

DEFENDING LIBERAL LAW: A REVIEW ARTICLE *

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In the final chapter of his important book (Critical Legal Studies: A Liberal Critique. Andrew Altman. Princeton University Press, Princeton, New-Jersey and Oxford, 1990. 206 pp. with index. Hardback £17.25), Andrew Altman quotes from the dialogue in which Hamlet and Horatio discuss the kinds of parchment on which the laws are written:

"Hamlet: Is not parchment made of sheepskins?

Horatio: Ay, my lord, and of calves' skins too.

Hamlet: They are sheep and calves which seek out assurance in that" (p. 196).

That quotation served as a caveat against unrealistically high expectations of liberal law as a just, neutral and objective protector of individuals. For it is these absolutist expectations which cannot be fulfilled that lead to disillusionment, and it is this disillusionment rather than anything else that motivates the idea of abandoning the "liberal legal doctrine" as intellectually unsustainable. Liberal law affords no absolute guarantee that our individual well-being will be immune from unjust, non-neutral and non-objective treatment by the state. It might well be reflective of conflicting values so that any choice between them is bound to be non-neutral, non-objective and riddled with contradictions. It can be manipulated by using its rules as "empty vessels" that can be loaded by whatever the powerholder deems fit. Finally, it may unduly objectify the existing choices of value by presenting them as socially necessary and thereby systematically suppress all other forms of life.

Despite this, Altman demonstrates throughout his book that

those who endorse liberalism and its core idea of the rule of law cannot sensibly be identified with the innocent "sheep and calves who seek out assurance in that." According to him, liberal law is capable of being sufficiently neutral, rational and objective; it is by postulating unrealistically stringent standards for each of those three that the more radical adherents of the Critical Legal Studies (hereafter, CLS) are claiming to have uncovered the law's irrationality, non-objectivity and lack of neutrality. Hence, the CLS's radical attack on liberal legal theory is self-refuting (as its arguments themselves cannot satisfy the rigorous standards of rationality which they postulate), or addressed against a straw-man, or both. Thus, the liberal idea of legislative neutrality is confined to substantive goals and forms of life that individuals of different persuasions (moral, religious or other) may wish to pursue. None of those goals and forms of life should be given preference over others and each of them ought to be treated with equal concern and respect. This by no means implies that the state should also be neutral in regard to the demands of justice and moral obligation which arise in setting the framework for social interaction, as distinguished from the ends that might be striven for within that framework. CLS, however, attributes to liberalism the idea of "subjectivity of values" in the sense that no moral conception of any kind licenses those who endorse it to coerce those who wish to dissent. This proposition indiscriminately assumes that liberalism embraces the subjectivity of *all* normative directives. As Altman explains (pp.66-72), this depiction of liberalism either ignores or underestimates the distinction between the ends-related "good" and the framework of "right" which requires different groups combining a pluralist society to work out compromises and accommodations that they can live with. If the doctrine of "total subjectivity of values" were taken up by some liberal theory of legislation as a basis for its neutrality, this theory would indeed be self-contradictory. None of the legal rules could, under this doctrine, ever be claimed to be neutral. But liberalism maintains the subjectivity of values only in the realm of "good" and not in the realm of "right." This distinction is not unproblematic, but, according to Altman (ch.3, *passim*), can be sustained.

Indeed, the most difficult problem arising in that context

relates to the possibility of making a neutral and objective distinction between the domain of "right" and that of "good." Can it be claimed to exist independently of consensus? In a pluralist society, when people might disagree about that distinction, subjectivity threatens to swallow up both domains. Altman (pp.72-77) offers in that context four forms for neutrality, favouring the most abstract one which, apart from its minimal demand of inner conceptual coherence, insists on imposing *some* '... substantial constraints on politics in the name of individual autonomy.' This abstract form of neutrality is indifferent to the specifics of these "substantial constraints." What is most important here is the very readiness in principle to impose them and participate in a debate about their specifics. These minimalist and abstract requirements do not postulate any truth-conditions for propositions of political morality. Nor do they rest on any specific epistemology of "right" and "good." Rather, instead of embarking on any of these hazardous enterprises, they are epistemologically neutral and, in Altman's words, "let a thousand epistemologies bloom" (p.75). This approach, shifting the main emphasis to what can be described as a continuous moral dialogue with the resulting consensus and accommodation, maintains neutrality which is sufficient for a liberal theory.¹ An encounter with the CLS's arguments which expose the liberal theory's limitations can, according to Altman, only clarify the liberal commitment to neutrality rather than prove its futility.

