

Critical Legal Studies

Robert W. Gordon

Critical Legal Studies (CLS) is deeply controversial, as Robert Gordon explains. In this essay Gordon describes the CLS perspective on legal "discourses," legal education, trashing, deconstruction, and history. He concludes by comparing how CLS and traditional lawyers might approach a free-speech case involving pickets in a shopping mall.

In April 1987 Assistant Professor Clare Dalton was up for tenure at Harvard Law School. Uninformed outsiders would have rated her chances high. She had written a book on nineteenth-century tort law, accepted by Oxford Press and praised by all but one of the thirteen eminent outside reviewers asked to read it. Colleagues with weaker files than hers had received tenure earlier in the year. Her case, however, provoked passionate and bitter debate. After several meetings, she fell short of the two-thirds faculty vote she needed for tenure.

... While the episode has attracted a lot of press coverage, little is remarkable about it except that it happened at Harvard and so involved Lifestyles of the Rich and Famous. The story is depressingly familiar, although unpublicized elsewhere. Job troubles for C. L. S.-affiliated teachers are common. One was denied tenure at Rutgers-Camden last year, for instance, four others were fired from New England Law School last fall, and refusals to hire Crits, however qualified, may now be more the custom than the exception. The dean of the Duke University Law School published a speech asserting that C. L. S. adherents were "nihilists" who had no place in professional schools. The retiring dean of Case Western Law School suggested they were a menace comparable in gravity only to declining applications. As the president of the law teachers' association observed last fall, "[F]aculty members at self-proclaimed prestigious schools and more modest ones alike express determination that no Critical Legal Studies adherent will find a place on their faculty." (Susan Westerberg Prager, "President's Message: Collegial Diversity,"

Association of American Law Schools *Newsletter*, September 1986.)

But again, this is an old story. People with identified left-wing associations have always had trouble finding and holding on to jobs. In universities these days leftists can count on some protection from liberals who remember or have heard about the appalling costs of cowardice and silence in the 1950s and know that next time the bell may toll for them.... But the number of professors with impeccable liberal credentials who will vote against leftists because they are "ideologues" or "disruptive" or "bad colleagues" remains large, and the number who regularly finds that work outside the mainstream fails to meet scholarly "standards" is legion.

Still there's something fascinating about the C. L. S. phenomenon. C. L. S. has made headway in some law schools, despite many setbacks. And it has provoked enormous controversy—in the newspapers, the *New Yorker* and the *New Republic*, the lawyers' press and bar journals, in law school alumni meetings, and in academic law reviews. It has reduced its opponents to spluttering rates, generally incoherent ones. (Very few discussions of C. L. S. outside its circle of members and sympathizers are aimed at understanding, much less engaging with, the substance of its ideas.) So it's worth asking: What are Critical Legal Studies and why do they make people so angry?

Critical Legal Studies began as a meeting in Madison, Wisconsin in 1977—a ragtag collection of friends and friends of friends in their thirties, who had been active in radical or left-liberal (civil rights and antiwar) politics in the 1960s and had gone on to law school and later into law teaching. This

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group wrote a number of books and law review articles that together made up an initial set of critiques of mainstream legal ideas—what they thought was wrong with their own legal education. They also organized a series of annual conferences and summer camps. Over the next ten years the movement spread well beyond the originating group. It has outposts of at least two or three adherents or sympathizers at several law schools—apart from Harvard....

If the original C. L. S. membership was hard to generalize about, the expanded new one is so exotically varied and internally di vided as to defy characterization almost entirely. Some aspects of C. L. S. work, however, generally distinguish it from the more traditional left-wing critiques of the legal system, such as those of the National Lawyers Guild, with whom the Critics have formed occasional if rather contentious alliances. Marxist lawyers usually take law to be an infernal machine for the projects of the ruling class, albeit one full of tricks and devices that can sometimes be turned back upon its makers. More liberal lawyers think law contains many good rules and expresses noble purposes, but that its rules and procedures are constantly bent out of shape by the powerful. Oppositional lawyers can bend it back and use it to advance progressive causes or to soften oppression of the weak and dissident.

