

Taking Ideology Seriously: Ronald Dworkin and the CLS Critique

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I. INTRODUCTION

One night, an American tenor made his debut at the famous La Scala Opera House in Milan. The performance went exceptionally well until the tenor's crucial aria in the final act. The tenor, sensing that his performance in this famous aria might establish his reputation forever, brought every ounce of commitment he had into his performance. At the aria's conclusion, the audience jumped to their feet and with one voice cried, "Encore! Encore!" The tenor was only too happy to comply, but afterwards, the audience asked for another encore, and yet another. Finally, the exhausted tenor addressed his audience: "Ladies and gentlemen, being asked for a single encore at La Scala is an honor few tenors are granted, but three? I cannot in good conscience. . . ."

At this point a little old man rose to his feet and interrupted him: "You gonna do it again," he said, "until you do it right."

If any person has taken that old man's advice to heart, it is Ronald Dworkin. Since the middle of the 1960s, he has been working and reworking his theories about law and legal reasoning, polishing their rough edges, adding new insights, and discarding outmoded ones. With the publication of his latest book, *Law's Empire*,¹ he has given us yet another version of his ideas. The book is important in two respects. First, it systematizes his increasing reliance on theories of interpretation as a method of legal philosophy.² Second, it considers his relationship to two of the most important movements in contemporary legal theory: Law and Economics, and the Critical Legal Studies Movement. Dworkin has written previously on the economic analysis of law;³ however, *Law's Empire* presents his first published discussion of Critical Legal

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1. R. DWORKIN, *LAW'S EMPIRE* (1986)[hereinafter *LAW'S EMPIRE*].

2. See, e.g., Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982), (also reprinted, with minor differences, in 9 CRITICAL INQUIRY 179 (1982); THE POLITICS OF INTERPRETATION 249 (W. Mitchell ed. 1983); R. DWORKIN, A MATTER OF PRINCIPLE 146 (1985)[hereinafter A MATTER OF PRINCIPLE](containing the essay *How Law Is Like Literature*); Dworkin, *My Reply to Stanley Fish*, in THE POLITICS OF INTERPRETATION, *supra*, at 287; Dworkin, *On Interpretation and Objectivity*, in A MATTER OF PRINCIPLE, *supra*, at 167.

3. See, e.g., Dworkin, *Is Wealth a Value*, 9 J. LEGAL STUD. 191 (1980); Dworkin, *Why Efficiency*, 8 HOFSTRA L. REV. 563 (1980). Both of these essays are reprinted (with minor revisions) in A MATTER OF PRINCIPLE *supra* note 2, at 237-89 (1985).

Studies (CLS).⁴

In this Article, I discuss the latest version of Dworkin's theory and offer my own version of the CLS critique. I will state my conclusions at the outset: Although there is much to commend in Dworkin's theory, he pays too little attention to the effects of ideology on the formation of legal concepts and the methods of legal reasoning.⁵ His theory suffers to the extent that it sidesteps these problems. His misunderstanding of the methods and goals of the Critical Legal Studies Movement is symptomatic of his neglect of the importance of ideological analysis; for this reason he has much to learn from CLS.

On the other hand, Dworkin's theory presents a significant sustained attempt at describing the phenomenology of judicial practice. As opposed to more skeptical accounts of legal practice that view law externally, Dworkin's is an internal account of legal practice, which attempts to explain why judges feel constrained by the materials of the law when they decide cases. This subjective experience of constraint is quite consistent with the usual CLS external analysis of the ideological underpinnings of legal practice. Therefore, members of the Critical Legal Studies Movement have much to learn from Dworkin's work, which concerns issues they have too often deemphasized.

II. THE THEORY OF LAW'S EMPIRE

In several important respects, Dworkin's theories have not changed much from their original incarnations to their most recent versions.⁶ He still rejects positivism — the theory, as he puts it, that propositions of law are true in virtue of "historical decisions made by persons in political power," or "in virtue of social conventions that represent the community's acceptance of a scheme of rules empowering such people or groups to create valid law."⁷ He

4. For an introduction to and discussions of the Critical Legal Studies Movement, see generally *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. OF LEGAL STUD. 1 (1986).

5. The word "ideology" has many meanings. Here I mean a world view about political and social life that combines aspects of factual and moral belief, often inextricably linked. See R. GEUSS, *THE IDEA OF A CRITICAL THEORY* 9-11 (1981) ("ideology in the sense of 'world view'"); Balkin, *Ideology and Counter Ideology From Lochner to Garcia*, 54 UMKC L. REV. 175, 176 n.7 (1986). Geuss distinguishes ideology in the descriptive sense (the sense used here), from ideology in the pejorative sense, R. GEUSS, *THE IDEA OF A CRITICAL THEORY* 12-22, which is his preferred use of the term and which implies delusion or false consciousness. As I use the term, a given ideology may involve varying degrees of false consciousness or may even be "true consciousness." See *infra* note 111.

Neither Geuss nor I want to use the word in the vulgar Marxist sense: an ideological superstructure determined wholly by an economic base. For a description of the problems with such a position, see N. ABERCROMBIE, *CLASS, STRUCTURE AND KNOWLEDGE* 11-70 (1980).

6. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].

7. Compare *LAW'S EMPIRE*, *supra* note 1, at 34 with *TAKING RIGHTS SERIOUSLY* *supra* note 6, at 22-45, 81-130. The first version of this theory Dworkin ascribes to Austin. See generally J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1954). The second version he ascribes to Hart. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961).

still argues that judges must decide cases according to general principles, and that, unlike legislatures, they may make decisions based only on principles rather than policies.⁸ And he still insists that there is only one right answer to most questions of law.⁹

A. The Turn to Interpretation

The strength of Dworkin's theory, at least in its most recent version, is that he now views law and legal philosophy as interpretive enterprises. The fundamental question for Dworkin is not a semantic question, "What is Law?," an inquiry which he thinks leads only to sterile and unhelpful debates.¹⁰ The fundamental question now posed is: "What is the best interpretation of our legal practices?"

At first glance this might not seem to be a very significant move. However, it greatly adds to the power of Dworkin's conception. A recurring problem with Dworkin's earlier work was the uncertainty whether he was offering a descriptive or prescriptive theory of law and legal reasoning. If his theory was merely descriptive, it could be easily rebutted on the grounds that it did not match the way judges actually decided cases. For example, some judges might decide cases using considerations of public policy in the way that Dworkin insists they should not. On the other hand, if Dworkin were offering a prescriptive theory as to how judges ought to decide cases, his theory might be politically interesting but not a particularly useful account of our present legal practices.

The turn to interpretation avoids this apparent dilemma. Dworkin argues that law and legal philosophy combine both description and prescription in the act of interpretation of previous practices. An interpretive conception of law, argues Dworkin,

8. Compare *LAW'S EMPIRE*, *supra* note 1, at 221-24, 243-44 with *TAKING RIGHTS SERIOUSLY*, *supra* note 6, at 90-100, 113-15, 294-327. According to Dworkin, principles are reasons given for rights that individuals have regardless of collective goals; policies involve reasons for conferring benefits on individuals regardless of their rights in order to advance collective goals. *LAW'S EMPIRE*, *supra* note 6, at 294. Dworkin gives the following example of the difference: "A law subsidizing contraception might be justified either out of respect for presumed rights that are violated when contraceptives are unavailable, which is a matter of principle, or out of concern that the population not grow too rapidly, which is a matter of policy." *LAW'S EMPIRE* *supra* note 1, at 339. However, Dworkin argues that when a judge interprets a statute, she must consider legislative policies. *LAW'S EMPIRE*, *supra* note 1, at 312 n.1, 338-39; *TAKING RIGHTS SERIOUSLY*, *supra* note 6, at 107-10.

This article does not address the viability of the principle/policy distinction as a constraint on what judges actually do or should do. I think other aspects of Dworkin's theories are more important to discuss here, although I do have serious reservations about the principle/policy distinction, recapitulating as it does the equally problematic distinction between private right and public policy. These matters, however, must be left to a future article.

9. Compare *LAW'S EMPIRE*, *supra* note 1, at 85-86, 260-62, 412 with *TAKING RIGHTS SERIOUSLY*, *supra* note 6, at 279-90, 331-38 and Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978). The latter is reprinted, with minor revisions, as Dworkin, *Is There Really No Right Answer in Hard Cases*, in *A MATTER OF PRINCIPLE*, *supra* note 2, at 119.

10. *LAW'S EMPIRE*, *supra* note 1, at 31-46.

makes no linguistic or logical claim [about the meaning of the word "law"]. . . . Instead it takes up the double-aspect, Januslike posture of any interpretation. It argues that this way of describing legal practice shows that practice in its best light and therefore offers the most illuminating account of what lawyers and judges do. It insists that this is therefore the best guide to what they should do, that it points out the right direction for continuing and developing that practice.¹¹

Although there are many types of interpretation, Dworkin is interested in the interpretation of social practices. According to Dworkin, this form of interpretation, like artistic interpretation, is "creative," in that it "aim[s] to interpret something created by people as an entity distinct from them."¹² The type of interpretation Dworkin is interested in is also "constructive," that is, teleological or purposive.¹³

Interpretation of works of art and social practices . . . is . . . essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible form or genre to which it is taken to belong.¹⁴

It should be clear that in trying to determine the "best" possible account of a practice or enterprise, one is simultaneously trying to describe it and to make value judgments about how it should be properly performed. Moreover, interpreting a practice or enterprise is not the same thing for Dworkin as discovering what the persons within the practice think they are doing when they engage in the practice.¹⁵ Finally, interpretation of a practice may involve critique, for we may discover that the best interpretation of a practice leaves certain aspects of it inconsistent with the meanings and purposes we ascribe to it, so that the enterprise can be made still "better" (under the intended interpretation) if the practice is reformed.¹⁶

Dworkin identifies three stages of interpretation of social practices, the last of which specifically involves critique and proposals for change. The first stage is "preinterpretive": where "the rules and standards taken to provide the

11. *Id.* at 116 (discussing interpretive theory of conventionalism).

12. *Id.* at 50.

13. *Id.* at 52.

14. *Id.*

15. *Id.* at 62-63. We might think that ordinary "conversational" interpretation — where we attempt to determine what another person had in mind by their remarks — is the standard account of what interpretation is, and that the "creative" or "constructive" type of interpretation that Dworkin concerns himself with is the exceptional case. But, argues Dworkin, it is quite the other way around. When we try to understand what a person meant by what he said, we construct a meaning by trying to make sense of what has been said, that is, we also try to make the communication the best it can be. Thus we can say that conversational interpretation is really a special case of a more general type of interpretation: the creation and ascription of meaning onto a practice or enterprise. *Id.* at 53.

16. *Id.* at 66.

tentative content of the practice are identified."¹⁷ At the second, or interpretive stage

the interpreter settles on some general justification for the main elements of the practice, identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is. The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one.¹⁸

The third and final stage is postinterpretive or reforming "at which [the interpreter] adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts."¹⁹

Dworkin's theory of law is interpretive at two separate levels. First, he argues that "what law is" (the object of the philosophy of law) is an interpretive question, so that the proper goal of the philosopher of law is to develop an account of law that makes it the best that it can be. Second, Dworkin argues that the act of judging — deciding not what is law but what the law is in a concrete case — is also an interpretive practice:

Law is an interpretive concept. . . . Judges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice. When they disagree in what I call a theoretical way, their disagreements are interpretive.

17. *Id.* at 65-66.

18. *Id.* at 66. This idea — that interpretation preserves a practice as opposed to changing it or creating a new one — has been strongly criticized by the literary critic Stanley Fish. According to Fish, one can only speak of changing or preserving a text (or in this case, a practice) through interpretation if one assumes that there is a text or practice which exists *before* interpretation and that the text or practice is somehow "given" and uninterpreted at a certain point in its history. But in fact, argues Fish, nothing comes to us in that state; all texts or practices come to us in a context of previous interpretations and conventions, which we may only confuse for a primeval, "uninterpreted" state. See generally Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983). Although Dworkin at first resisted the force of this point, see Dworkin, *Law as Interpretation*, *supra* note 2; THE POLITICS OF INTERPRETATION, *supra* note 2, at 287, he has made a partial concession in LAW'S EMPIRE. As he notes with respect to the so-called "preinterpretive" stage of interpretation:

I enclose "preinterpretive" in quotes because some kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels. But a very great degree of consensus is needed — perhaps an interpretive community is usefully defined as requiring consensus at this stage — if the interpretive attitude is to be fruitful, and we may abstract from this stage in our analysis by presupposing that the classification it yields are treated as given in day-to-day reflection and argument.

LAW'S EMPIRE, *supra* note 1, at 66. Yet, Dworkin does not think that the point amounts to much. He is quite willing to take a preinterpreted consensus of standards about a practice as a benchmark for determining whether an interpretation merely interprets an existing practice or actually creates a new one. However, Dworkin's position leaves him especially vulnerable to the charge that his "consensus" of standards merely reflects the dominant political ideology, as explained *infra* in the text accompanying notes 99-120 concerning the ideological critique of Dworkin's theories.

