J. Angelo Corlett

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Ronald Dworkin's Cardozian Theory of Law

Dworkin's theory of the nature of law has received a great deal of attention in recent decades.[51] Indeed, Dworkin himself has spent great effort in replying to certain of his critics, and so I will not focus on those particular discussions of his theory.[52] The purpose of this section is to do the following: (1) provide a concise description of Dworkin's early formulation of his theory of legal interpretation; (2) note some leading criticisms of it; (3) defend his theory against such criticisms (drawing heavily, though not exclusively, from *Law's Empire*[53]); (4) set forth an internal critique of Dworkin's theory; and (5) outline part of the groundwork of a theory of legal interpretation, which is congruent with what is most fundamental to Dworkin's Cardozian view. In so doing, I assume a legitimate connection between constitutional and legal theory, one which rests at least on their common interest in legal interpretation, and, more precisely, the nature and determinacy of law.[54]

In "A Model of Rules,"[55] Dworkin makes a distinction between principles, policies, and rules. A principle is a standard observed simply because it is a requirement of justice, fairness, or another dimension of morality. An example of a principle is "no one may profit by one's own wrongdoing." A policy is a standard that sets out a goal to be reached. An example of a policy is that auto accidents are to be decreased. A rule, however, is different from a principle. An example of a rule is "a will is invalid unless signed by three witnesses." Rules are applicable in an all-or-nothing way. If the facts a valid rule stipulates are present, then what the rule says must be respected. A principle, however, states a reason for something but does not necessitate a

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[51] Marshall Cohen, Editor, *Ronald Dworkin and Contemporary Jurisprudence* (Totowa: Rowman and Allanheld, 1983). Also see *The Journal of Ethics*, 5 (2001), pp. 197–268, devoted to Ronald Dworkin's contributions to philosophy of law; J. W. Harris, *Law and Legal Science* (Oxford: Clarendon Press, 1979), Chapter 22.

[52] See, for instance, Dworkin's replies to Stanley Fish, "Working on the Chain Gang," *Texas Law Review*, 60 (1982), pp. 551–567; "Wrong Again," *Texas Law Review*, 62 (1983), pp. 299–316, in Ronald Dworkin, "My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Anymore," in W. J. T. Mitchell, Editor, *The Politics of Interpretation* (Chicago: University of Chicago Press, 1983); *A Matter of Principle* (Cambridge: Harvard University Press, 1985), Chapter 7. Also see Cohen, Editor, *Ronald Dworkin and Contemporary Jurisprudence*, Part 5.

[53] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

[54] David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy and Public Affairs*, 17 (1988), pp. 105–148.

[55] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), Chapters 2 and 3.

particular decision. It inclines without necessitating. Principles, but not rules, have weight. Principles can conflict and be assigned weights, but when rules conflict only one of them can be valid. This is, of course, a modest point in light of Roscoe Pound's claim that "Modern juristic analysis shows law operating through four distinct categories—principles, standards, concepts, and rules," where principles are the broad reasons that ground a rule of law and provide for the law's life, growth, and development, and where concepts are categories of classification rigidly determined by the law, and where standards depend on ideas of what is reasonable for their application, and where rules are stated precisely and are applicable in absolute terms, assuming that they are unambiguous.[56]

Distinguishing between his own and H. L. A. Hart's[57] approach to the role of principles in judicial decision-making, Dworkin argues that legal principles are binding as law and must be taken into account by judges who make decisions imposing legal obligation. The law includes principles as well as rules. As Ackerman argues, "there is more to law than rules."[58] And as Dworkin elaborates: "Legal history and political morality both count in deciding what the law is."[59] Judges are wrong to not apply principles when they are relevant to a case. Hart, on the other hand, argues that principles are not binding as rules are. They are extra-legal considerations that judges are free to follow in hard cases, if they wish. Dworkin objects that Hart's theory of judicial discretion allows judges to appeal to ordinary policies and to make retroactive laws. Dworkin also argues that Hart's model of rules is inadequate and misleading; that the rule of recognition is not the only law that is binding because it is accepted (some principles are binding as well); judges have discretion only in a trivial sense on Hart's view.

Dworkin argues that *Riggs v. Palmer* shows that principles play an essential part in arguments supporting judgments about legal rights and obligations.[60] For a rule does not exist before the case is decided, the court cites principles to justify adopting or applying a new rule. In *Riggs v. Palmer*, the court decided the case by appealing to the principle that no one may profit

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[56] Roscoe Pound, *Philosophy of Law* (New Haven: Yale University Press, 1959), pp. 115–143.