For the Crits, law is inherently neither a ruling-class game plan nor a repository of noble if perverted principles. It is a plastic medium of discourse that subtly conditions how we experience social life. Crits therefore tend to take the rhetoric of law very seriously and to examine its content carefully.

To get a picture of the way Crits think, consider all the habitual daily invocations of law in official and unofficial life—from the rhetoric of judicial opinions through advice lawyers give to clients, down to all the assertions and arguments about legal rights and wrongs in ordinary interactions between police and suspects, employers and workers, creditors and debtors, husbands, wives, and neighbors, or television characters portray-

ing such people. Sometimes these ways of speaking about law (*legal discourses*, let's call them) appear as fancy technical arguments, sometimes as simple common sense. ("An employer has the right to control what happens on his own property, doesn't he?") In whatever form, they are among the discourses that help us to make sense of the world, that fabricate what we interpret as its reality. They construct roles for us like "Owner" and "Employee," and tell us how to behave in the roles. (The person cast as "Employee" is subordinate. Why? It just is that way, part of the role.) They wall us off from one another by constituting us as separate individuals given rights to protect our isolation, but then prescribe formal channels (such as contracts, partnerships, corporations) through which we can reconnect. They split up the world into categories that filter our experience—sorting out the harms we must accept as the hand of fate, or as our own fault, from the outrageous injustices we may resist as wrongfully forced upon us. Until recently, for instance, an employer's sexual advances didn't occupy any legal category. They were a kind of indignity that a woman had to interpret as something her own dress and manner had invited, or as an inevitable occupational risk, given natural male aggression (and the statistical frequency of creeps), one that could get her fired unless she gave in or had incredible tact. Now such advances have the legal name of "sexual harassment." This doesn't always improve the practical situation of the victims—since vindicating legal rights costs money, emotion, smooth working relations, the chance of promotion, and maybe even one's career—but for many men and women the feminist politics that forced the change in legal categories has completely changed how they interpret and feel about the behavior.

Some of the basic points the Critics want to make about legal discourses are as follows:

These are discourses of power. Law is not, of course, uniquely the tool of the powerful. Everyone invokes the authority of law in ev-

everyday interactions, and the content of laws registers many concessions to groups struggling for change from below, as well as to the wishes of the politically and economically dominant. But to be able to wield legal discourses with facility and authority or to pay others (lawyers, legislators, lobbyists, etc.) to wield them on your behalf is a large part of what it means to possess power in society. Legal discourses therefore tend to reflect the interests and the perspectives of the powerful people who make most use of them.

Whether actually being used by the powerful or the powerless, legal discourses are saturated with categories and images that for the most part rationalize and justify in myriad subtle ways the existing social order as natural, necessary, and just. A complaint about a legal wrong—let's say the claim that one is a "victim of discrimination"—must be framed as a complaint that there has been a momentary disturbance in a basically sound world, for which a quick fix is available within the conventional working of existing institutions. A black applicant to professional school, whose test scores are lower than those of a competing white applicant, asks for admission on grounds of "affirmative action." Everybody in that interaction (including the applicant) momentarily submits to the spell of the worldview promoted in that discourse, that the scores measure an "objective" merit (though nobody really has the foggiest idea what they measure besides standardized test-taking ability) that would have to be set aside to let him in. A middle-aged widow buys a cheap promotional package of lessons at a dance studio. The studio hooks her on flattery and attention, then gets her to sign a contract for 4,000 hours of dance instruction. To break her contract, she will have to struggle to make a case that her situation is grotesquely exceptional—the result of serious fraud, and, even if she wins, she and her lawyers will have participated in and reinforced the law's endorsement of "normal" marketplace relations as unproblematically voluntary, informed, noncoercive, and efficient.

Thus legal discourses—in conjunction with dozens of other nonlegal discourses—routinely help to create and maintain the ordinary inequities of everyday social life: the coercions, dominations, and dependencies of daily relations in the marketplace, the workplace, and the family; the ordering of access to privilege, authority, wealth, and power by hierarchies of class, race, gender, and "merit."