19. LAW'S EMPIRE, *supra* note 1, at 66.

They disagree, in large measure or in fine detail, about the soundest interpretation of some pertinent aspect of judicial practice.²⁰

This two level theory of legal philosophy makes Dworkin's work easy to misunderstand. For example, in the above quotation Dworkin seems to be describing what judges actually do: they engage in an interpretive enterprise. However, according to his theory about philosophy of law, Dworkin himself is engaging in an interpretive enterprise: he is giving what he believes is the best account of what judges do, given the constraints of his chosen interpretive practice. Thus the best account of what law is, according to Dworkin, is that judges decide cases by attempting to offer the best account of what the law is. Dworkin tends to collapse these two levels by claiming that they are really the same:

General theories of law . . . must be abstract because they aim to interpret the main point and structure of legal practice, not some particular part or department of it. But for all their abstraction, they are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice. . . . [A]ny judge's opinion is itself a piece of legal philosophy.²¹

Of course, Dworkin's identification of these two levels of interpretive practice is not a necessary result of an interpretive theory of law; it is something he must argue for separately. Thus, one might agree with Dworkin that law is an interpretive enterprise and still not agree that the best interpretation of law is his particular interpretation of it, which he calls law as integrity. One might believe that this interpretation does not sufficiently match our present experiences of legal practice to be a reasonable candidate for an interpretation of law. Alternatively, one might believe that other interpretations place legal practice in a morally or politically superior light. Thus, acknowledging that theories of law are interpretive, or that law itself is an interpretive practice, does not commit us to Dworkin's other views that judges may decide cases only on the basis of principle as opposed to policy, or that there is only one right answer to most questions of law.

B. Objectivity and Subjectivity

When Dworkin argues that the proper interpretation of legal practice is that interpretation which makes the law the best it can be, he also wants to insist that there is one and only one interpretation. Dworkin recognizes that his claims about interpretation are likely to be puzzling to many people. Different people will see different interpretations as the "best" ones, and there seems to be no good way to establish that any single interpretation is the "best."

20. *Id.* at 87.

21. *Id.* at 90.

In order to explain why his thesis is not as odd as it might first appear, Dworkin attempts to distinguish two types of claims about interpretations and values: we can make assertions about value from outside a system of values or from within it. One might say that claims about the best interpretation are subjective in the sense that people often disagree about them and there is no actual property of "bestness" which adheres to any particular interpretation. Rather there are merely different opinions held by different people, which may be more or less popular depending upon preexisting moral consensus, cultural values, history, or other variables. This is a position taken from outside of a system of values; Dworkin refers to it as "external skepticism" about values.²²

Dworkin argues that "external skepticism," as he defines it, holds no terror for someone like himself, who claims that there is a best interpretation to legal materials, and thus a right answer to legal questions. According to Dworkin, there is no difference between the statements "Slavery is wrong," and "Slavery is *really* (that is, objectively) wrong." Every argument for the later proposition is an argument for the former proposition, and vice-versa. As Dworkin puts it:

I see no point in trying to find some general argument that moral or political or legal or aesthetic or interpretive judgments *are* objective. . . . I have no arguments for the objectivity of moral judgments except moral arguments, no arguments for the objectivity of interpretive judgments except interpretive arguments, and so forth.

. . . .
In fact, I think that the whole issue of objectivity, which so dominates contemporary theory in these areas, is a kind of a fake. We should stick to our knitting. We should account to ourselves for our own convictions as best we can, standing ready to abandon those that do not survive reflective inspection. . . . I do not mean that this is all we can do because we are creatures with limited access to true reality or with necessarily parochial viewpoints. I mean that we can give no sense to the idea that there is anything else we could do in deciding whether our judgments are "really" true. If some argument should persuade me that my views about slavery are not really true, then it should also persuade me to abandon my views about slavery. And if no argument could persuade me that slavery is not unjust, no argument could persuade me that it is not "really" unjust.²³

For Dworkin, then, the external skeptic is not saying anything additional that could convince us that we have not hit upon the right answer to a question of value, if we are indeed convinced that our answer is right. The only way that the external skeptic could change our mind is to make additional arguments within the enterprise she is criticizing. For instance, the skeptic might try to argue that different circumstances may make slavery permissible, perhaps based upon utilitarian considerations. But this is an argument within morality, not outside of it, and it is not the same as saying, under any particular

22. *Id.* at 78-80.

23. A MATTER OF PRINCIPLE, *supra* note 2, at 171-72.

set of historical conditions, that there is no answer to whether slavery is right or wrong.

Of course, this approach threatens to make more than the concept of objectivity meaningless — it threatens to subvert the whole point of insisting that there are right answers to questions of value. If there is no difference between my assertion that slavery is wrong, and my assertion that it is really wrong, then the existence of right answers to questions of value threatens to become a trivial point; the existence of right answers might mean no more than that people are very much convinced of those answers. Dworkin, however, wants to avoid that unsettling conclusion:

Someone might say that my position is the deepest possible form of skepticism about morality, art, and interpretation because I am actually saying that moral or aesthetic or interpretive judgments cannot possibly describe an independent objective reality. But that is not what I said. I said that the question of what “independence” and “reality” are, for any practice, is a question within that practice, so that whether moral judgments can be objective is itself a moral question, and whether there is objectivity in interpretation is itself a question of interpretation. This threatens to make skepticism not inevitable but impossible.²⁴

Dworkin does think that there is a skeptical position that can be made within a particular enterprise, a position he calls “internal skepticism.”²⁵ First, one could deny that there is any coherent way of explaining the enterprise — that the practice described is so jumbled and irrational that no coherent account can be given of its goals and purposes that would be an interpretation and not an alteration of the practice.²⁶ Second, one could argue that the only coherent interpretations of a practice show it to be purposeless or to have a bad purpose.²⁷ Third, one could argue that several interpretations of the practice make the practice the best it can be, because the differences between interpretations under that theory do not add to the value of the practice.²⁸ Fourth, if one’s theory about the interpretation was designed to secure a large measure of interpersonal agreement, one could argue that no interpretation can achieve such agreement.²⁹ In all these cases of “internal” skepticism, however, the skeptic is arguing within a theory of interpretation — she is making interpretive arguments to convince us that no interpretation is good or that many are equally good. Dworkin is more concerned about this type of skepticism, but he believes that his theory of interpretation and his interpretations

24. *Id.* at 174.

25. *LAW’S EMPIRE*, *supra* note 1, at 78-79.

26. *Id.* at 78; *A MATTER OF PRINCIPLE*, *supra* note 2, at 175.

27. *LAW’S EMPIRE*, *supra* note 1, at 79.

28. *A MATTER OF PRINCIPLE*, *supra* note 2, at 175. Dworkin gives as an example a theory of art under which it would make no difference to the value of the play *Hamlet* whether or not the character Hamlet slept on his side. There might also be theories of art under which it would make no difference to the value of the play whether Hamlet and Ophelia were or were not lovers. *Id.*

29. *Id.* at 176.

of legal practice are more convincing than any such internally skeptical position.

C. Integrity as an Interpretive Value

Dworkin proceeds to apply his theories of interpretation to give an account of law and legal philosophy. His interpretation of the social practice of law involves the three stage process described above.³⁰ Interpretations of the law begin with preinterpretive paradigms. General theories of law begin with paradigms of what practices are legal practices. Judges who seek to interpret law also begin with legal paradigms: these are "proposition[s] of law . . . that we take to be true if any are; an interpretation that denies these will be for that reason deeply suspect."³¹ According to Dworkin,

Law cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement . . . so that lawyers argue about the best interpretation of roughly the same data. . . . I do not mean that lawyers everywhere and always must agree on exactly which practices should count as practices of law, but only that the lawyers of any culture where the interpretive attitude succeeds must largely agree at any one time.³²

After the preinterpretive stage, the legal philosopher must decide on the central purposive concept of the institution of law. Dworkin suggests that law is designed to

guide and constrain the power of government. . . . Law insists that force not be used or withheld, no matter how beneficial or noble that would be to the ends in view, no matter how beneficial or noble these ends, except as licenced or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.³³

Although this description more or less matches our ideas about the function of the Rule of Law, Dworkin's "concept" is deliberately abstract; he believes that it is consistent with a number of more concrete conceptions of the law. He considers and rejects two such conceptions — "conventionalism" and "pragmatism," in order to argue for a third, which he calls "law as integrity."³⁴

30. See *supra* text accompanying notes 17-19.

31. *LAW'S EMPIRE*, *supra* note 1, at 91.

32. *Id.* at 90-91.

33. *Id.* at 93.

34. *Id.* at 94, 114-50 (discussing conventionalism), 151-64 (discussing pragmatism). For Dworkin, "conventionalism" is the interpretive theory roughly equivalent to the semantic theory of positivism; it holds that legal practice is a matter of respecting and enforcing legal conventions. *Id.* at 115. Judges must respect these conventions except in rare circumstances. Where there is no convention as to a particular legal issue, judges must exercise discretion and use extralegal standards to create new law. *Id.* at 116-17. As an interpretive theory, conventionalism differs from positivism because it argues that "this way of describing legal practice shows that practice in its best light and therefore offers the most illuminating account of what lawyers and judges do . . . and that this is therefore the best guide to what they should do." *Id.* at 116.

"Pragmatism," for Dworkin, is the interpretive equivalent either of legal realism or of result-

"Integrity" is a political value that Dworkin sees as distinct from fairness, justice, or procedural due process,³⁵ terms which have a particular meaning for Dworkin. Fairness implies procedures that distribute political power in morally correct ways.³⁶ Justice concerns the moral correctness of outcomes that have been obtained, fairly or unfairly, through the use of political power.³⁷ Procedural due process involves the "right procedures for judging whether some citizen has violated laws laid down by . . . political procedures."³⁸

"Integrity," according to Dworkin, is the principle that "we must treat like cases alike."³⁹ "It requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some."⁴⁰

For Dworkin, integrity is a somewhat broader principle than the Rule of Law. Under the Rule of Law, we might have different standards for damages in automobile accidents than in accountant liability cases. We might deny recovery for negligent injury in one case but not the other. This would be consistent with the Rule of Law in that all citizens are equally subject to the rules laid down — it only happens that if you are negligently injured in an automobile accident one set of rules apply (which permit recovery), while if you are injured by an accountant's negligence another set of rules apply (which deny

oriented jurisprudence. See *id.* at 153. It "denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power." *Id.* at 151. Instead, judges should "decide and act on their own views . . . [so as to] bring [society] closer to what really is a fair and just and happy society." *Id.* at 152. Under pragmatism, "judges . . . act as if people [have] legal rights, because acting that way will serve society better in the long run." *Id.* (emphasis in original). However, judges are free to disregard or alter these "as if" rights if that would make society better off in the long run. *Id.* at 154-55.

35. *Id.* at 164.

36. *Id.* Thus, political processes might be fair because they are democratic and respect the rights of minorities, yet the outcome of activities in society might not correspond with our moral views as to what people deserve to have, and therefore the outcome might not be just. Of course, some theorists argue that whatever results are obtained through morally fair procedures are *ipso facto* just. See, e.g., R. NOZICK, ANARCHY, STATE AND UTOPIA 150-53 (1974) (a person's holdings are just if acquired through principles of justice in acquisition and transfer; society is just if every person's holdings are just); J. RAWLS, A THEORY OF JUSTICE 87 (1971) (if government keeps markets competitive, provides a reasonable social minimum, and guarantees equal liberties and fair equality of opportunity, resulting distribution will satisfy principles of justice). Rawls distinguishes situations of "perfect procedural justice," where this connection always occurs, and situations of "imperfect procedural justice," where the use of fair procedures only guarantees that the result often will be just. *Id.* at 85-86. As an example of the latter, Rawls offers the (question-begging) example of a criminal trial, where abiding by fair procedures does not always guarantee that the guilty will be punished and the innocent vindicated. *Id.*

37. LAW'S EMPIRE, *supra* note 1, at 165. Thus, if a tyrant handed out material possessions according to a morally justifiable theory of desert, the outcome might be just even if the use of political power was not fair because (for example) it was not democratic.

38. *Id.* Dworkin admits that some theorists see this as a special case either of justice or fairness; he wants to treat it as a separate political virtue. *Id.* at 164.

39. *Id.* at 165.