[57] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

[58] Ackerman, *We the People*, p. 30.

[59] Ronald Dworkin, "Replies to Endicott, Kamm, and Altman," *The Journal of Ethics*, 5 (2001), p. 263.

[60] Of course, Roscoe Pound notes that there are in every legal system not only concepts and a method of how they are to be applied but extra-legal ideals giving direction to the development of law (Roscoe Pound, *Philosophy of Law*).

from one's own wrongdoing as a principle against which to read the statute of wills.[61] Such an approach is often necessary because the rules relevant to a case are often vague or ambiguous. Rules require interpretation. Thus judges need to appeal to principles in interpreting rules. As noted in the previous section, this point is also made long ago by Cardozo, among others.[62] As one scholar puts it, "The Constitution—as illuminated by history and philosophy—provides a vision, but not all the details about how that vision should be achieved or approximated."[63] For Dworkin, principles originate from the sense of appropriateness developed in the legal profession and the public over time.

But "whether in the application of a settled rule, or in the creation of new law, we cannot avoid the influence of the personal factor,"[64] which leads to the issue of judicial discretion in interpreting the law. And as Pound argues: "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."[65]

There are three meanings of "discretion," according to Dworkin. There are two weak senses and one strong sense of this concept. One weak sense of discretion is that rules that a judge applies are not done so mechanically, but demand the use of judgment. Another weak sense of discretion is that a judge has the final authority to decide a case. The strong sense of discretion is that on some issues a judge is not bound by standards set by an authority. This delineation of judicial discretion somewhat deepens the one articulated by G. W. Paton:

> In truth, discretion is used in two senses—sometimes it means a power to depart from rules, sometimes it means a power of choice within fixed limits set up by law. In this second sense a judge may have discretion as to the sentence he will impose, the upper and sometimes the lower limits being fixed by law. . . . In truth, we can make a clear-cut distinction between the certainty of rules and discretion

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[61] See also, Cardozo, *The Nature of the Judicial Process*, pp. 40–41.

[62] "The process of legal judgment, as it is empirically observed, involves the use of rules and principles for a clarification of what the law is and what the issue presented for judgment may be treated as" [Edwin N. Garlan, *Legal Realism and Justice* (New York: Columbia University Press, 1941), p. 39].

[63] Richard Fallon, *Implementing the Constitution* (Cambridge: Harvard University Press, 2001), p. 5.

[64] G. W. Paton, *A Text-Book of Jurisprudence*, 2nd Edition (Oxford: The Clarendon Press, 1951), p. 169.

[65] Pound, *Philosophy of Law*, p. 111.

> as to their application, only if we regard law as a set of detailed rules and ignore the elastic nature of general standards and broad principles.[66]

Dworkin then goes on to discuss Hart's theory of judicial discretion in hard cases. Hard cases are the result of a gap in the law, argues Hart. The judge must apply extra-legal social policies and his own moral convictions and create new law to fill the gap. This creates new rights and duties that the judge then assigns retroactively to the case at hand. Hart thus argues that judges have discretion in a strong sense. Dworkin objects that (a) Hart's view permits *ex post facto* legislation and the losing party will be punished or deprived of property because he violated a new duty created after the event; (b) the winning party will not have his rights vindicated and will not be given the award he had a prior right to; and (c) it is inappropriate for a judge to appeal to policy to decide a case.

Dworkin defines a hard case as one in which no settled law or rule dictates a judicial decision one way or another because either (a) legislative intent is uncertain due to vagueness or ambiguity or (b) it is a case of first impression.[67] More specifically, there are many possible sources of hard cases. Some result from vagueness of language, such as a statute that prohibits vehicles on grass but fails to specify what counts as a vehicle. Others result from divided authority, as in *Spartan Steel & Alloys Ltd. v. Martin & Co*. Still other hard cases result from first impression, where new technology (such as an "abortion pill") makes it difficult to determine cases. Others result from essentially contested concepts such as "fair" when used in statutes. How such concepts are interpreted makes a difference as to the outcome of a case. This point is made clear by Edwin N. Garlan:

> . . . while it is accepted doctrine in American constitutional law that the doctrine of police power is a controlling principle, limited only by a standard of proper exercise both with respect to ends and means which are in turn estimated by the standards of reasonableness and the "due process of law" clause, it is an equally accepted criticism of constitutional law that the police power clause is what the courts say it is, or, in other words, is basically an elastic, indeterminate instrument of decision.[68]
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> The indefinite elasticity of the conception of justice, as embodied in legal formulae, provides a convenient instrument in the judicial process both for growth and for the limitation of change.[69]

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[66] Paton, *A Text-Book of Jurisprudence*, p. 170.