Yet legal discourses have the legitimating power they do because they sketch pictures of widely shared, wistful, inchoate visions of an ideal—a society of dealings between genuinely free and independent equals, one so ordered that we could cooperate with others without having to worry that they would hurt or enslave us, so structured as continually to open to question the legitimacy of its hierarchies. Thus law is always a source of images and ideals that challenge and urge us to revise current arrangements as well as justifying them. The problem is that, in the ordinary uses of law, the revisionary images are realized in scattered fragments and otherwise muted and repressed.

So the big premise of the C. L. S. method, the *raison d'être* of its scholarship and local political tactics, is that the deployment of ordinary legal discourse is a form of political practice, and one with *unnecessarily* conservative consequences. If we experience a sense of stasis and paralysis about the possibilities for social change, we owe our passivity in part to the character of these pervasive discourses. C. L. S. people believe that when you take legal discourse apart and see how it works, you can start to reinterpret it and to gain the energy and motivation to engage in local political action that in turn can help to change the social context that the discourse has hardened. Since most of the Crits were academics in law schools, they first picked on the targets that were closest to them, the standard ways that other law teachers wrote, taught, and talked about, the first-year legal subjects, such as Torts, Contracts, and Property.

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legal training produces its mind-numbing paralysis—how even left-liberal students trained by left-liberal teachers end up drained of energy and hope for social change. One big reason, of course, is that graduates of the elite schools are lavishly rewarded in money and social status for going into large-firm corporate law practice and tend over time to adjust their ideals to their situations. Graduates of less elite schools think themselves lucky to get any legal job on any terms that are offered. But both types of lawyers tend to excuse their passivity with the gloomy thought that nothing can change anyway, and that conclusion—so the Crits speculate—they owe in part to the conservatizing elements in academic-legal discourse.

Those elements take a number of different forms. There is a traditional kind of law teaching, perfected around the 1950s and still probably the dominant one, that is very elusive because it never makes any of its premises or assumptions explicit. The teacher creates confusion by slashing up the reasoning of the judges who decide the cases assigned for classroom reading and also the reasoning of the students, but ends up suggesting that there's a delicate, complex balance-point, a moderate centrist position, that a smart, sensible, *professional* lawyer can settle on. Such a teacher presents a centrist politics as if it were a craft. There is now a fresh set of discourses urging the natural necessity of conservative or mildly reformed social arrangements; this is the economic analysis of law by scholars such as Guido Calabresi of Yale and Richard Posner of Chicago—far more intellectually formidable than the old style of legal theory and increasingly influential among policymakers and scholars. Legal economists assert that disputes about particular legal arrangements (e.g., decisions about whether polluters should have to pay homeowners to pollute the air, or homeowners pay polluters not to pollute) may be resolved through value-neutral comparisons of alternative solutions as more or less "efficient."

Fighting, as they saw it, fire with fire, the

Crits responded to long articles in elite law journals with longer articles in elite law journals. Streetwise radical lawyers have always mocked the Crits for "footnote activism," using up political energy in pedantic swiping at mandarin doctrines, but from the C. L. S. point of view, the strategy made sense: they were matching a local discourse of power and constraint—one that had some discernible impact on their own and their students' lives—with a discourse of resistance. It is a modest form of political action simply to try to reduce the authority of those people who control the local situation and thus to create a little extra space for your own projects, your counterinterpretations of the same discourses. Through this work, the Crits hoped to develop a set of critical insights and demolition rhetorics that they and others could pick up and use on all sorts of legal discourses, not just those of other scholars. (The success of the project has been mixed. Some of their students picked up and improved on this early work, and went on to teach it to others. Most radical or left-liberal lawyers probably found it too arcane, abstract, and not obviously enough connected to the goals of practice to be of immediate use. Some teaching has been done through conferences, summer camps, and more popular books, but not yet enough to make the ideas widely accessible.)