40. *Id.*

recovery). In short, the Rule of Law is blind to principle.⁴¹

Integrity, on the other hand, requires that different rules reflect and enforce the same sets of moral and political principles. Thus, if we justify awarding damages in automobile accidents on the ground that one who is injured by the negligent act of another should receive compensation, integrity demands that we explain why recovery should not be permitted in cases of accountants' malpractice.⁴² It is possible that a further counter-principle will justify the distinction, but integrity requires us to articulate that principle and make clear why it overcomes the first one.⁴³

Dworkin believes that integrity is a distinct political virtue which avoids Solomonic compromises that might not offend either justice or political fairness (in the special sense in which he defines those terms). Such solutions, which Dworkin calls "checkerboard solutions,"⁴⁴ violate neither justice or fairness but do violate integrity.

For example, suppose that two thirds of the voting populace think that abortion should not be a crime, and one third seek criminalization. Now consider the following "checkerboard" solution: We make abortions a crime every third year. The result is fair (under Dworkin's definition) because it fairly allocates political power in proportion to voting strength. It is just, argues Dworkin, because it produces less instances of injustice from the standpoint of both pro-choice and pro-life advocates: fewer abortions are performed than would be performed if all were permitted, while more are performed than would be performed if abortion were made criminal all the time.⁴⁵ However, we resist the idea that such a compromise would be permissible; Dworkin believes we do so because it would violate a political virtue distinct from either fairness or justice (or even procedural due process). We reject the compromise because it is unprincipled, that is, because it lacks integrity.⁴⁶

41. It can also be blind to fairness. *Plessy v. Ferguson*, 163 U.S. 537 (1896) is unfair in that it permitted racist policies, but it did not violate the Rule of Law. All citizens, white or black, were equally bound by its decision that state governments could constitutionally separate the races in public facilities. In this very formal sense the Rule of Law permits any result, no matter how evil, as long as it follows from general rules equally applicable to all citizens. One cannot object that laws that make classifications are not general laws or do not apply equally to all citizens, for in that case hardly any regulation would be consistent with the Rule of Law.

42. LAW'S EMPIRE, *supra* note 1, at 165.

43. Note also that we need not agree with the principles chosen or their application in order to say that a system of law has integrity. Integrity only requires that "the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are." *Id.* at 166.

44. *Id.* at 179.

45. *Id.* at 179-80.

46. *Id.* at 182-83. Sometimes we accept internal compromises in rules because we think they will lead to more good than harm. Thus, a pro-life advocate might vote for a bill that outlawed all abortions except in cases of rape or where the mother's life was endangered. But in this case, Dworkin thinks that we do not have a true "checkerboard solution"; the law recognizes a competing principle, albeit one which the pro-life advocate might not believe overrides the more basic principle of the sanctity of the fetus' life.

Dworkin divides the claims of integrity into two subprinciples. The principle of integrity in legislation "asks [that] those who create law by legislation . . . keep that law coherent in principle."⁴⁷ The principle of integrity in adjudication is the main concern of Dworkin's book: it requires that judges see and enforce the law as a coherent set of principles; "judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one."⁴⁸

The principle of adjudicative integrity is the basis for Dworkin's theory of law; he converts its injunction about what judges should do into a claim about what the grounds of the law are. In so doing, he offers his own interpretive theory of law — "law as integrity":

According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.⁴⁹

. . . .

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in fresh cases that come before them, so that each person's situation is fair and just according to the same standards.⁵⁰

D. The Chain Novel

Dworkin offers a metaphor to explain how law as integrity works in practice. He compares the practice of adjudication to the construction of a chain novel:

In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity.⁵¹

The chain novelist must make the novel appear as if it were written by a single author. To do this, she must offer interpretations about plot, characters, genre, theme and point in order to continue the enterprise. Her theories may

Dworkin argues that this sort of internal compromise is very different from a statute that prohibits abortions except to women born in one specified decade each century: "[A pro-life advocate would] see the first of these statutes as a solution that gives effect to two recognizable principles of justice, ordered in a certain way, even though [she] reject[s] one of those principles. [She] cannot treat the second that way; it simply affirms for some people a principle it denies to others." *Id.* at 183.

47. *Id.* at 167.

48. *Id.*

49. *Id.* at 225.

50. *Id.* at 243.

51. *Id.* at 229.

be multifaceted and complex. However, Dworkin argues, her work is constrained by two factors. The first is the dimension of fit. Her work must be consistent with what has gone before; "it must have general explanatory power, and it is flawed if it leaves unexplained some major structural aspect of the text."⁵² If no interpretation achieves this, she must adopt that interpretation that makes as much of the text coherent as possible.⁵³

If more than one interpretation fits the bulk of the text, the second dimension of constraint "requires her to judge which of all these eligible readings makes the work in progress best, all things considered."⁵⁴ The two dimensions, of fit and aesthetic appeal, work together to convince the interpreter that one way of continuing the chain novel is superior to all others. This interpretation is the correct continuation of the chain novel.

At this point, Dworkin must face a skeptical objection. Dworkin's answer to this charge is the key to understanding his theories, and so I shall dwell on both the objection and his response at some length. One might object that different chain novelists will often reach different conclusions about which interpretation was in fact the best one. Some novelists' interpretations will be quite controversial, and other novelists may criticize those interpretations as wrong-headed and wholly inconsistent with earlier parts of the book. This is possible because each of us would have different ideas about whether a given interpretation fits well or ill, whether an idea is aesthetically pleasing or not, and what constitutes a proper balance between fit and aesthetic desirability. Thus, the skeptic might argue that the dimensions of fit and aesthetic value leave so much choice to different chain authors that they will provide no real constraint at all.

The skeptic's argument becomes clearer if we examine the potential manipulability of Dworkin's suggested interpretive practice in a more concrete setting. I will use an example that Dworkin himself gives as a clear example of a poor interpretation, and shows how a skeptic would argue that interpretation might be considered not only quite good, but even the best one available.

Dworkin imagines that we are given Dickens' *A Christmas Carol* "with only the very end to be written — Scrooge has already had his dreams, repented, and sent his turkey."⁵⁵ Dworkin argues

it is too late for you to make [Scrooge] irredeemably wicked. . . . Someone might take that putative redemption to be a final act of hypocrisy, though only at the cost of taking much else in the text not at face value. This would be a poor interpretation, not because no one could think it a good one, but because

52. *Id.* at 230.

53. *Id.*

54. *Id.* at 231. This is, of course, an aesthetic judgment. According to Dworkin, however, it is not so far removed from the first sort of judgment, for "even when neither of two interpretations is disqualified out of hand as explaining too little, one may show the text in a better light because it fits more of the text or provides a more interesting integration of style and content." *Id.*

55. *Id.* at 232.

it is in fact, on all the criteria so far described, a poor one.⁵⁶

Of course, the skeptic might argue, Dworkin's paradigmatic example shows exactly how little constraint the notions of fit and aesthetic value place upon a chain novelist. This ending is really quite good if we hold certain notions of fit and aesthetic value. If one saw *A Christmas Carol* as a story about the redeemability of man, and had a particularly pessimistic view of human nature, one might think that the way to make the story a *really* great work of art would be to have Scrooge change his mind after he sends the turkey, rush to the Cratchits' house, and instead of offering Bob Cratchit a raise, snatch the turkey from Tiny Tim's lips, fire Cratchit on the spot, and walk out of the house, chuckling gleefully all the way home as he counts his gold sovereigns.

Under this interpretation, the story would become an example of how even the intervention of Heaven cannot save people from their baser instincts. One might close the story with a biblical quotation explaining how the Children of Israel saw miracle after miracle in Egypt and in the wilderness, sincerely acknowledged their fealty to the Lord, and then forsook Him by worshipping a golden calf. Scrooge's worship of his money (his sovereigns) would be both a symbol and a pun (on the word "sovereign," meaning both money and lord), recalling the story of the golden calf.

According to this view, we understand the title, *A Christmas Carol*, as a bitterly ironic statement: The plot contradicts the idea of the redeemability of humanity while the title recalls the story of Jesus who was born on Christmas to redeem the world, and the songs (carols) that people sing to celebrate his birth and the promise of redemption it brought. Irony becomes the *raison d'être* of the piece, so that refusing to take parts of the text at face value (which Dworkin thinks a bad thing) *enhances* rather than detracts from the story's aesthetic value under our new interpretation. Each reference in the text to Christian values now becomes an ironic commentary on the hopelessness of the human condition, and the inability of people to attain salvation, even when given every opportunity.⁵⁷

At first glance, these skeptical examples seem to cause problems for Dwor-

56. *Id.* at 232-33.

57. Indeed, Dworkin's example of a "wrong" ending is consistent with another, even more radical interpretation of *A CHRISTMAS CAROL*: let us suppose that we are *avant garde* artists and want to celebrate nothingness or contradiction, or the incoherence of life. A perfect way to symbolize that point is to end *A CHRISTMAS CAROL*, a well constructed story, in exactly the way everyone expects that it should not end; that is, with Scrooge as irredeemably wicked at its conclusion. In this way we say to the audience: "See, it's just a work of art, that we can play with, disfigure, or even demolish in the most arbitrary fashion. Our lives, and yours are also crazy, irrational, and subject to disfigurement in ways that make no sense whatsoever. Your life is no more immune to this than a work of art is. And in the same way that we can make what appeared to be meaningful and coherent meaningless and incoherent, we are showing you that life can at any moment become just like that. We agree that nothing in the story prepared you for the end — we agree it's totally crazy. But it is precisely because the disfigurement comes so out of the blue that it makes our point so well." Only by disfiguring an (up to that point) carefully planned and coherent work of art do we make that artistic statement clear. In this way, it becomes the greatest work of art it can be.

kin. They seem to show that Dworkin's theory places no constraint on the chain novelist because the novelist can justify virtually any conclusion she likes given the manipulability of the notions of fit and aesthetic value. But Dworkin's theory is designed specifically to meet skeptical objections of this sort. His response is that there is a constraint upon each author in the chain; each author feels constrained by her own interpretation of the rules of the enterprise. That sense of constraint is very real, even if its substantive content is different for each author:

It is a familiar part of our cognitive experience that some of our beliefs and convictions operate as checks in deciding how far we can or should accept or give effect to other [beliefs] and the check is effective even when the constraining beliefs and attitudes are controversial. . . . We might say . . . the constraint is "internal" or "subjective." It is nevertheless phenomenologically genuine, and that is what is important here. We are trying to see what interpretation is like from the point of view of the interpreter, and from that point of view the constraint he feels is as genuine as if it were uncontroversial, as if everyone else felt it as powerfully as he does.⁵⁸

One might nevertheless object that the constraint is an illusion, because it is based upon values that are subjective. In other words, the chain novelist is not really constrained because she is constrained by her own values, instead of the truly objective theory of fit and aesthetic values that would lead to the best result. However, Dworkin argues, this is not an argument that the chain novelist is not constrained; it is an argument based upon a disagreement about what the proper constraints are. A person who talks in this way will not use a different process of interpretation than the chain novelist; she will merely come to different conclusions about what respecting the novel-up-to-that-point requires.⁵⁹

Finally, one might object that Dworkin's theory undercuts his claim that there is a single right answer to questions of interpretation. If each person has her own views of what the best continuation of a chain novel should be, there cannot be a single right answer to the question, but only many different answers, each of which is based upon subjective value choices.

Dworkin's answer to this charge relies upon his theories about objectivity. We saw earlier that, for Dworkin, a moral or artistic position gains no additional force from the claim that it is objectively grounded (that is, that it is *really* true); conversely, no moral or artistic position is more convincingly refuted by the claim that it is merely someone's subjective opinion. The only good arguments for holding that a position is subjective are arguments that it is not a correct position; the only arguments for thinking that a position is objective are arguments that it is the correct one.

Thus, if we think that one ending of *A Christmas Carol* is better than another, and can give reasons why, we are arguing within the interpretive en-

58. LAW'S EMPIRE, *supra* note 1, at 235.

59. *Id.* at 238.

terprise. We may not claim that all interpretations are equally good because they are subjective, for we clearly think that our views are correct. On the other hand, if we think that no interpretation is the best because all are substantively bad, we also make a claim within the enterprise, a claim that is based upon a theory of what a correct interpretation is.⁶⁰

E. Enter Hercules

The point of the discussion about chain novels should by now be clear — Dworkin wants to argue that a judge's practice of writing opinions is much like an author's continuation of a chain novel:

Law as integrity asks a judge deciding a . . . case . . . to think of himself as an author in the chain of common law. He must think of [previous] decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be . . . from the standpoint of political morality.⁶¹

Of course, no judge in real life has the time or the energy to develop a complete theory of the entire corpus of legal materials. Thus, Dworkin introduces the by-now familiar character of Hercules,⁶² the infinitely patient and scrupulous jurist, as the ideal towards which judges should strive: "Just as a chain novelist must find, if he can, some coherent view of character, and theme" consistent with a single author's vision, so Hercules must try to find "some coherent theory about legal rights . . . such that a single political official with that theory could have reached most of the results the precedents report."⁶³

The theory of the law that Hercules develops will, like the chain novelist's interpretation, have several different dimensions. It will include convictions about fit and about justification. His theory must explain a large portion of the cases, and it must justify these cases in terms of the best moral and political principles consistent with them:

[T]he different aspects or dimensions of a judge's working approach — the dimensions of fit and substance — are in the last analysis all responsive to his political judgment. . . . [H]e believes that an interpretation that falls below his threshold of fit shows the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonored its own principles. When an interpretation meets the threshold, remaining defects of fit may be compensated, in his overall judgement, if the principles of that interpretation are particularly attractive.⁶⁴

60. *Id.* at 235-38.

