kelman, "Interpretive Construction in the Substantive Criminal Law," *Stanford Law Review* 33 (1981): 591.

¹⁰ Kennedy, "Form and Substance in Private Law Adjudication," p. 1685.

¹¹ Kennedy, "Form and Substance in Private Law Adjudication," p. 1724.

¹² Fried, *Contract as Promise*.

¹³ Unger, "The Critical Legal Studies Movement," p. 571.

¹⁴ Kennedy, "The Political Significance of the Structure of the Law School Curriculum," p. 15.

¹⁵ Dworkin, *Taking Rights Seriously*, p. 127.

REVIEW AND DISCUSSION QUESTIONS

1. Why does Altman think Hart's notion of "open texture" is inadequate to answer the legal realists?
2. Describe Dworkin's answer to the realists, indicating why it seems preferable to Hart's.
3. Describe the "patchwork quilt" thesis. What two arguments against Dworkin does it lead to?
4. The first CLS argument involves the

extent to which law is internally contradictory. Why does that matter, according to Altman?

5. Altman suggests law places no "practical" constraints on judges. Explain why.

6. Consider Dworkin's distinction between strong and weak discretion (from "The Model of Rules" in Section 5) and its relevance to Altman's charge.