Here are some of the methods the Crits have deployed against mainstream legal discourses:

Trashing

This sixties-evoking phrase covers a big miscellaneous grab bag of techniques designed to dent the complacent message embedded in legal discourse, that the system has figured out the arrangements that are going to make social life about as free, just, and efficient as it ever can be. The trasher tries to show how discourse has turned contingency into necessity and to reveal the repressed alternative interpretations that are perfectly consistent with the discourse's stated pre-

ises. Trashing techniques are used sometimes simply to attack the discourses on their own terms—to show their premises to be contradictory or incoherent and their conclusions to be arbitrary or based on dubious assumptions or hidden rhetorical tricks. The C. L. S. critiques of legal economics, for instance, have borrowed from and added to the multidisciplinary critiques of the neoclassical economic model of human beings as rational self-interested maximizers of their satisfactions: critiques that the model is vacuous (it tells you that people "want" *everything* they get); that when the model is given concrete content, it is obviously wrong (people are often irrational or altruistic) and too narrow (people want self-worth and the esteem of others as well); that there are fatal ambiguities in the notion of choosing selves (personalities are divided in their desires, desires change over time, short-term desires are often destructive to long-term selves); that the individualism of the model is a culturally and historically specific image of human conduct (a product of certain modern market cultures) that the model falsely claims is universal; and so forth. Crits by no means reject economic analysis as valueless: they teach it and make regular use of it in their work (although the economists do not reciprocate). But by showing that the agile interpreter can justify as economically efficient virtually any imaginable scheme of social arrangements, the critique helps to deprive technocracy of its mystery; its pretense that science, magically substituting for agonizing political and ethical choices, dictates that if we want to remain prosperous we must endure all the miscellaneous injustices now in place and even invent new ones. The Critics' message is that the economic-efficiency analysis of legal practices isn't a science, it's just a very manipulable rhetoric, often a useful rhetoric which highlights problems and possible consequences that one wouldn't otherwise notice, but a myopic rhetoric, too, which systematically obscures from view—has no way even to *talk* about—the violence, coercion, irrationality, cultural

variety, solidarity, and self-sacrifice of lived experience.

Deconstruction

The Crits do not believe, however, that their trashing reveals a random chaos or that what lies behind the seeming order of legal decisions is just pure power (or personal whim). There is a *patterned* chaos, and the aim of Critical scholarship is in part to uncover the patterns. Some of their best work is a familiar kind of left-wing scholarship, unmasking the often unconscious ideological bias behind legal structures and procedures, which regularly makes it easy for business groups to organize collectively to pursue their economic and political interests but which makes it much more difficult for labor, poor people, or civil rights groups to pursue theirs. Other work aims at laying bare "structures of contradiction" that underlie fields of law. Contract law in the Critics' view, for example, draws regularly for its inspiring assumptions upon two diametrically opposed visions of social life. One is a stark neo-Hobbesian world of lonely individuals, predatory and paranoid, who don't dare associate with each other except through formal contracts that strictly limit their obligations. The other is a world in which trustful cooperation is the norm and people assume indefinite open-ended responsibilities to others with whom they deal regularly and who have come to rely on them. Both sets of images, and the regimes of legal obligation they recommend, are potentially available in every legal decision about a contract. Yet the legal system persistently gives one of the regimes (the rule-bound, formal, individualistic one in this case) an arbitrarily privileged position and partially suppresses the other or reserves it for the deviant or exceptional case.

Genealogy

Still another way to heighten awareness of the transitory, problematic, and manipulable ways legal discourses divide the world is to write their history. The Crits have turned

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ther way to heighten awareness of history, problematic, and manipulative legal discourses divide the world in their history. The Critics have turned

out a lot of history of legal categories. They have focused their attention, for instance, on the mid-nineteenth century moment, when the business corporation, once an entity created only to serve the "public" ends of the commonwealth, was reclassified as "private" and thus free as any individual to do what its managers pleased in the market, while the city corporation was reclassified as the "public" agent of the legislature and its managers' legal powers from then on were strictly confined. Critics also write social history revealing that even the most basic legal concepts, such as "private property," have never had any definite, agreed-upon content but have, on the contrary, always been fiercely struggled over, so that any conventional stability the concepts may now seem to possess represents nothing more than a temporary truce that could be unsettled at any moment.