[67] Dworkin, *Taking Rights Seriously*, Chapter 4.

[68] Garlan, *Legal Realism and Justice* (New York: Columbia University Press, 1941), p. 60.

[69] Garlan, *Legal Realism and Justice*, p. 70.

Still other hard cases result from the necessity of having to interpret the rules of the game in question, while others result from the ambiguity of legislative purpose.

Dworkin then provides his own theory of law and judicial discretion, using the character Hercules as his ideal judge. Hercules uses settled law as data and seeks the theory that best explains and justifies this settled body of law. He then applies this theory to hard cases. Hercules' theory of law contains the following sorts of data: (a) a corpus of valid statutes; (b) a corpus of settled precedents; (c) constitutional rights; (d) implied principles of key settled decisions; (e) incorporated community principles of justice; (f) principles of settled "heavy weight," such as *stare decisis*.

We might ask, "How does Hercules identify mistaken past decisions and how does he deal with them?" Correct decisions in hard cases are those that provide the best fit over their alternative decisions in accordance with the one political theory, which gives the best justification for the past decisions already decided. Thus Dworkin's legal coherentism entails two dimensions of justification for decisions in hard cases: the "dimension of fit" and the "dimension of political morality." Consonant with Cardozo's view, the dimension of fit states that one political theory is a better justification than another if it fits established law better. The dimension of political morality states that one political theory provides a better justification than the other, degree of fit being the same, if it best captures the rights people have as a matter of political morality. This constitutes Hercules' justification test for previous decisions. Although Hercules will sometimes have to reject some earlier decisions as mistaken, even he must limit the number of past decisions he rejects so as not to threaten the stability of the law itself.

Dworkin uses a literary analogy to explain how Hercules decides hard cases. Hercules first asks which decision best fits with other parts of settled law. Then he asks which way of reading the law makes it holistically better. All along Hercules must bear in mind that the legislator's intent is not always relevant to judicial decision-making. Instead, Dworkin argues, judges are like authors of a chain novel, where all but the first author have the dual responsibilities of interpreting and creating. The judge must read past cases and advance the enterprise of law rather than strike out in an entirely new direction. Hercules must decide cases in such a way that his decisions fit with settled law, and the decision must show the value of settled law as if it were a "seamless web." In so doing, Hercules both explains (fits) the law and justifies it.[70] With Dworkin's view, both the meaning and the evaluation of the law merge. These are the two tasks of judicial decision-making. Whereas

[70] In discussing the First Amendment's protection of free speech, Dworkin argues that:

the judge's or legislator's intent is not always relevant to judicial decision making, it might be that the judge gives the law an intention of its own, just as the author of a novel gives a novel its own intention. On Dworkin's view, the judge is both interpreter and creator of law (mostly interpreter). Unlike a novelist, however, judges must be willing to at times sacrifice some aspects of law that threaten the overall consistency and integrity of law.[71]

J. L. Mackie's Critique of Dworkin's "Third Theory of Law"

J. L. Mackie[72] notes Dworkin's puzzlement[73] in explaining why antislavery "positivist" judges such as Judge Joseph Story did not simply exercise their strong discretion on behalf of fugitive slaves. Mackie questions why Dworkin is puzzled. Was not Story simply following his judicial duty of enforcing the law of the land (which ran contrary to his own moral views)?

Dworkin argues that the matter is not so simple because the Fugitive Slave Laws were not settled, but controversial. He notes three types of principles a "third theory" judge might have invoked from the U.S. Constitution in deciding cases for the fugitive slave: the concepts of individual freedom, procedural justice, and federalism. Instead, Story and other judges decided to follow the policies of the United States Constitutional Convention, according

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> The First Amendment, like the other great clauses of the Bill of Rights, is very abstract. It cannot be applied to concrete cases except by assigning some overall *point* or *purpose* to the amendment's abstract guarantee of "freedom of speech or of the press." That is not just a matter of asking what the statesmen who drafted, debated, and adopted the First Amendment thought their clauses would accomplish. Contemporary lawyers and judges must try to find a political justification of the First Amendment that fits most past constitutional practice, including past decisions of the Supreme Court, and also provides a compelling reason *why* we should grant freedom of speech such a special and privileged place among our liberties [Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996), p. 199].

[71] Dworkin's view here is not inconsistent with John Rawls' claim that " . . . when legal argument seems evenly balanced on both sides, judges cannot resolve the case simply by appealing to their own political views. To do that is for judges to violate their duty" [John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 168].