61. *Id.* at 238-39.

62. Hercules plays a prominent role in earlier versions of Dworkin's theories. See *TAKING RIGHTS SERIOUSLY*, *supra* note 6, at 105-30.

63. *LAW'S EMPIRE*, *supra* note 1, at 240.

64. *Id.* at 257. In determining which principles best fit existing precedents, Hercules gives priority to explaining cases within the same "department" of law as the case he is presently considering. *Id.* at 250-51. If more than one theory provides an adequate fit, he expands his study to

The interplay of fit and justification thus produces a constraint on the judge — a constraint produced by action of one political principle on others. Like the constraint on the chain novelist, it is an internal constraint. However, Dworkin would argue that it is no less real.⁶⁵

Similarly, Dworkin would insist that it is no objection that judges determine the best interpretation of previous materials based upon their subjective views. This does not contradict the claim that hard cases have a single right answer, because both the judge's decision and our criticism of it must be based upon principles of political morality which each of us thinks is correct. When we engage in the enterprise of criticizing the judge's opinion, we presume that the question of law before her has a right answer.⁶⁶

III. CRITICAL LEGAL STUDIES AND THE CRITIQUE OF INTEGRITY

Most readers will find Dworkin's theories about the irrelevance of the objectivity/subjectivity distinction the most controversial point in his argument. Dworkin, however, sees his greatest challenge not from "external skeptics" who deny the objectivity of values from a standpoint outside an interpretive enterprise, but from those he refers to as "internal skeptics," that is, those who claim that within the enterprise itself there is no coherent set of principles that can explain the law:

Hercules knows that the law is far from perfectly consistent in principle overall. He knows that legislative supremacy gives force to some statutes that are inconsistent in principle with others, and that the compartmentalization of the common law, together with local priority, allows inconsistency even there. But he assumes that these contradictions are not so pervasive and intractable within departments that his task is impossible. He assumes, that is, that some set of reasonably plausible principles can be found, for each general department of law he must enforce, that fit it well enough to count as an eligible interpretation of it. This is the assumption the [internal skeptic] now challenges. He insists that the law of accidents, for example, is so shot through with contradiction that no interpretation can fit more than an arbitrary and limited part of it.⁶⁷

This criticism strikes at the very heart of Dworkin's enterprise, for his theory is based upon the possibility in every case of finding a single coherent set of principles that (1) explains the corpus of legal materials and (2) is morally defensible.⁶⁸

more distant areas of the law. *Id.* Dworkin, however, recognizes that the division of areas of law is in some sense arbitrary; hence the principle of local priority has greater or lesser force depending upon whether the distinctions between the departments of law themselves reflect coherent moral principles. *Id.* at 252.

65. *Id.*

66. *See id.* at 260-62, 266-67.

67. *Id.* at 268.

68. Both of these requirements are necessary. Suppose that the judge is an egalitarian who

Law as integrity might fail as an interpretation, then, if the corpus of legal materials lacks a principled justification with sufficient intellectual coherence. Dworkin identifies this claim with the work of several members of the Critical Legal Studies Movement.⁶⁹ In order to understand both the criticism and Dworkin's response to it, I would like to give a version of the argument based upon my own work in the area of tort law,⁷⁰ the very area on which Dworkin focuses.

A. The Crystalline Structure of Law and The Doctrinal Conundrum

If we look at the law of tort, we see certain recurrent and stereotypical forms of argument that judges use to support the extension and development of legal doctrines. These include arguments based upon social policy (which Dworkin generally thinks inappropriate for judicial consideration), arguments about rights, and arguments about moral responsibility and desert.⁷¹ To give an example of these arguments at work, consider the issue of whether a person

believes that the best moral or political theory is that everyone should have equality not only in opportunities but also in income and social status. If the first requirement were not necessary, it would be irrelevant that this theory does not fit the body of legal materials; the judge would be permitted to decide cases to equalize income and social status. Dworkin would probably argue that when a judge decides cases according to her vision of the best moral and political theory without taking fit into account, she is not interpreting an existing practice but simply inventing a new one. See *id.* at 66 & n.16; Dworkin, *Law as Interpretation*, *supra* note 2, at 531-32, 543-44; A MATTER OF PRINCIPLE, *supra* note 2, at 168-71. On the other hand, even if one can derive a set of principles that explains most cases, law as integrity requires that the principles be morally defensible. Assume that we discover on close inspection that in most cases in our legal system the law disfavors persons who are poor and politically powerless. Even if this principle explained the result in most of the cases, Dworkin would argue that such an interpretation could not be used to decide future cases; it is a substantively bad principle.

69. LAW'S EMPIRE, *supra* note 1, at 271-75 & n.20 (discussing Hutchinson, *Of King's and Dirty Rascals: The Struggle for Democracy*, 1985 QUEEN'S L.J. 273, 281-83). In the discussion that follows, I give my own version of this critique, which is similar in many ways to Hutchinson's and also to earlier pieces by Duncan Kennedy, whose work contains the seminal discussion of these issues. See generally Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976)[hereinafter Kennedy, *Form and Substance*]; Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983); D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983). Kennedy, however, has recently shown dissatisfaction with the style of large scale theorizing that I present here, see Kennedy & Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Hunt, *The Theory of Critical Legal Studies*, *supra* note 4, at 24-28. In any event, because of the diversity of views among those persons who loosely identify themselves with Critical Legal Studies, the reader should not assume that I am explicating any critical legal theories other than my own.

70. See generally Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1987).

71. These are not the only recurrent forms of argument. There are also, for example, arguments about ease of administration of rules, as well as arguments, about the institutional competence and authority of particular bodies to make decisions under these rules. See Kennedy, *Form and Substance*, *supra* note 69; Balkin, *supra* note 70.

should be held liable for all the damages caused by his intentional tort. Suppose that the defendant playfully kicks the plaintiff on the shin, the plaintiff has a preexisting condition making her especially susceptible to infection, and that the slight bruise caused by the defendant's battery leads to a serious illness that ultimately results in the loss of the plaintiff's leg. Shall we enforce the rule that only damages reasonably foreseeable from the nature of the battery are recoverable, or the "eggshell skull" rule — that the defendant may be held liable for all damages directly caused by her act?⁷²

The defendant will no doubt argue in terms of her lack of fault. She will insist that it was not foreseeable that the plaintiff's leg would be so affected; she had no intent to harm the plaintiff and she did nothing really wrong other than give the plaintiff a playful kick. Loss should be shifted only where there is fault, and to hold her liable for all the damages, even those which could not reasonably have been foreseen, is to hold her liable without proportionate fault.

The plaintiff will respond that the defendant may indeed have intended no harm, and that it may well be that no person in the defendant's situation could reasonably have foreseen that the slight touching would lead to so grievous a result. But the plaintiff is now without the use of a leg; she is no less harmed because the defendant did not intend to hurt her. As between the two innocents, the person who caused the harm should bear the loss.⁷³

These two arguments are stereotypical: we may classify them according to the formal principles they espouse. The defendant has argued No Liability Without Fault (NLWF); the plaintiff has argued As Between Two Innocents, Let the One who Caused the Damage Pay (ASB2I). We can symbolize the debate by the following dyad:

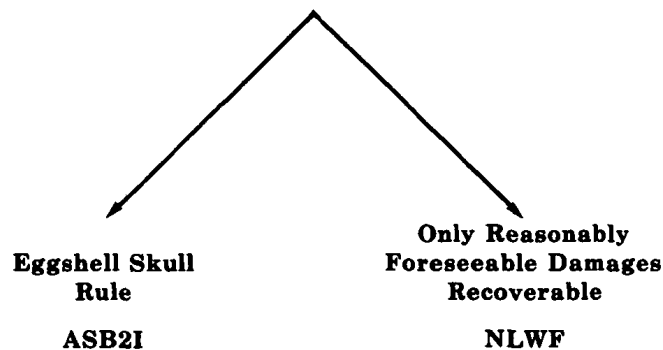


Figure 1

72. See *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891).

73. Of course there are many other arguments that the plaintiff can make as well: that the rule is a better deterrent of undesirable conduct, that it is easier to apply, and so on. Here I am only interested in the interplay of arguments about moral responsibility and desert. The points I make about these particular types of arguments also apply to the other argument forms and their associated responses.

Argument forms like NLWF and ASB2I are significant for several reasons. First, we encounter them in almost every rule choice in the law of tort.⁷⁴ Second, they are always situated and used in the same type of opposition; in each case, the NLWF argument is used to advance the position reducing the potential responsibility of the defendant; the ASB2I argument is used to argue for a potentially greater responsibility owed to the plaintiff.⁷⁵

Third, the use of these argument forms in support of a particular legal rule is wholly contextual. In other words, it is not the rule, but the proposed rule in opposition to it, that determines whether the argument in support of a rule will be NLWF or ASB2I. Thus, when choosing between an objective standard of negligence and strict liability, the argument for the objective standard will be NLWF. However, when arguing for an objective standard of negligence as opposed to a subjective standard, the argument for the objective standard of

74. I hasten to repeat that these are by no means the only type of arguments that we would use in deciding a case like *Vosburg v. Putney*. We might also use arguments and counterarguments about rights, arguments about social policy and utility, about which rule was easiest to apply and so on. The point is that each of *those* other types of arguments and counterarguments would also reoccur in almost every rule choice in the law of tort. See Balkin, *supra* note 70. I use these arguments of moral responsibility and desert as an example of this more general phenomenon, which I refer to *infra* as the "crystalline" structure of legal thought and legal argument.

75. Consider the following examples:

(1) Shall we have a negligence standard or strict liability?

NLWF: Negligence is a better standard because it shifts loss only when the defendant takes risks that are not cost-justified or that a reasonable person would not have taken. To shift loss in cases other than these is to punish a defendant for engaging in activity that is morally blameless, either because the activity is cost-justified or reasonable under the circumstances.

ASB2I: Even if the defendant has acted reasonably under the circumstances, the plaintiff is still injured and deserves compensation. If a manufacturer places a dangerous product in the stream of commerce and that product injures an innocent consumer, the manufacturer should not be able to avoid liability even if she exercised reasonable care.

(2) Shall we have a defense of mistaken self-defense in the law of intentional tort?

NLWF: A person who believes she is in danger cannot be faulted for acting so as to protect herself. It is unjust to hold her liable because she did nothing wrong.

ASB2I: A person who injures an innocent party under the mistaken impression that she is in danger still has caused injury to an innocent party and must compensate that party for her loss.

(3) Is the doctrine of *res ipsa loquitur* justified?

NLWF: Shifting burdens of proof or production based upon evidence and inferences that otherwise would not be sufficient to survive a motion for summary judgment increases the risk that the defendant will be held liable when she was not at fault and had nothing to do with the cause of plaintiff's injury.

ASB2I: Where the circumstantial evidence suggests that the defendant caused the plaintiff's injury, and where the defendant is in a much better position to know what happened, she should bear the risk of non-persuasion.

(4) Shall we have a state-of-the-art defense in products liability cases?

NLWF: In determining whether a product is defective, it is unfair to hold a manufacturer to knowledge about dangers or to a standard of protection not available to the industry at the time the product was produced.

ASB2I: The plaintiff is no less injured because the manufacturer complied with the state of the art; she still deserves compensation for the injury caused by the defective product.

negligence would be ASB2I:⁷⁶

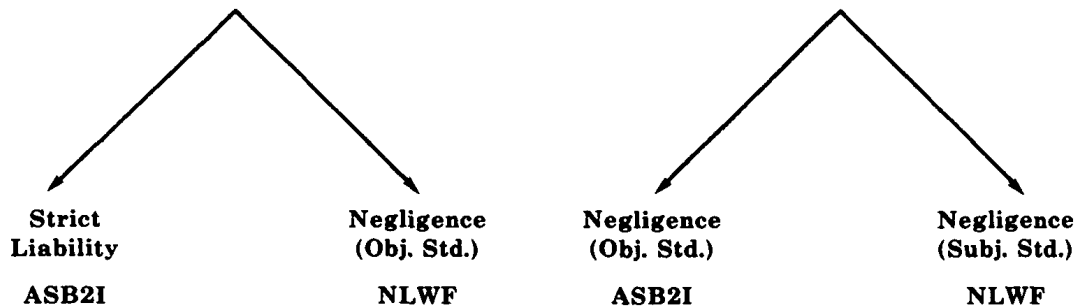


Figure 2

Fourth, these argument forms are routinely accepted and rejected at different levels of doctrine and across other areas of doctrine, with no apparent pattern. Consider whether tort law should recognize a defense of mistaken self-defense. The argument for the defense is NLWF; the argument against is ASB2I. Next consider whether the standard of mistaken self defense should be objective or subjective. The argument for the subjective standard is again NLWF; the argument for the objective standard is again ASB2I. However, at the first level of debate, (whether to recognize the defense at all), the NLWF argument wins; at the second level (what standard to use), the same argument loses, and the law adopts an objective standard:

76. The argument for a subjective standard is that a person who in good faith believes she is acting reasonably under the circumstances cannot be faulted because she does not realize that she is doing anything wrong. To hold a child, or an insane person, or a stupid person to the standard of a reasonable adult of ordinary capabilities and intelligence is to hold them liable without fault. The classic argument for the objective standard is that a person is no less injured and is no less deserving of compensation even if the defendant did not act inadvertently or indifferently, but sincerely believed that she was exercising due care. See Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 868 (1926). The ASB2I argument form also provides an argument for the still more stringent position of strict liability as it does for the objective standard of negligence. We might argue that even if the defendant acted reasonably in harming the plaintiff, the plaintiff is still no less injured, and no less deserving of compensation.