Such techniques owe much to standard liberal and radical analyses. But in the hands of Critics they add up to a style and method of critique that is quite distinctive. Consider the case of picketers who want to demonstrate in a shopping mall and are kicked off the mall by the owner. Lawyers usually approach this situation as one involving a conflict between two opposing "rights," the property right of the owner to exclude unwanted visitors or behavior and the demonstrators' right to free speech. Judicial decisions suggest that the way to resolve the conflict is to ask whether the mall is "public" or "private" in character (the more "private" it is, the greater the right to exclude). The Crit begins by asking why labeling the mall as "property" should give the right to exclude picketers in the first place and goes through the standard justifications for property rights. The efficiency rationale says that owner control will yield the highest valued uses of the property. But it is not at all clear that the shoppers do not value diverse viewpoints at the mall, that they are only there to buy and not to converse and socialize, or that their decisions to shop at this small or go elsewhere are likely to any important extent to depend on being free from picketers.

Anyway, the "taste" of owner and shoppers, if real, to be free from exposure to political speech may be one (like the "taste" for not serving or sitting next to blacks at lunch counters) that should not be entitled to recognition, rendering the whole "efficiency" calculus irrelevant. The privacy rationale for exclusion has much less appeal when the owner is a bodiless corporation that lets hordes of strangers swarm over "its" property daily. Critics examine the private versus public distinction, what it means, and why any of those meanings should be dispositive. How "private," for instance, is the owner's decision to exclude picketers, once he asks the cops and courts for injunctions, fines, and jails to back it up? History lends a hand here, pointing out that common law traditionally prescribed social obligations to property-holders (such as public access to inns and common carriers) in return for the protections of public force and the privileges of corporate status. Some argue that the picketers' right of access ought to turn on how "public" the property is in the sense of how many links it has to state agencies—zoning privileges, tax exemptions, police services—a bundle of attributes only arbitrarily related to the crucial issue of the appropriate sites of political debate.

This brief sketch of one Critical approach certainly does not demand the conclusion that the correct legal solution is to allow pickets, although all Critics probably would favor that result. One can examine just as skeptically the scope of "free speech" rights, which as currently interpreted would allow demonstrators no access at all even to platforms intended for public political discussion, such as newspapers, unless they first purchase a controlling shareholders' interest. All the approach is meant to do is to show that when legal discourse identifies the shopping mall as "private property," it sets up a powerful mystifying charm that sends the pickets scrambling to find a stronger countercharm—"free speech." When you pick the discourse apart, you may find that calling the mall "private property"—even if you completely accept all the standard justi-

fifications for private property—tells you virtually nothing about whether owners should be able to exclude pickets.

Trashing, deconstruction, and history have the very real utility of exposing the vulnerability of the routine justifications of power, of enabling people to spot the structural defects and to challenge many of the rationales they hear advanced for especially ugly legal practices. But nobody can be content just to trash, and in the second phase of C. L. S. many Crits find themselves trying to do the intellectual spadework, and often some of the political organizing as well, for various concrete projects of reconstruction. Some of these, notably that of the Harvard theorist Roberto Mangabeira Unger, are on the grand scale—a thousand-page reimagining of democracy, with detailed architectural sketches of political, economic, and social life as it might become. Most are much less ambitious and take the form of activism regarding low-income housing policy, legal regulation of pornography and rape, immigration reform, welfare and social security policy, delivery of legal services, labor law and specifically university labor practices, and always, naturally, law school politics.