[72] J. L. Mackie, "The Third Theory of Law," *Philosophy and Public Affairs*, 7 (1977), pp. 3–16.

[73] Ronald Dworkin, "Review of Robert Cover, *Justice Accused*," *Times Literary Supplement*, 5 December 1975.

to Dworkin. He and Robert Cover[74] agree that Story saw himself in a subordinate role as a judge, bound to make the Fugitive Slave Laws coherent with the Constitution. Dworkin argues that this is a failure of the judge, a failure based on the fact that he adhered to a positivist view of judicial discretion. If Story had adhered to Dworkin's theory of law, then Story would have searched and found in the Constitution a principle antagonistic to slavery, which would have justified a quite different judicial response (i.e., *against* the Fugitive Slave Laws). Consistent with Dworkin's reasoning, here is the consideration that Story's opinion in *Prigg v. Pennsylvania* reflects some basic aspects of antebellum U.S. culture and values insofar as it reflects the idea that one human being can own another as property simply on the basis of race or ethnicity, and insofar as it seeks to quell discussion of the legality and justification of U.S. slavery as a dehumanizing institution.[75] As such, Story's decision exemplifies the content of the proposition that "Western history is a running commentary on the efforts of the powerful to impose a conception of reality on those they would rule."[76] More specifically,

> When Justice Story interpreted the Fugitives-From-Service-or-Labor-Clause of the Constitution in *Prigg v. Pennsylvania* as though it had entirely to do with harmonizing polities and nothing to do with the whips and shackles of slave-catchers, his interpretation did not alleviate the weight of those whips and shackles upon the black limbs he licensed them to fall on.[77]

Mackie objects that any restrictions on the Fugitive Slave Laws were overridden at the federal level. Knowing this, Story decided correctly. The only basis on which Story would have a right to decide against the Fugitive Slave Laws was if it violated due process. However, Mackie argues, the fugitive slave was not denied due process. For the slave was simply returned to the home state for a trial.

At the very least, the debate between Dworkin and Mackie on constitutional interpretation and the Fugitive Slave Laws represents an example of how Dworkin's third theory of law and legal positivism represent ways in which the legal system contains competing cultures contesting for control over conceptions of human living.[78] The question, though, is which theory of law is correct and to what extent ought judges to be free to "make" law in hard cases such as these.

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[74] Robert Cover, *Justice Accused* (New Haven: Yale University Press, 1975).

[75] Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), p. 217.

[76] Amsterdam and Bruner, *Minding the Law*, p. 225.

[77] Amsterdam and Bruner, *Minding the Law*, p. 226.

[78] Amsterdam and Bruner, *Minding the Law*, p. 231.

Andrew Altman's Critique of Dworkin's Theory of Law

Another set of objections to Dworkin's theory of judicial interpretation of the law is proffered by Andrew Altman. Altman[79] calls "intuitionism" the view according to which relative weights are directly apprehended in each case without there being any higher-order standard in virtue of which each principle has its particular weight. Dworkin holds that there is a legal fact of the matter regarding the weight of a given principle in a given case, and this weight is determined by the weight assigned that principle according to the soundest theory of law (i.e., the most defensible moral and political theory that coheres with and justifies settled law). Legal decisions are the outcomes of reasoning reconstructed according to principles that can be articulated and understood. This means a judge cannot simply appeal to her inner sense that a particular principle is weightier than some competing one. Instead, she must believe there is some higher-order principle that makes the one weightier than another, and that higher-order principle must be articulated. Dworkin also holds a theory of mistake that admits some things in settled law inevitably conflict.

Critical legal studies thinkers, according to Altman, argue that there is no discoverable higher-order principle for assigning weights to principles. This places the burden of argument on Dworkin to defend his thesis. Moreover, there are competing principles embedded in settled law (e.g., legal rules and doctrines accepted as authoritative by the community), but the respective weights of these principles are determined by ideological power struggles. So settled law is the result of such ideological conflict. Thus Dworkin's claim that there is a system of norms that governs the weighting of principles is implausible.

This leads to what Altman refers to as the critical legal studies' "patchwork theory" of law, which holds that the law is a set of irreconcilably opposed ideologies. Ideological conflicts in politics are also present in law. The law is a mirror, which faithfully reflects the fragmentation of politics. There is a sense in which the critical legal studies position politicizes legal theory.[80]

The critical legal studies thinkers deny Dworkin's claim that there is any soundest theory of law because of the internal contradictions present in the fundamental doctrines of law. The concept of the soundest theory, critical

[79] Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin," *Philosophy and Public Affairs*, 16 (1986), pp. 205–235.