The task undertaken by Altman in this part of this defence of liberalism is yet to be accomplished. His discussion might not persuade every fair-minded reader that what he identifies as liberalism's limitations do not threaten to undermine the very core of liberalism. First, Altman's account provides no guidance in cases where people's political dialogue about the basic terms of their association, including the "right/good" distinction, ends up in a stark disagreement. How can such disagreements be resolved both neutrally and objectively? Second, what ought to be the standards of moral coherence and whose view of moral

1. Altman (p.75, n 22) maintains that this approach to liberal neutrality is consistent with that which appears in J. Raz (1986) *The Morality of Freedom*, Oxford.

coherence should prevail in cases of disagreement? Altman's coherence requirement appears to be too abstract and inexplicit. By applying that requirement, as it stands, to concrete issues, one, for instance, can neither confirm nor repudiate the proposition that to legalize abortion while murder remains illegal would be incoherent. Third, which constraints on politics in the name of individual autonomy would be regarded as substantial enough? Who would ultimately be empowered to decide on these matters in cases of disagreement? Is it not the case that virtually every contestable issue, such as abortion, euthanasia, pornography, welfare, taxation or vivisectionism would never be amenable to a settlement which would be considered by everyone as "liberal" rather than, say, simply majoritarian?

Each of these points tends to suggest that in Altman's theory, the boundaries separating liberalism and crude majoritarianism are rather flimsy. This problem is not intrinsic to every conception of liberalism. Rather, it is intrinsic to Altman's ideal type of liberalism: this problem seems to be a result of carrying the point of liberal ethical abstinence too far. Liberals may and probably must take sides on substantive issues of morality, such as those which relate to the limits of state power, individual autonomy and equality.² This, undoubtedly, would make them not ideally neutral. But why would this render them illiberal? As was persuasively argued by Raz, it is far from certain that liberal theory *must* and, indeed, can be founded upon some kind of strong and all-encompassing conception of moral neutrality.³ Unfortunately, Raz's arguments, and especially the point that what typically passes for "neutrality" is biased in favour of some individualistic conception of the "good," has not thoroughly been discussed by Altman.⁴

Altman also argues that liberal law is not oppressive, as some of the CLS's adherents would like us to believe. Liberal law remains indifferent in regard to different values and forms of life in so far as the freedom to practise them does not interfere with exercise of corresponding freedoms by those who subscribe to

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2. R. Dworkin (1986) *A Matter of Principle*, Oxford, ch. 8.
 3. J. Raz, *supra*, n 1, ch.5.
 4. *Ibid.*, 117-24.

other forms of life and values. Typically, but not invariably, it resorts to coercion only as a matter of "corrective justice," ie, when this is necessary for the restoration of the state of equilibrium which has been interrupted. It goes without saying that social equilibrium, being an outcome of largely unfettered human interactions, is bound to consist of "haves" and "have-nots," powerful and powerless and so forth. It also seems to be clear that the "have-nots" and powerless may often feel oppressed by the "haves" and powerful and that at least in some cases such feelings might be justified. This would mean that liberal law does not entirely outlaw all kinds of oppressive behaviour. To prove this, it would be sufficient to recall the famous Hohfeldian distinction between other-regarding "claim-rights" which are correlated to duties and self-regarding liberties or "privileges" which are not correlated to duties of any kind. It is evident that liberal law consists of far more "privileges" than "rights," so that the powerful can relatively freely exercise their "privileges" in ways which adversely affect others. Liberties or "privileges" are "self-regarding" only in the artificial world of law. In real life they are very much "other-regarding:" when *A* is at liberty, he is under no duty to abstain from directly or indirectly harming *B*, so long as he acts within the bounds of his liberty. This widely opens the gates for *damnum sine injuria*,⁵ and it would therefore be wrong to maintain that liberal law affords protection to the outcast, the despised and the weak. It does undoubtedly impose serious limitations upon public power, but that can only be done by unleashing a great deal of private powers. At the same time, it cannot plausibly be argued in defence of liberalism that liberal law can only be held responsible for state, as distinguished from merely "private," oppression. First, granted that this argument is correct, it would not be sufficient for justifying liberal law: private oppression is bad enough. Moreover, privatized powers of subordination and coercion cannot survive without being facilitated by the state's law which constrains the ways of implementing changes in existing power relationships. Hence, the "private/public" distinction becomes fatally weak and cannot

5. J. Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," [1982] *Wis.L.Rev.* 975.

be used as a justification of liberal legal doctrine, as, indeed, was powerfully argued by several CLS writers.⁶ A conclusion that liberal law legitimizes at least *some* kinds of oppression is therefore inescapable.