If one of the effects of law is to constrict our ability to imagine alternative social arrangements, then it should be possible to liberate social imagination by dredging up and then working to flesh out some of the alternatives that are already present but have been suppressed in legal discourse. Historians have recently been revising the "republican" view of the purpose of politics as that of facilitating self-development through participation in community self-governance—a periodic rival to the dominant liberal view that the end of politics is only to facilitate the individual pursuit of self-interest. Several Crits have begun to ask how republican ideology might influence the redesign of legal institutions—cities, corporations, workplaces, local administrative agencies. Others have followed what Unger calls the method of "doctrinal deviation," taking a set of practices that have been routinely applied in one social field and imaginatively transferring

them to another. Economic democracy is one example. Another is William Simon's program of "downward professionalization." In detailed studies of welfare administration, Simon makes the case (backed up by the historical example of the New Deal-era social workers) for entrusting the kind of broad discretionary decision making habitually given by judges and corporate managers to street-level welfare workers, arguing that such a regime could be superior in terms of both efficiency and humanity than the current regime of mechanized administration. Still other Crits are making use of feminist theory and phenomenology to try to evoke richer and fuller descriptions of intersubjective experience than can be found in the abstract and impoverished categories of law and legal economics, to try to recapture the selves from which they claim legal discourses have alienated us, as well as exposing the techniques of alienation.

To return now to where I began: What is it about C. L. S. that makes people so angry? As American critical movements in law go, it has stung the sharpest of any since the Legal Realism of the 1920s and 1930s, which C. L. S. much resembles in its evident delight in showing up the manipulability, vacuity, and arbitrarily conservative conclusions of legal discourses. The other main challenge to mainstream legal thought has been the movement to study law in its social context, which has repeatedly shown how power politics and cultural variation prevent formal legal rules from being enforced and applied in real life the way legal theories and doctrines predict they will be. But lawyers who make their livings expounding formal legal doctrine have been mostly impervious to demonstrations of its limited relevance. It has taken rowdies invading the heart of their own citadel to make them sit up. Still, why such fury?

For one thing, for all the use it makes of conventional academic argument, C. L. S. is a radical movement and of the left, and that's enough in itself to make some fellow lawyers see Red. The public attacks on C. L. S. make up a fascinating collage of what Amer-

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icans tend to think a left-wing movement must be about, with bits and pieces pulled from the French Revolution (Burke-Carlyle-Dickens version), vulgar Marxism, Soviet Stalinism, sixties anarchism. In these bizarre fantasies, Crits are Bolshevik saboteurs who will take over if you allow any in your faculty or firm, dangerous (in the Age of Reagan, yet), "nihilist" subverters of the "rule of law," infantile but basically harmless hippie/yippies—or all of these at once. The attackers automatically suppose—obviously without bothering to read any of their work—that Crits must believe law to be nothing more than the result of ruling-class domination or the personal and political whims of judges, and that the Crit program must be, after a violent seizure of the state, to "socialize the means of production."

But there are more sophisticated opponents, too. After all, the Crits really are out to reduce the legitimacy and authority of their elders in the intellectual legal establishment; and those elders, no fools, realize that and despise them for it, the more so because the Crits are not always kind or polite. Along with the academic trashing techniques I've described go ruder ones—satire, savage mockery, even sometimes scatology and a sort of juvenile thumb-nosing irreverence. Such trashing has a function. As the Norwegian philosopher Jon Elster puts it, in a society where authority is typically legitimized through control of the rational discourses, sometimes the most effective challenges to authority are those of "irony, eloquence, and propaganda," refusing to talk authority's language and aping its forms. Law in particular has lent a lot of its persuasive power by its manners: the pompous gravity of its hierophants, their arrogant certainty that the "smartness" certified by their success carries with it command over social truth. (At the same time, such rudeness, while helping to preserve the movement's edge and to save it from becoming normalized into just another academic school, has undoubtedly alienated a lot of potential supporters.)