[80] This claim is not meant to be a value judgment, but a mere description of the critical legal studies position on the nature of law.

legal studies argue, really has more than one referent. Dworkin's reply to this critical legal studies objection is twofold. First, he argues that it is rather improbable that in the complex U.S. system of law several theories of law would fit the settled law sufficiently. Second, he argues, even if there were several theories that fit well enough, that does not defeat his claim that the soundest theory would be the one from among the several which meets the condition of political morality as well.

Altman responds to Dworkin's reply by arguing that the critical legal studies objection is not that there are several soundest theories of law, but that there are none. Thus Dworkin's reply misses the critical legal studies point. The indeterminacy thesis (i.e., the thesis that in most cases the law fails to determine a specific outcome) holds precisely because there just is no soundest theory of law.

The second critical legal studies criticism of Dworkin's theory, according to Altman, is that there is a range of ideological conflict affecting legal doctrine. Even if there were a soundest theory of law, it would impose no practical constraints on judges whose preferred ideology is in conflict with the soundest theory. Thus the soundest theory would have no effect on judges who fail to share its view.

Altman cites two possible responses Dworkin might provide to rebut this objection. First, Dworkin might deny that political ideological conflicts are not altogether found in the realm of law due to the fit requirement. Second, Dworkin might deny that the legitimacy of political adjudication in hard cases hinges on whether or not ideological conflict in law ranges as wide as in politics. Both of these tries fail on Altman's view. Thus there stand problems facing Dworkin's theory of law.

In Defense of Dworkin's Theory of Law

As we have seen, Mackie poses a threefold objection, which charges Dworkin with "playing fast and loose with the law," while Altman discusses two critical legal studies criticisms of Dworkin's theory. I shall now defend Dworkin's theory against each of these sets of objections. My principle aim in defending Dworkin's theory is not to provide a set of conclusive arguments for his position. Rather, it is to either defeat or neutralize Mackie's and Altman's respective objections to it so as to render Dworkin's view, or one like it, plausible.

As mentioned, Dworkin argues that legal principles are binding as law and must be taken into account by the judges who make decisions imposing legal obligation. The law includes principles as well as rules. Judges are wrong not to apply principles when they are relevant to a case. Correct decisions in

hard cases are those that provide the best fit over their alternative decisions in accordance with the one political theory that gives the best justification for the past decisions already decided. Thus Dworkin's legal coherentism entails two dimensions of justification for decisions in hard cases: the dimension of fit and the dimension of political morality. The dimension of fit states that one political theory is a better justification than another if it fits established law better. The dimension of political morality states that one political theory provides a better justification than competing theories, degree of fit being the same, if it best captures the rights people have as a matter of political morality. This constitutes Hercules' justification test for previous decisions. Although Hercules will sometimes have to reject some earlier decisions as mistaken, even he must limit the number of past decisions he rejects so as not to threaten the stability of the law itself. Dworkin also holds that there is a legal fact of the matter regarding the weight of a given principle in a given case, and this weight is determined by the weight assigned to that principle according to the soundest theory of law (i.e., the most defensible moral and political theory, which coheres with and justifies settled law, where "settled law" consists in the legal rules and doctrines accepted as authoritative by the community).

The main point of Mackie's discussion, as we have seen, centers on the positivist judges in regards to the Fugitive Slave Laws and whether or not the law was settled. Dworkin takes the position that the law was unsettled, seeing judges like Story in a quandary as to what to do: to either uphold positive law or decide cases according to deeply held moral principles. Mackie argues that the law was settled and the judges simply fulfilled their obligation to uphold positive law. This explains why Story decided cases against his moral convictions.

It is at this point where Mackie objects to Dworkin's third theory of law. He argues that Dworkin's theory construes as unsettled cases those that are settled on the positivist account. Second, even if Story decided cases according to Dworkin's theory, he might still have reached the same conclusions as he would have by using the positivistic approach to deciding cases. Third, the adoption of Dworkin's theory, argues Mackie, makes the law less certain and less determinate that it would be on the positivist approach.

In reply to Mackie's first concern, it might be argued that it begs the question as to the status of law to imply that the positivist account of law is correct when it construes certain laws as settled when Dworkin does not. Thus this first point of criticism fails to count against Dworkin's theory unless it can be shown, by way of independent argument, that either the positivist construal of law is correct or that Dworkin's is false (or both). Mackie's claim that they construe certain laws differently does nothing to show either the correctness of the positivist view or the falsity of Dworkin's view.