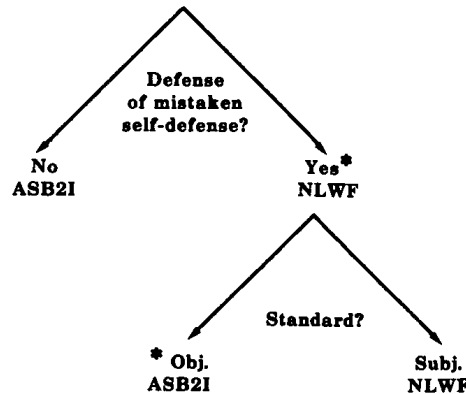


Figure 3

As another example, consider the differing treatment of justification used in intentional and unintentional tort. In intentional tort, the law recognizes an incomplete privilege rather than a complete privilege of private necessity. If a defendant acts out of private necessity and destroys the chattel of another in order to save a more valuable chattel or a person's life, the defendant must pay for the chattel destroyed.⁷⁷ However, if a defendant risks damaging the chattel of another and the expected loss is less than the expected cost of not taking the risk, the defendant is not required to pay even if the risk is realized and the chattel is destroyed.⁷⁸ This is because the general rule in unintentional tort is negligence and not strict liability. As explained above, the argument for a negligence standard over strict liability is NLWF; on the other hand, the argument for an incomplete privilege of necessity (over a complete privilege) is ASB2I:⁷⁹

77. *E.g.*, *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

78. This follows from the Learned Hand test announced in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). If the burden of prevention (the value foregone by not engaging in the activity that puts the chattel at risk) would cost more than the probability of the destruction of the chattel times its value, there is no liability even if taking the risk results in destruction of the chattel.

79. The argument for a complete privilege is that the defendant has done the socially proper thing: She has saved the more valuable chattel (or a person's life). Because she has done nothing wrong, she should not have to pay (NLWF). The argument for the incomplete privilege is that she has injured the plaintiff's property, even if for a worthy cause, and therefore should be required to compensate the plaintiff for the use of the plaintiff's property (ASB2I).

Several commentators have previously noted the apparent tension between the justifications for the Learned Hand test and the incomplete privilege of necessity. *E.g.*, Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 308 n.3 (1926); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 410-18 (1959).

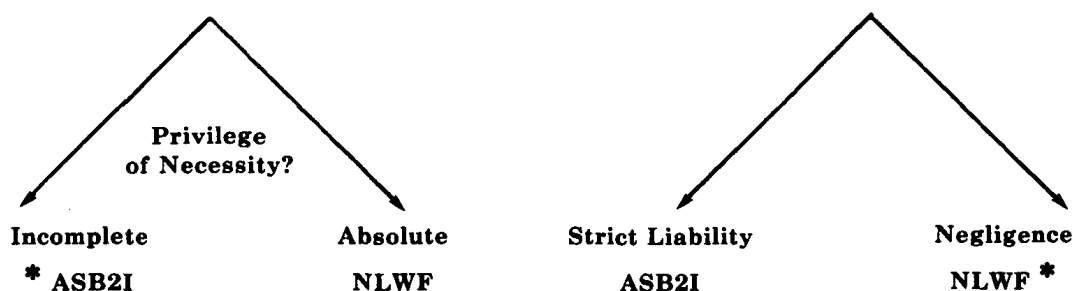


Figure 4

I refer to the phenomenon in both these examples as the doctrinal conundrum.⁸⁰ The conundrum, or puzzle, consists in the fact that the type of arguments accepted at one level to justify certain rule choices are often rejected at the next level of doctrinal complexity as well as in other areas of doctrine.⁸¹

Now the recurring forms of argument, the recurring patterns of contextual opposition of the forms of argument, and the doctrinal conundrum can all be explained by a simple fact: Our moral and legal consciousness is antinomial, that is, structured in oppositions. We think in terms of mutually opposed ideas of how people should relate to each other in society; what duties they owe each other, and what rights they have against each other. These mutually opposed ideas are at war in all issues of human responsibility in the law — in other words, they are at war everywhere. There are always arguments on each side of a rule choice, and the arguments always have the same flavor.

Two opposed ideas animate the ASB2I and NLWF arguments. These opposed ideas are attitudes or orientations concerning human responsibility for others in society. The position emphasizing responsibility of actors for others in society I call communalism; the position deemphasizing responsibility of actors for others in society I call individualism.⁸² The tension between individualism and communalism occurs at every level of doctrinal choice in tort law.⁸³

80. See Balkin, *supra* note 70.

81. A favorite example of mine consists of the rules concerning negligence. At the first level of doctrine (Strict Liability v. Negligence), the NLWF argument wins. At the next level (Objective Standard v. Subjective Standard of Negligence) the ASB2I argument wins. At the next level of doctrine (No Special Standard for Children v. Special Standard), the NLWF argument wins again. At the next level of doctrine (Adult Activity Rule [objective standard applies to children engaging in adult activities] v. No Adult Activity Rule), the ASB2I argument wins yet again.

82. Balkin, *supra* note 70; see Kennedy, *Form and Substance*, *supra* note 69, at 1713 (opposition between individualism and altruism). NLWF and ASB2I are two examples of a number of standard individualist and communalist arguments of moral responsibility and desert. There are also individualist and communalist forms of rights arguments and social policy arguments.

83. There are many other opposed ideas in our legal and moral consciousness besides individualism and communalism. The more general point is that almost all arguments that lawyers use reflect one side or other of these sets of opposed ideas. Since these ideas appear and reappear at

In some rule choices, the law adopts the relatively individualist position; in others it chooses the relatively communalist position. The doctrinal conundrum is that there seems to be no clear pattern which explains why individualism wins in some cases and communalism in others.⁸⁴

In sum, the doctrinal conundrum presents problems for the theory of law as integrity in two different ways. First, it contradicts law as integrity because it suggests that in law as it presently exists there is no way of reconciling the conflicting principles which are situated cheek by jowl in the materials of the law. Second, it suggests that this haphazard arrangement is not accidental — that it must occur because of the antinomial nature of human moral consciousness.

B. The Historical Critique of Integrity

It is important to distinguish these two claims. One claim is purely historical; it does not rest solely upon a theory about the way human thought is structured. Rather, it argues that the law is the product of many minds working over many centuries, each of which, to be sure, felt internal constraint, but in each case a different internal constraint. This critique suggests that the attempt to reconcile all of the different achievements of these minds into a coherent system is doomed to failure because the life of the law has not been logic, but a random walk. As Roberto Unger states in a celebrated passage:

[I]t 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. . . .⁸⁵

What adds to the utter confusion of legal doctrine is that not only have judges had different ideas about the best interpretation of legal doctrine, but no judge who has ever lived has possessed the synthetic skills that Dworkin

each level of doctrine, so do their associated argument forms.

84. As Duncan Kennedy puts it:

Given that individualism and [communalism produce] sets of stereotyped pro and con arguments, it is hard to see how either of them can ever be "responsible" for a decision. First, each argument is applied, in almost identical form, to hundreds or thousands of fact situations. When the shoe fits, it is obviously not because it was designed for the wearer. Second, for each pro argument there is a con twin. . . . [T]he opposing positions seem to cancel each other out. Yet somehow this is not *always* the case in practice. Although each argument has an absolutist, imperialist ring to it, we find that we are able to distinguish particular fact situations in which one side is much 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. And there are many, many cases in which confidence in intuition turns out to be misplaced.

Kennedy, *Form and Substance*, *supra* note 69, at 1723-24.

85. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 571 (1983).

attributes to Hercules.⁸⁶ From the beginnings of the common law, countless judges have lacked either the time, the skill or the patience to make their decisions locally consistent in principle with what has come before, much less globally consistent in the manner of Dworkin's Hercules.⁸⁷ The summing up of all these deviations from the ideal is likely to make the developing mass of legal materials less susceptible to principled explication, not more. Thus, even if every judge since 1100 consciously tried to emulate Hercules, the result would likely be disordered and unprincipled.⁸⁸

86. Dworkin dismisses this objection in another context because his point is that Hercules is an ideal towards which judges should strive. *LAW'S EMPIRE*, *supra* note 1, at 265. But the issue here is whether the result of previous decisions by judges is coherent or is a jumbled mass. As to that question, whether previous judges in the history of the common law have been anything like Hercules is quite relevant.

87. In earlier times, judges often lacked knowledge of cases that had previously been decided in other courts; this placed an additional obstacle in the path of decisional consistency. Today, improved technologies have made it possible to gain access to a greater percentage of judicial decisions, but their sheer bulk occasionally produces the same effect.

Another difficulty is that judges may not always have had the same notions as Hercules of what "principled" distinctions are. Thus, entirely different sets of rules might develop for real property as opposed to personal property, even if today we see no principled moral distinction between the two. In a later age we must live with these conceptualist distinctions and must try to come up with principles of our own to explain them. A second example involves the law of tort, where the growth of precedent was dependent for centuries upon the plaintiff's ability to shoehorn her cause of action into a common law form of pleading. The distinction between direct and indirect harm, which distinguished trespass from case, was jurisdictional; it may not appear principled to us today, but it shaped the development of the law of tort irrevocably.

This leads to a final problem: Even if judges' previous decisions were made on the basis of Dworkin's definition of principle, they may not have done so exclusively. Thus, if judges had been deciding cases on grounds of policy *in addition to* those of principle, we would expect this fact to confound later efforts to explain the body of received law in terms of principle alone.

88. As an example, consider the rules concerning mistake in intentional tort. In an exhaustive survey taken in 1902, Clarke Butler Whittier discovered that in some cases accidental or mistaken injury subjected the defendant to liability, while in others it did not. *See generally* Whittier, *Mistake in the Law of Torts*, 15 HARV. L. REV. 335 (1902)(collecting cases). Whittier's conclusion was succinct: "It is believed that no adequate distinction can be drawn between these two lines of cases." *Id.* at 341.

It is important to understand that this type of disorder is not the same as irrationality. The process of legal decision is quite rational in the sense that reasons are almost always given for decisions. The point is that the reasons given to distinguish cases may not be consistent with each other, or may be *post hoc* rationalizations that explain disparities between rules created at different times or places in history. These rules continue to coexist because of their perpetuation through the doctrine of *stare decisis*.

A good example is the different rules regarding excuses in intentional and unintentional tort, which are no doubt due to the different historical periods in which the different doctrines solidified. In general, the rules of intentional tort are much more closely akin to strict liability than those of unintentional tort. This no doubt reflects the earlier development of the former and the relatively recent transformation of trespass on the case into the modern law of negligence during the 1800s.

A second example concerns the separate rules regarding libel and slander. Slander is a product of ecclesiastical courts and was turned over to the common law in the sixteenth century, while libel is a product of the Court of Star Chamber and was passed along to common law courts in the

C. The Structuralist Critique of Integrity

There is, however, a deeper critique of Dworkin's theory than a purely historical critique, that is, the claim that historically the law has been a random walk. The doctrinal conundrum and the tension between individualism and communalism are not simply the result of the accidental clash of judicial forces. Rather, the tension between opposed legal ideas like individualism and communalism is a structural feature of moral and legal thought — this kind of tension is replicated at every level of doctrinal debate. For this reason I call its structure "crystalline," because certain kinds of crystals replicate structural patterns at both macroscopic and microscopic levels.⁸⁹

The difference between the historical point and the structuralist point is that even in the opinions of the same judge we will find competing principles expressed. Thus, a judge may uphold a negligence standard on the basis that liability should be assessed only for fault. The same judge may then state, in the same opinion, that the standard of negligence should be objective because a person is no less injured because the tortfeasor was too stupid to realize what she was doing.⁹⁰

seventeenth century. See PROSSER AND KEETON ON TORTS 772 (5th ed. 1984). Modern attempts to distinguish rules regarding oral and written accusation on the basis that speech is different than writing are mere rationalizations which often rise to the level of the ridiculous. See *id.* at 771-72 ("It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word. . . . The actions for defamation developed according to no particular aim or plan.").