Harder to forgive than rudeness is rejection—not only of the elders themselves but

of their whole elaborate structure of deference to their own seniors, their system for picking successors, their canon of heroes and respected texts. Much of the Harvard bitterness derives from the Crits' insulting refusal to accept the long-approved criteria of "smartness" and "competence" for choosing colleagues—criteria, the Crits unkindly pointed out, that (besides yielding a faculty of look-alikes—people who wrote mostly the same kind of doctrinal scholarship, had views varying from the center-right to the center-left of the political spectrum, and included almost no women or minorities), were plainly deficient on their own terms, as evidenced by the fact that many teachers who met them burned out early and produced very little. Some C. L. S. work is disrespectful not only of their elders' scholarship, but of the political achievements these men personally struggled for and are proudest of, such as the labor-relations policies of the New Deal and after. And C. L. S. perversely sets up its own intellectual counterheroes, who include the disreputable Legal Realists, as well as weird foreign imports, such as Hegel, Sartre, and Foucault. (I have heard one eminent legal scholar denounce C. L. S. as "un-American" and another disparage it as infected with "French and German" influences. Ah, the Continent—that dark breeding ground of dirty postcards and pestilential philosophic vapors!)

Among younger C. L. S. opponents—not caught up in the generational struggle and often as critical in their own way of their elders' work and politics—are the true technocrats, committed to a positivist model of science that seeks, even from social knowledge, law-like regularities that can be used for prediction and control. The technocrats are naturally revolted by C. L. S.'s aggressive antiscientific stance and furious at the reduction of social sciences to rhetorics. Their real quarrel, of course, isn't exclusively with C. L. S. but with the entire "interpretive" strain of philosophy and social science that denies the possibility of objective knowledge....

Some opponents see C. L. S. as a threat

to liberal freedoms, those maintained by the "rule of law." If every "right" is seen as contingent, up for grabs, capable of being flipped inside out through reinterpretation in the twinkling of an eye, what will we rely on to save us from the "fascists" or the "mob"? These are hard questions, too hard for this sort of space, but a brief Critical answer might run like this: Legal "rights" are shorthand symbols for social practices that we collectively maintain. We value the symbols because of the latent utopian promises they hold out to us—promises of a world where we could freely and safely choose our associations with others without fear of domination by arbitrary authority. Yet, in any actual version of the legal code and its application, such promises will be realized only partially, occasionally, in fragments. The pretense that legal rules have an objective fixed set of meanings, above and beyond political choice, may sometimes help to keep monsters fenced in: If you live in Chile or Poland, or belong to a habitually trampled group in this country, you want to appeal as often as you can to rights and legal principles transcending those recognized by the dominant political forces. But the pretense of the objectivity of law also harmfully mystifies social life, encouraging people to think that the practices codified in law have fixed and frozen what they can hope to achieve, that so long as their rights are protected they can't complain, and discouraging them from political action aimed at transforming the content of rights so as to realize the emancipatory potential of law. A commitment to legalism can never substitute for a commitment to the ideals law distortedly symbolizes.

As the Czech dissident Vaclav Havel writes in *The Power of the Powerless* (1985), after insisting at length on the importance of a politics of legalism aimed at embarrassing state authorities into giving some real content to the legal rituals that sustain their legitimacy:

[E]ven in the most ideal of cases, the law is only one of several imperfect and more or less external ways of defending what is better in life against what is worse.... Establishing respect for the law does not automatically ensure a better life, for that, after all, is a job for people and not for laws and institutions. It is possible to imagine a society with good laws that are fully respected but in which it is impossible to live. Conversely one can imagine life being quite bearable even where the laws are imperfect and imperfectly applied.... Without keeping one's eyes open to the real dimensions of life's beauty and misery, and without a moral relationship to life, this struggle [for legality] will sooner or later come to grief on some self-justifying system of scholastics.

Possibly the most violent of all reactions to C. L. S. have come from people who are (like most lawyers) neither technocratic prophets of a scientifically managed social order nor committed to a view of law as determinate neutral principles. After all, if what you're looking for is a picture of law as irrational, chaotic, arbitrary, idiotically administered, loaded in favor of the rich and well-connected, you don't go to C. L. S., but to a veteran practitioner. *Nobody* is more cynical about law than lawyers. The fiercest reactions seem to come from people who have made their own complex peace with the way things are, have labeled that compact maturity and realism, and, for the sake of their own peace, wish that others would as well. For them, C. L. S. is a form of class treachery.