89. Balkin, *supra* note 70.

90. Consider, for example, Justice Holmes' remarks in *THE COMMON LAW*. O. HOLMES, *THE COMMON LAW* (M. Howe ed. 1963). First, he argues against strict liability and in favor of negligence, using a standard argument that liability should be based upon fault:

Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of a series of extraordinary, although natural, events? The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so.

. . . .

State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but . . . to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

Id. at 74-75, 77-78.

Only a few pages later, Holmes realizes that the principle of No Liability Without Fault proves too much, since it could be used to argue for a subjective standard of negligence, while Holmes believed in an objective standard:

Supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or moral blameworthiness in some sense, the question arises, whether it is so in the sense of personal moral shortcoming. . . . Suppose that a defend-

In this case, the tension between legal doctrines is not due to an adventitious contradiction produced by two separate judges who decide cases one after the other. It is a tension produced *within* each individual between each individual's own most deeply held moral and legal beliefs. Each of us subscribes to the principles of individualism and communalism to varying degrees. The point of the doctrinal conundrum is that our individual embrace of communalist and individualist arguments does not occur in segregated areas of doctrine or of life, but everywhere at the same time. Our views about law are a patchwork quilt where first one principle, then its opposite, prevail in a seemingly unending and disordered pattern. The structuralist critique then, is the claim that this doctrinal conundrum is an inescapable feature of individual moral and legal thought that is writ large in the doctrines of law.⁹¹

Dworkin's response to this line of criticism relies on a distinction between contradicting principles and competing principles. If Hercules were presented with the question of whether or not to adopt the eggshell skull rule, he would proceed by determining which principles best explain pre-existing cases:

[Hercules] constructs two principles: that people should not be held responsible for causing injury they could not reasonably foresee and that people should not be put at a disadvantage, in the level of protection the law gives them, in virtue of physical disabilities beyond their control. He has no difficulty in recognizing both at work in the law of tort and more generally, and no difficulty in

ant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence judged by a moral standard that would take his personal characteristics into account.

Id. at 85-86.

Holmes thus shifts his ground, and uses an As Between Two Innocents Argument, the very argument he rejected above:

If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

Id. at 86.

The remarks indicate that Holmes was quite conscious of the fact that each of his arguments "proved too much"; he acknowledged that "[s]ome middle point must be found between the horns of this dilemma." *Id.* If a skilled and self-conscious judge like Holmes cannot avoid the doctrinal conundrum, how much less so can judges who do not even realize the rhetorical contradictions implicit in their decisions.

91. Recall the "zig-zagging" of the rules concerning the standard of care in general and the more specific standards relating to children. *See supra* note 81. Another way of stating this is that our adherence to economic individualism (or communalism) is not total: Even though a conservative may be globally more individualistic than a liberal in the area of economic regulation, she may adopt communalistic arguments at a more specific level of doctrine. A person may prefer negligence to strict liability yet support the Adult Activity Rule, even though that position is more communalist.

accepting both at the level of abstract principle. These principles are sometimes competitive, but they are not contradictory.⁹²

Dworkin's theory of principles in competition, then, holds that principles underlying the law are only in conflict in a certain number of situations; only in these situations does the law require a choice between them. The two principles articulated above would not be in conflict, for example, in determining whether children should be held to the standard of a reasonable adult in negligence cases. In both cases they would argue for a lower standard of care. Nevertheless

in some cases they will conflict, and coherence does then require some nonarbitrary scheme of priority or weighting or accommodation between the two, a scheme that reflects their respective sources in a deeper level of political morality.⁹³

[Hercules] asks whether past decisions in cases in which they do conflict have resolved them coherently. Perhaps they have, though whatever account he accepts of that resolution will probably require him to treat some past decisions, those that fall on the wrong side of some line, as mistakes. Perhaps not: perhaps a coherent legal system must treat all cases of this kind of conflict in the same way. Then he must ask, in the way now becoming familiar, whether one of the choices the system might make between the principles is ruled out on the grounds of fit; if neither is, he must decide which is superior in personal and political morality, and though others would decide differently, that in itself is no objection to his choice.⁹⁴

Clearly Dworkin means something different by "principle" than the arguments (such as NLWF and ASB2I) discussed in the structuralist critique. It is important to achieve some common ground of terminology or else there is a danger that the structuralist critic and Dworkin will end up talking past each other. In order to avoid confusion, I will henceforth refer to the structuralist principles as "argument forms."

The key to understanding the connection between Dworkin's constructed principles and the argument forms involved in the doctrinal conundrum is a fundamental tenet of structuralism: Social practices take their meaning from what they are opposed to in a given relational structure; that is, what makes them different from another thing in that structure.⁹⁵ The principles that

92. LAW'S EMPIRE, *supra* note 1, at 443-44 n.20.

93. *Id.* at 269 (discussing conflict between principles that people should be protected from "being ruined by accidents even when the accident is their own fault" and that "accidental loss should be borne by the person at fault, not the innocent victim.")

94. *Id.* at 444 n.20.

95. For an introduction to structuralism, see generally T. HAWKES, STRUCTURALISM AND SEMIOTICS (1977). In a trivial sense, it is always true that everything may be understood in terms of that which it is not. However, the structuralist point is that our minds organize reality into relational structures (here oppositions) which need not be logically contradictory opposites. "In consequence, the true nature of things may be said to lie not in the things themselves, but in the relationships which we construct, and then perceive, *between* them." *Id.* at 17 (emphasis in original).

Dworkin constructs do not, by hypothesis, lead to different results in a substantial number of cases. Ironically, then, it is only the existence of cases in which they do lead to different results that establishes them as different moral principles and enables us to choose between them as the guiding force of the law.⁹⁶

Thus, if we strip away the areas of agreement between the two principles Dworkin offers, and consider only that which differentiates them in the case before us, we get the following result:

- (1) No one should be held liable for unforeseeable injury.
- (2) People should be compensated for injuries caused by others, even if their injury is due to a special preexisting condition beyond their control.

Yet these principles are strangely reminiscent of the argument forms No Liability Without Fault (NLWF), and As Between Two Innocents, Let the Person Who Caused the Damage Pay (ASB2I).

We are approaching a generalization of considerable importance. The structuralist critique of integrity is quite consistent with Dworkin's assertion that his principles do not contradict each other, but only compete. The point of the structuralist critique is that in those cases where Dworkinian principles do make a difference as to how a case is decided, the differences consist in a number of standard forms of argument that occur and reoccur at every level of doctrinal debate. Thus, argument forms like NLWF and ASB2I are not Dworkinian principles; they are the *difference between* those principles in the context of specific cases. Moreover, and most essential to the structuralist critique, it is the difference between Dworkinian principles that determines which way the case comes out.

Dworkin's theory of competing principles thus leaves the structuralist critique in place, because his theory secretly relies on it. Dworkin's theory is that Hercules chooses from competing principles the principle that is most desirable from a political and moral standpoint. This assumes that the competing principles do lead to different results in a certain class of cases; otherwise, there would be no need to choose among them. Yet, what makes one principle superior to the others is precisely the results it produces in that class of cases in which it does make a difference. Thus, even if Dworkinian principles are not always in conflict, their value as principles arises in cases in which they are in conflict.⁹⁷

96. That is, if someone challenged you to show that the principles really had different content, you would respond by giving cases where they led to different results.

97. Dworkinian principles, moreover, are contextual. That is to say, the class of cases in which principle A and B diverge and in which principle A and C diverge may be very different. For that reason, the argument forms that represent the "difference" between principle A and principle B may be quite different than the argument forms that represent the "difference" between principle A and C. We saw above that in the context of the eggshell skull rule the Dworkinian principle that "people should not be held responsible for causing injury they could not reasonably foresee," LAW'S EMPIRE, *supra* note 1, at 443 n.20, was relatively individualist; its difference from the com-

The doctrinal conundrum is thus as real a problem for Dworkin as before, although we now describe it in different language. Even if a set of Dworkinian principles can explain a large part of the law, at every level of doctrine the principles that justify a rule choice will have to be chosen over other competing principles. Which principle prevails will turn upon the difference between the principles in the context of the individual rule choice. However, what will ultimately distinguish those principles from each other, in every case, will be a small set of argument forms that appear and reappear at each level of doctrinal debate. These argument forms, these distinguishing principles, will be chosen by the law with no apparent order or method; there will be no metaprinciple that explains the choice of distinguishing principle.

Thus, law as integrity requires not only that the law can be explained as a result of principles; it also requires that the way in which we resolve the competition between principles in one area must be consistent with the way that we resolve competition between principles in another area. This is precisely what the doctrinal conundrum appears to deny.⁹⁸

From the above criticisms, one might gather that I believe that law is not a rational enterprise. Nothing could be further from the truth. Legal thought and legal argument are quite rational, despite (perhaps even because of) their antinomial nature. The law is full of unresolved tensions because our way of thinking is oppositional. On the other hand, law is rational, for we do attempt to give reasons for our decisions and we do try to defend them using logic and common sense.

peting principle was a version of the No Liability Without Fault Argument. Yet the same principle — that liability should be proportioned to reasonably foreseeable injury — can also be relatively communalist in a different situation.

Consider the principle of fault-based liability in the context of whether a landowner has a duty to warn a trespasser of a dangerous condition on the premises. A second principle that might explain previous cases is "a person has no duty to assist one who wrongfully or unreasonably places herself in a position of danger." (This principle explains such legal doctrines as contributory negligence and assumption of risk.) Now in cases where the landlady could not have been aware of the presence of the trespasser, the principles do not conflict. Assume, however, that the landowner is on notice that trespassers frequently come onto her land. Now the competing principles are in conflict, and discarding their points of common agreement, they become the following argument forms:

(1) If a person causes a foreseeable and unreasonable risk of harm to another, she should pay if the risk is realized.

(2) Where both parties engage in unreasonable activity, there should be no liability.

The first argument is a standard communalist argument that Fault Implies Liability (F-L); the second argument is a standard individualist rejoinder that As Between Two Guilty Parties, Let the Loss Lie Where it Falls (ASB2G).

98. This is perhaps the most important way in which Dworkin misunderstands the CLS critique of legal reasoning. It is not necessary that principles be everywhere hopelessly in contradiction for what I call the doctrinal conundrum to operate. Indeed, the doctrinal conundrum is consistent with a considerable amount of agreement between principles. Rather, the doctrinal conundrum relies on a structuralist idea: that what gives a principle force and meaning is its differentiation from other principles, and that these differentiations will always be in conflict with each other.

There is no inconsistency between these last two statements. Rather, together they describe the law's contingency and boundlessness. We may view law as a system, but the more we try to systematize the law, the more the law escapes us. That is well, for there is always more in the law than we can confine to a single set of principles. In the end, law must always escape principle even as it is always defined by it.

D. The Ideological Critique

The historical and structuralist critiques have offered reasons why we should accept a position of internal skepticism, why

[no] set of reasonably plausible principles can be found, for each general department of law [Hercules] must enforce, that fit it well enough to count as an eligible interpretation of it . . . [and that] the law of accidents, for example, is so shot through with contradiction that no interpretation can fit more than an arbitrary and limited part of it.⁹⁹

Yet we do experience the law, at least sometimes, as coherent and ordered. Lawyers and judges are able to work their way through the materials of the law, and they certainly do attempt to work with the law as if it contained a set of consistent principles. Furthermore, lawyers and judges very often agree about what the law is. This phenomenological experience of order seems inconsistent with the claim that the corpus of legal materials lacks a principled justification with sufficient intellectual coherence.

The final critique of Dworkin's theory demonstrates how this phenomenology is possible. In so doing, it accepts Dworkin's theory of legal reasoning as correct but turns that theory on its head to demonstrate how lawyers and judges feel subjectively constrained by the materials of the law while writing their ideological preferences into the law. Because the ideological critique accepts Dworkin's theory but uses it for a wholly different purpose, it presents the most significant problems for Dworkin.

In order to understand the force of this critique, we must return to Dworkin's theory of judicial practice. According to law as integrity, judges decide cases by creating a theory that explains a substantial majority of pre-existing legal materials and is the best moral and political theory consistent with those materials. The judge, like the chain novelist, feels constrained by the nature of the exercise, even though she will use her own standards in determining fit, and her own judgment in determining which moral and political principles are the best ones.