REVIEW AND DISCUSSION QUESTIONS

1. Explain the role of law in legitimizing power, according to CLS.
2. Explain "trashing."
3. Explain what Gordon means by "deconstruction" of law, using the example of contract law.
4. Compare and contrast CLS with legal realism.
5. What political program does CLS advocate?
6. Describe the similarities and differences between CLS and the views defended by Ronald Dworkin.

Legal Realism, Critical Legal Studies, and Dworkin

Andrew Altman

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

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his second form of indeterminacy 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....

3

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

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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

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portant to recognize here that I am g about the theory which Dworcules would try to construct, one sing the entire body of the law. hat is at issue is a theory for some but limited portion of the law, ie law of contracts. Both CLS and I at Dworkinians are committed to n that such limited theories can be umans, not merely by gods. For if cannot construct even such modest the problem of legal indeterminacy resolvable from a human point of matter what may be true from a dit of view. If the rule of law is to be a deal for humans, and not just gods, problem of legal indeterminacy resolvable from a human point of reover, Dworkinian jurisprudence exhibits 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 immanent moral rationality whose message could be articulated by a single cohesive theory. This daring and implausible sanctification of the actual is in fact undertaken by the dominant legal theories....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.

with the bulk of the settled law. Dworkin's principled reconstruction of a portion of doctrine is ruled by his internal contradictions, such as being symptomatic of the position in ideological compromise and of its tendency to reflect political conflict present in the means that there simply is no theory of the settled law, and so the efforts to rescue legal determinacy fail.

Helpful in clarifying this CLS is to show how Dworkin's responses to conventional criticisms of his jurisprudence completely fail to come to grips with the central claim of this argument. A conventional criticism will claim that determinacy survives the Dworkinian because there are multiple theories no one of which can be established as providing an accurate settled law which is superior to any of the other theories. In other words, the concept of the soundest theory is more than one referent, and they give different answers to questions regarding who should win cases.

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

iting explicitly states that there is a 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, if not all, of the doctrinal materials. However, CLS analyses suggest that doctrinal influence is so deep and pervasive that, one grants that accounting for doctrinal lines (the trends) gives some better fit than accounting for others (untrends), any coherent theory must be incompatible with such a broad theory of doctrine as to make implausible the claim that it has satisfied the threshold. Analyses do not conclusively establish this, but they do raise a strong prima facie case to which there has been only the meager response by conventional legal philosophers of any stripe, Dworkinian or otherwise.

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

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

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 patchwork-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-

ment is, at bottom, another effort to discredit Dworkin's argument that judicial legitimacy 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 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) 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

representatives. There is virtually no enactment or policy which is based on reasoning. The second argument begs the whole question of law is determinate in hard cases. A judge may believe that it is, belief is incorrect or even unjustifiedly be claimed that her refusal of legislative judgment in a hard case goes to the positivist judge's reasoning in an easy case. Yet, even grants determinacy, Dworkin's argument that the soundest theory of law impose some effective constraints on judicial decision making. For there will be no practical difference between a legal regime in which judges decide hard cases according to (the soundest theory of) the soundest theory of law and one in which they decide such cases on the basis of red ideology, and one in which they have such a duty. Dworkin's views lead to the claim that there is no difference between the two regimes, latter sort of regime alone can be evaluated in terms of the principles of democracy.

I would like to add that CLS does not share an important assumption shared by realists and their positivist critics, that the exercise of judicial power, in cases, is largely legitimate and that it is over how to account for that. For CLSers, the legitimacy of the judicial power is not something assumed but is deeply problematic. They are no more persuaded by Altman's efforts to wrap judicial decisions in the cloak of legislative legitimacy than by Dworkin's invocation of the soundest theory of law. From this perspective, the positivist interpretation according to the will of the law leaves as much room for advancing their favored ideology as does the Dworkinian interpretation according to the soundest theory of law. Dworkinian jurisprudence shows that the soundest theory of law

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.

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.

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