If a judge works in accordance with Dworkin's theory, then she must, almost by definition, have a subjective feeling of order and coherence in the law, or else she would be unable to formulate a theory that explained previous cases. Moreover, she must experience herself as constrained by the rules of her practice, otherwise she could not see herself as explaining the law rather than

99. LAW'S EMPIRE, *supra* note 1, at 268.

changing it.¹⁰⁰

In short, Dworkin's interpretation of legal practice, if correct, virtually guarantees that Hercules, or any other judge, will experience order in the materials of the law and constraint in the exercise of his or her power. For this reason, Dworkin quite rightly argues that it is unfair to charge Hercules with consciously imposing his personal political beliefs into the law.¹⁰¹ Hercules is not secretly and conspiratorially substituting his views for the "real" law; he is using his best judgment to discover what the law requires. Similarly, it is unfair to say, as a positivist might, that where the law is in conflict or uncertain, or where the law "runs out," Hercules has discretion to decide the case any way he likes. The law never runs out for Hercules because the rules of his enterprise always require him to construct the principled theory that best explains the cases. This activity does not result merely in a statement by Hercules about what he thinks the law should be; it results in a statement about what he thinks the law is.¹⁰²

Dworkin believes that he can avoid the charge that his theory places no real constraint on judges because of the spuriousness of the objectivity/subjectivity distinction. For Dworkin, it is no objection that any constraint is illusory because it is based upon subjective values; if we criticize a judge's opinions, our disagreement must be founded on our own interpretation of the law. Yet there is another way of criticizing a judge's work: We can argue that the judge labors under a form of false consciousness. The judge's subjective feelings of constraint always lead her to decisions consistent with her ideological preferences.¹⁰³ She is, in short, so thoroughly enmeshed in her own world view that it always seems to her that the best moral and political theory that fits the largest number of cases is the theory that comports with her ideological convictions. This would explain why a very conservative justice would often find a principled (in her view) way of upholding a criminal conviction or death sentence, while a very liberal justice would often find a principled (again, in her view) way of reversing a criminal conviction or death sentence.

Surprisingly, Dworkin has very little to say about this possibility. At one point, while discussing the chain novel metaphor, he notes:

The skeptical objection can be made more interesting, however, if we weaken it in the following way. It now insists that a felt constraint may sometimes be illusory, not for the external skeptic's dogmatic reason, that a genuine constraint must be uncontroversial and independent of other beliefs and attitudes, but because it may not be sufficiently disjoint, within the system of the interpreter's more substantive artistic [or political] convictions, ever actually to check or impede these, even from his point of view. . . .

. . . .

100. See *id.* at 423-24 n.16; Dworkin, *Law as Interpretation*, *supra* note 2, at 531-32, 543-44; A MATTER OF PRINCIPLE, *supra* note 2, at 168-71.

101. See LAW'S EMPIRE, *supra* note 1, at 258-60.

102. *Id.* at 261-63.

103. See *supra* note 5 for a definition of the word "ideology."

Suppose we discover in the process of argument that your formal convictions [of fit and coherence] are actually soldered to and driven by more substantive ones. Whenever you prefer a reading of some text on substantive grounds, your formal convictions automatically adjust to endorse it as a decent reading of that text. You might, of course, only be pretending that this is so, in which case you are acting in bad faith. But the adjustment may be unconscious, in which case you are constrained but, in the sense that matters, you actually are not. Whether any interpreter's convictions *actually* check one another, *as they must if he is genuinely interpreting at all*, depends on the complexity and structure of his pertinent opinions as a whole.¹⁰⁴

Dworkin considers this objection "a lively possibility" that "we must be on guard against . . . when we criticize our own or other people's interpretive arguments."¹⁰⁵ Yet he does not seem to consider the objection as very important. He does not attempt to meet it at all, other than to suggest that a person in this situation is not "genuinely interpreting at all," because her convictions do not "actually" check each other. But that is precisely the point of the objection. If the process of adjudication is informed by ideological thinking, no one would be "genuinely interpreting" within Dworkin's theory, and no one's convictions would "actually" constrain them:

[A]nyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment. If he does not — if his threshold of fit is wholly derivative from and adjustable to his convictions of justice, so that the latter automatically provide an eligible interpretation — then he cannot claim in good faith to be interpreting his legal practice at all. Like the chain novelist whose judgments of fit automatically adjusted to his substantive literary opinions, he is acting from bad faith or self-deception.¹⁰⁶

Dworkin's theory of law as integrity, then, depends upon a distinction between judges who are genuinely interpreting legal texts and those who are not. The former judges are acting in good faith, the latter are suffering from bad faith or self-deception. This problem of "false consciousness" is a real one for Dworkin, for he has just conceded that "the adjustment [of formal convictions to substantive convictions] may be unconscious, in which case you . . . actually are not [pretending to interpret and acting in bad faith]."¹⁰⁷

But once Dworkin has conceded that judges may act in good faith yet still labor under false consciousness, he has undermined the very distinction between genuine interpretation and non-genuine interpretation that his theory of integrity rests upon. For genuine interpretation can no longer be synonymous with good faith interpretation, with its accompanying experience of internal constraint. How then, is a judge to tell whether she is "actually" constrained, if she feels the same internal constraint whether or not she is free from ideologi-

104. LAW'S EMPIRE, *supra* note 1, at 236-37 (emphasis added)(footnote omitted).

105. *Id.* at 236.

106. *Id.* at 255.

107. *Id.* at 237.

cal delusion?

The problem of false consciousness is especially problematic for Dworkin because it requires him to establish a test of genuine interpretation independent of the subjective good faith (or the sense of internal constraint) of the interpreter. Yet this will be difficult, if not impossible, for Dworkin because he has rejected the objectivity/subjectivity distinction. If we take that position seriously, what could it mean for Dworkin to say that a person is not "genuinely interpreting" or that there is no "actual" constraint, other than a claim that Dworkin disagrees with the substantive results of her interpretation?

Dworkin here faces a dilemma. He wants to be able to say that in certain cases he disagrees with the results of the judge's interpretation, yet he believes that the judge is acting in a principled fashion because the judge experiences the subjective constraints of law as integrity. He also wants to say, in other cases, that he disagrees with the results of the judge's interpretation because the judge is not interpreting the practice, but changing it; in these cases the judge is not acting in a principled fashion and the subjective constraint is illusory because the judge is ideologically deluded.¹⁰⁸ But there is no way for Dworkin to make that distinction without reestablishing some form of the objectivity/subjectivity distinction. In short, Dworkin's theory of law as integrity subtly relies upon the very distinction it seeks to avoid or exclude.¹⁰⁹

We might say that the ideological critique has been deconstructive — it has demonstrated how Dworkin's theory has depended upon what it sought to deny.¹¹⁰ We have just seen that Dworkin's theory must smuggle back the objectivity/subjectivity distinction in order to operate properly. However, there is a further distinction that is essential to law as integrity, and that we can also deconstruct: the distinction between non-ideological consciousness and false consciousness.

Dworkin's theory has viewed a good faith sense of internal constraint as

108. *See id.* at 236-37, 255.

109. For example, Dworkin might attempt to avoid reinstituting the objectivity/subjectivity distinction by recourse to the preexisting social consensus of norms. This consensus is the device he uses to define social practices at the preinterpretive stage. *See id.* at 66; *see also supra* note 15 and accompanying text. We would then look to the preexisting social consensus to determine if the judge is changing the practice rather than interpreting it. If so, she is acting in bad faith, or, if she acts in good faith, she is ideologically deluded. Of course, Dworkin might be reluctant to adopt this explanation because he has previously argued that the constraint upon judges "is not the constraint . . . of interpersonal consensus." *LAW'S EMPIRE*, *supra* note 1, at 257. But even if he accepted this solution, the problem is that the preexisting social consensus might itself only reflect a dominant political ideology, or at the least, the intersection of the most prominent competing ideologies. Dworkin then needs a theory to explain why this consensus is more reliable as a benchmark than a particular judge's internal sense of constraint. The conclusion we are leading up to, and which is developed more fully in the next section of text, is that *all* thinking may be ideological, in which case we would have to enshrine a dominant world view as the benchmark of ideological delusion. This preferred status is simply another way of relying on the objectivity/subjectivity distinction without acknowledging it.

110. For a general discussion of deconstruction, *see Balkin, Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987).

the normal case of judicial practice; he has based law as integrity upon that phenomenology. Dworkin admits that occasionally judges might feel the same experience if they were ideologically deluded, but he sees this as the exception, the special case, a deviation from normal judicial practice. His problem seems to be his inability to determine whether judicial practice falls within the core of non-ideological thought or the periphery of false consciousness. He can only do this by reasserting a new version of the objectivity/subjectivity distinction.

However, our previous deconstruction has suggested an alternative possibility: Perhaps the reason that Dworkin cannot establish a distinction between false consciousness and non-ideological consciousness is that no such distinction exists. All consciousness is ideological consciousness, and what we thought was non-ideological consciousness simply involves being under the influence of the "right" ideology.¹¹¹

Under this view, judges are always imposing their ideological preferences into law. Where their preferences do not deviate too much from the norm, we say that they are genuinely interpreting legal materials. Where they deviate too much, we charge that they are changing the practice or "reading things into the law."

Dworkin's theory, then, is especially vulnerable to the CLS critique of legal thought. CLS scholars may easily concede that judges feel subjective constraint yet still claim that judges do impose their ideological preferences upon the materials of the law. The whole point of the CLS critique of American law has been that judges do suffer from false consciousness, and the law does reflect the ideological biases of judges.¹¹² This is perfectly consistent with Dworkin's explanation of how judges decide cases. Indeed, it explains why judges feel constrained by the materials of the law when, at the same time, outside observers are able to predict their positions with a high degree of accuracy by reference to politics alone. For example, we may assume that both Justice Brennan and Chief Justice Rehnquist feel constrained by the materials of the

111. Now, instead of ideological consciousness being the abnormal, or special case, we see all consciousness as a more generalized form of ideological "delusion." What we call "true" consciousness involves an ideology whose delusionary aspects do not matter much.

I cannot stress this last point too much. Although the word "ideology" normally has pejorative connotations of false consciousness, it is incorrect to assume that all ideological thinking is misguided. Every ideology involves a partially true as well as a partially false vision of the world, and one cannot exist as a social and political being without engaging in ideological thought. Thus, in any given ideology there may be aspects that are useful, or that do not result in unjustifiable repression. The best ideology, of course, is one that minimizes these undesirable traits.

An unavoidable result of this theory of ideology, however, is that we can evaluate other ideologies only from the standpoint of our own. Furthermore, our own consciousness may be subject to ideological critique; thus, our determination of what is the "best" ideology and what is false consciousness may be colored by the delusive aspects of our own ideology. We can only determine if we, too, suffer from a form of false consciousness by a lengthy process of self-reflection. For a discussion of these very difficult issues, see R. GEUSS, *supra* note 5, at 55-95.

112. See Hunt, *The Theory of Critical Legal Studies*, *supra* note 4, at 11-20; Hutchinson, *Law Politics, and CLS*, 36 STAN. L. REV. 199, 217-19 (1984).

law. We may assume that both of them experience the subjective feelings of order that Dworkin describes. Yet it is clear that they disagree vehemently about many issues of constitutional interpretation, and, what is more important, the substance of their disagreements is relatively predictable.¹¹³

Indeed, a significant advantage of the ideological critique of integrity is that it can reconcile, in a way Dworkin's theory cannot, our internal experience of order and constraint in deciding legal cases with the external skeptical views embodied in the historical and structuralist critiques developed above, and with our knowledge that conservative judges consistently decide certain types of cases differently from liberal judges. The ideological critique explains how it is possible that law, viewed externally, could be a patchwork of conflicting principles (whether due to historical circumstance or the antinomial nature of human moral consciousness), while legal thinkers working within the law could experience it as a relatively ordered, constrained and principled system, and could routinely arrive at different answers to legal questions based upon their ideological biases.

The ideological critique builds upon the historical and structuralist critiques in this way: If the law is filled at every level with opposed moral and legal ideas, so that no single set of principles can contain the whole of the law, there is something in the law for everyone along the political spectrum. Right and left alike can find versions of their favorite principles in the doctrines of the law. Moreover, these principles are not confined to isolated segments of the law; the doctrinal conundrum assures us that they will be found everywhere, in every portion of legal discourse. Andrew Altman gives an excellent version of this argument in discussing an earlier version of Dworkin's theory:

[I]t is undeniable that the canons of legal argument place certain formal constraints on the ideological controversies which manifest themselves within judicial decisionmaking. 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. . . . 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 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.¹¹⁴

113. For any fourth amendment case that comes before the Court, it is a good bet, without our knowing any of the facts beforehand, that Rehnquist will vote to uphold the conviction, and Brennan will vote to reverse it. If I were a betting person, and followed this policy consistently, I would make a lot more money than I would lose, even though I would occasionally be wrong. (In fact, I might make hardly any money, because no one in her right mind would take the other side of the bet.) Yet this fact about judicial behavior is completely consistent with the subjective feelings of constraint that both Justices feel.

114. Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 16 PHIL. & PUB. AFF. 205, 229 (1986).

...
[Thus], even if there were a Dworkinian soundest theory [of the law], 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 that judges make 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 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.¹¹⁵

Altman's argument rests on the claim that "each view on the political spectrum is embodied in some substantial portion of the authoritative materials."¹¹⁶ This statement may be puzzling at first, because it seems to say that every political position is represented in legal doctrine — a highly contestable claim. In fact, the argument is more subtle; it relies upon the crystalline structure of legal thought and the doctrinal conundrum.

A better version of the argument is the following: Lawyers and judges justify all the doctrines of American law by means of a small set of standard argument forms which are derived in turn from basic sets of opposed legal ideas in our moral and legal consciousness. American political ideologies partake in those same basic moral and legal oppositions; hence, the moral and political principles these ideologies espouse are justified by the same types of argument forms.¹¹⁷

115. *Id.* at 230-31.

116. *Id.* at 231.

117. I will try to give some idea of how political ideologies are related to opposed moral and political ideas, by giving a rough account of the relationship between liberal and conservative ideology and the opposition of individualism and communalism. In America, political liberals and conservatives may be described, roughly, in terms of how individualist and communalist they are with respect to certain preferred liberties. Thus, liberals are apt to be more communalist with respect to freedom of contract than conservatives; while conservatives are apt to be more communalist with respect to freedom of speech, sexual autonomy, and the rights of accused persons. Thus, neither liberalism or conservatism is coextensive with individualism or communalism; rather each ideology is relatively individualist (with respect to the other ideology) in some areas of social life, and relatively communalist in other areas.

The curious result is that conservatives are more likely to argue for strict liability in criminal law (through the felony murder rule) while decrying strict liability for defective products; they are more likely to resent government telling people how they may or may not run their businesses than they would be likely to resent government telling people what they can or cannot do sexually. Conversely, liberals are more likely to decry restrictions on speech, even if the speech is harmful to others, while they are more likely to press for increased liability for business activities that harm others.

Even in these kinds of examples, however, most liberals and conservatives do not completely accept individualism and communalism. This is mainly due to the fact that individualism and

The doctrinal conundrum guarantees that, in every area of the law, each of the available opposing argument forms will justify some aspects of the rules. Therefore, no matter what the ideological position of the judge, and no matter what area of the law she is considering, she will always find principled justifications in that area of law that are hospitable to her politics. A *laissez-faire* judge deciding whether to adopt a warranty of habitability in residential rental property will have no trouble finding many examples of the principle of freedom of contract in the law of property and contracts; a more communalist judge will find no end of principled reasons for contractual regulation in the same bodies of law.

But the ideological critique does not merely show how disagreement among judges is possible. Its great strength is that it also shows why judges agree so often on how cases should be decided. No theory of law can be successful unless it explains this undeniable fact of legal experience. The answer provided by the ideological critique is that the dominant American political ideologies do not disagree about every aspect of social life. In fact, given that most judges subscribe to the ideology of Liberal capitalism, the differences between the sub-ideologies of liberalism and conservatism may not be very great at all — the areas of agreement may be quite substantial.¹¹⁸

Thus, it should not surprise us that Justice Brennan and Chief Justice Rehnquist agreed on forty-four percent of the cases decided in the Supreme Court's 1985 term.¹¹⁹ Like most Americans, both believe in Liberal democratic principles, private property, capitalism, and the Rule of Law; both come from the same traditions of moral thought and legal practice. They are much closer to each other than either is to Josef Stalin, Mao Tse Tung, or the Ayatollah

communalism are less coherent positions than orientations along a continuum of possible positions. Although a more individualistic position with respect to speech is generally more liberal, most persons who call themselves liberal will at some point agree that certain types of expressive activity may be regulated, discouraged, taxed, penalized, or even outlawed (for example, child pornography). The more liberal the person, the more individualist, and the further out the boundary of protected expression will be drawn. Thus, it is better to say only that a liberal is *relatively* more individualistic than a conservative in matters concerning freedom of speech.

118. There is no conflict between this assertion and our experience of the often bitter division between liberals and conservatives on political issues. We need only remind ourselves of the structuralist point: What gives meaning to a thing is how it differentiates itself from other things. Thus, we would expect liberals and conservatives to fight most heatedly about the limited number of things over which they disagree.

Similarly, this assertion supports our deconstruction of the non-ideological/false consciousness distinction. It is not the case that some judges at the fringes of the American political spectrum labor under false consciousness, while others in the mainstream do not. Rather, all subscribe, more or less, to Liberal capitalism, the dominant political ideology of American life, which includes a belief in Liberalism, capitalism, democracy, private property and the Rule of Law. We see the common aspects of judges' ideologies as representing the norm and mistakenly refer to them as "non-ideological" positions, while the areas where judges' ideologies diverge, that is, the differences between them, we mistakenly label the "ideological" components of their thought.

119. See 100 HARV. L. REV. 305 (1986)(statistical summary of the voting records of each member of the Supreme Court).

Khomeini. Moreover, it should not surprise us that the cases they do disagree about are the cases that accentuate the differences between the sub-ideologies of liberalism and conservatism. Once again, we see the importance of the structuralist notion that it is the differences, not the similarities, that give force to an opposition of ideas.¹²⁰

At this point, it might be useful to summarize the ideological critique of Dworkin's theories: The theory of law as integrity neglects the possibility that judges will see themselves in good faith as constrained by the materials of the law when they are in fact imposing their ideological views upon the law; their delusion is due to these same ideological biases. The ideological delusion is possible because the materials of the law already contain justifications supporting every variety of liberal and conservative positions. Because of the ideological nature of legal decisionmaking, judges tend to agree in most cases where their differing ideologies are not strongly opposed, but routinely and predictably disagree in cases where their ideologies clash most severely. In each class of cases, however, judges will see their decisions as fully principled and constrained by the existing materials of the law.

Dworkin does not think that decisions made under false consciousness are genuine interpretations of legal materials, because there is no actual constraint on judges. Yet Dworkin appears to rest his test of genuine interpretation on the subjective constraint that judges feel when interpreting the materials of the law. If this felt constraint would exist even when a judge was ideologically deluded, Dworkin must establish an independent test of "genuine" interpretation. However, this task is made virtually impossible by Dworkin's rejection of the objectivity/subjectivity distinction. He is unable to articulate how a person within the enterprise of legal decision can distinguish good faith interpretations that are not *really* interpretations from other good faith interpretations with which the person happens to disagree.

The ideological critique suggests that we accept the inability to make this distinction and recognize that all judicial practice is in some sense ideological.

120. The number of disagreements between Justices on the Supreme Court is probably artificially high, given that most of the Court's docket is discretionary. In his study of judges on the Eighth Circuit Court of Appeals, Douglas Linder noted that a very high percentage of circuit court opinions are unanimous. See Linder, *How Judges Judge: A Study of Disagreement on the Eighth Circuit Court of Appeals*, 38 ARK. L. REV. 479, 483-84 (1985). Although the actual amount of disagreement may be higher than the number of unanimous opinions indicates due to institutional considerations (collegiality, insufficient dissatisfaction with the result), see *id.* at 484, it is still fair to say that judges very often agree on the result in cases when they cannot choose in advance which cases they will decide. Linder suggests that judges tend to disagree "when they care about the outcome of a case and when they see things differently," *id.* at 517 (emphasis omitted). His statistics indicate precisely what the ideological critique would predict — namely, that dissents occur most often in those areas where liberal and conservative ideologies differ most pointedly, such as civil liberties cases, employment discrimination cases, labor relations, and antitrust cases. *Id.* at 499-501. Thus the high rate of agreement on most cases may reflect a unity of ideological bias rather than ease of decision. Put another way, the reason why cases appear easy may be due to the fact that judicial ideologies vary little with respect to the issues presented in them.

However, the dominant political ideology of American life is shared to a great extent by all judges. This explains at one and the same time why judges agree so often about what the law is and why judges contest cases most strongly when what is at stake accentuates the differences between their respective ideologies.

IV. CONCLUSION: WHAT CLS AND DWORKIN CAN LEARN FROM EACH OTHER

Both Dworkin and the Critical Legal Studies Movement have been guilty of paying too little attention to each other. Dworkin's treatment of CLS in *Law's Empire* is distressingly brief, and much of the discussion is relegated to footnotes. His discussion also lacks sensitivity to the force of the CLS critique. This is a serious mistake, for by characterizing CLS merely as a form of what he calls "internal skepticism," he has neglected what I consider the most important aspect of CLS work — the CLS concern with ideological analysis of the law. Had Dworkin been more concerned with what CLS theories were really addressing, he would have seen their direct relevance to his own work. As it stands, he has committed the very sin he accuses CLS of: He has not attempted to give an account of the Critical Legal Studies that makes it the best it can be. To paraphrase Dworkin himself: "Nothing is easier or more pointless than demonstrating that a flawed and contradictory account [of CLS] fits as well as a smoother and more attractive one. The . . . skeptic must show that the flawed and contradictory account is the only one available."¹²¹

One reason why Dworkin may have fallen into this trap is an underlying ambiguity in the expression he uses more often than any other in *Law's Empire*: "the best it can be." If the "best" thing is to explain and legitimate present legal practices, then, the "best" interpretation of CLS will be an interpretation that contributes to that goal. However, it will be very difficult to give an interpretation of CLS writings that will reconcile them with such an apology, and so one might conclude, following Dworkin's theory, that there is no good interpretation of CLS practice. Apparently, Dworkin is trying to impose this apologetic purpose upon CLS, and it is no surprise that he finds it wanting:

Critical legal studies should be rescued from [its] mistakes because its general skeptical ambitions, understood in the mode of internal skepticism, are important. We have much to learn from the critical exercise it proposes. . . . *This assumes, however, that its aims are those of law as integrity*, that it works to discover whether, and how far, judges have avenues open for improving law while respecting the virtues of fraternity integrity serves.¹²²

The flaw in this approach is that CLS may have a very different purpose than Dworkin ascribes to it; Dworkin is wrong in thinking that only purposes he likes are proper purposes to ascribe to a practice. The ideological critique of

121. *LAW'S EMPIRE*, *supra* note 1, at 274.

122. *Id.* at 275 (emphasis supplied).

law is not designed to show us why the system of law we have is the best one. Critical Legal Studies, like its namesake, Critical Theory, is designed to liberate us from the aspects of our ideology that apologize for and justify political and economic oppression.¹²³ If this psychological liberation is successful, we will become dissatisfied with the social and political structures we have built for ourselves, that we mistakenly assumed reflected what was natural and unchangeable, and we will alter them.¹²⁴

Like Dworkin then, Critical Legal Studies may want to eliminate the bad and preserve the good, but its intellectual strategy for achieving those goals differs radically from Dworkin's. Critical Legal Studies takes ideology seriously, while Dworkin does not. For that reason, an analysis of legal ideology cannot accept law as integrity as an unquestioned value because it is quite possible that law as integrity is intimately tied to the very type of ideological thought that we are critiquing. Therefore, the techniques and strategies of Critical Legal Studies cannot be harnessed to serve Dworkin's cause, as he apparently thinks they should be if they are to be deemed worthy and important. They cannot be made subservient to the greater goal of law as integrity, because law as integrity is a possible subject of CLS analysis and critique.

If Dworkin has underestimated and mischaracterized the Critical Legal Studies Movement, CLS scholars have too easily dismissed Dworkin as yet another apologist for the dominant political ideology and prevailing legal system. If Dworkin has not taken ideology seriously, CLS has not yet taken the phenomenology of judging seriously. As I have explained earlier, Dworkin's theory describes, with a high degree of accuracy, the internal constraint that judges who deal with legal materials experience. I have also explained why this theory is not only consistent with, but even supports, the claim that judicial practice is ideological. CLS has spent considerable time demonstrating the latter claim, which is an external description of the legal system. CLS scholars have much to learn from Dworkin about the internal account of law, the phenomenology of finding one's self within and navigating through the legal system. If CLS scholars paid more attention to Dworkin's theories about how judges interpret the law, their ideological analyses would be more convincing.¹²⁵

Of course, what has been said about Dworkin is also true of CLS: CLS's use for Dworkin's theories will be for quite different purposes than Dworkin himself might have intended. But CLS scholars should not make the same mis-

123. See R. Geuss, *supra* note 5, at 55 ("Critical theories aim at emancipation and enlightenment, at making agents aware of hidden coercion, thereby freeing them from that coercion and putting them in a position to determine where their real interests lie.").

124. For an illuminating account of the purposes of Critical Legal Theory along these lines, see Gordon, *New Developments in Legal Theory*, reprinted in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982); see especially *id.* at 288-92. Gordon admits that not all members of the CLS movement share his views. *Id.* at 291.

125. For an interesting attempt at a phenomenology of judicial practice, see Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

take that Dworkin has made in *Law's Empire*; they should not assume that they can only learn from Dworkin if his purposes are the same as theirs.