Despite this, Altman maintains that it would be a mistake to dismiss liberal legal protection as fictitious and unduly "reifying," viz., as one which merely disguises the contingency and oppressiveness of existing power relationships by presenting them as objective and/or socially necessary. Any such dismissal is derived from an unwarrantedly perfectionist premise that the rule of law was designated to be an unqualified human good, a panacea for all human sins and evils. Liberal law is certainly not capable of fulfilling such expectations, but it can still be justified as a *least oppressive* and therefore the best political framework among the currently known ones. CLS's attempts to refute this defence of liberalism analytically, let alone by socio-political experience, have so far not been successful. All that these attempts did, was to show that liberal law does not eliminate oppression as well as many other evils. By unveiling this and other shortcomings of liberalism, CLS can merely contribute to a more critical understanding of the liberal legal doctrine rather than demolish it (pp.15-18 and 196-201).

Few liberals would contest and few CLS adherents would accept this proposition. CLS's attacks upon liberalism have invariably been intended to do more than renounce complacency and insensitivity to injustice and suffering. If these attacks can indeed be reduced to such a renunciation, then, despite Altman's admirable attempt at making peace between CLS and liberals, a conclusion that at least this part of the CLS programme has blatantly failed appears to be inescapable. This conclusion, however, seems to be premature. Any argument aimed at showing that liberal law is not oppressive or least oppressive has to rest upon some particular conception of "oppression." What would appear as oppressive to an individualist would not necessarily be so regarded by a communitarian, and vice versa. Thus, welfare-orientated liberals might support and treat as non-

6. See the CLS symposium on the Private/Public distinction in (1982) 130 *U.Pa.L.Rev.* 1289ff.

oppressive (or least oppressive) an imposition of restrictions on competition, no-fault system of compensation in torts, redistribution of wealth through taxation and so forth. Those who are committed to individualism might understandably renounce such policies as grossly oppressive, whilst CLS might advocate them (in various ways) without pretending that they are non-oppressive. It is pertinent to recall at this point one of the main problems faced by utilitarians, namely, their assumption, which was postulated rather than proved, that "pleasures" which are subject to overall augmentation and "pains" which are sought to be minimized are reducible to an intelligible common denominator. Exactly the same difficulty is involved in presupposing commensurability in respect of *all* kinds of "oppression." Any such presupposition, as well as any gradation of various kinds of "oppression," are, to say the least, not unquestionable, for they are bound to be biased in favour of some particular view of "oppression." When implemented in actual political life, they might themselves become oppressive, at least to the extent that they go beyond the existing political consensus or suppress other views. No political system can warrantably be claimed to have eradicated or minimized "oppression" when people disagree about this very notion qualitatively rather than quantitatively. It is arguable, for example, that contrary to what some liberals might think, no political process, be it as fair and non-oppressive as it can ever get to be, can be considered as an adequately rectifying factor when it ends up in *social conditions* activating one type of "oppression" or another. It can, of course, be argued that this proposition is profoundly wrong; that one can tenably distinguish between unjustified acts of oppression and unavoidable "oppressive conditions,"⁷ or between "state-generated" and "merely private" oppression and so forth. What then makes one view of "oppression" better than another?

The answer to this question may well be "nothing." However, in order to maintain a more or less orderly social life, people *have* to make substantive choices which might be regarded by some

7. Cf., R. Nozick (1974) *Anarchy, State and Utopia*, New York, 262-65.

as "oppressive." People's abstention from making such choices would itself amount to a substantive political choice which, in turn, can be charged with generating "oppression" or some other evil. People, nevertheless, have to arrive at *some* common political denominator, if they are to live together at all. They have to do that even when their common denominator, such as liberalism, is evidently not perfect, provided that it allows them to continue their search for a better form of life. Therefore, the main problem with the oppression-based critique levelled by CLS against liberalism is not that it suffers from some inherent philosophic-analytical weakness and implies no more than an *ad hoc* correction of some liberal faults. The major problem is that CLS has not yet come out with an intelligible political agenda that could constitute a viable alternative to liberalism. Theoretically at least, one has to leave room for such an alternative. To produce it, however, CLS scholarship must become more constructive and less deconstructive.⁸

Liberal Framework of Adjudication

Altman's critique of the CLS's radical account of adjudication is rather more vigorous. In his account, law is more than just naked inscriptions on parchment readily susceptible to deconstructions, conflicting interpretations and other destabilizing applications, as radical CLS scholars would like us to believe. It is a host of social practices, not just "paper-rules," and these practices are constrained so as to shield our freedoms, substantially enough if not hermetically, from unwarranted intrusions of brutal political force. These practices are replicated in *interpretive conventions* which form part of the law.

The existence of such conventions contradicts the "empty vessels" vision of legal rules held by some of the CLS scholars. Altman convincingly demonstrates that this vision rests on dubious epistemics (largely inspired by self-refuting foundationalist assumptions which are used as a platform for sceptical conclusions) and unsustainable conceptions of linguistic meaning (pp.90-98). He also shows that the strong version of the

8. J. Stick, "Can Nihilism be Pragmatic?" (1986) 100 *Harv.L.Rev.* 332.

"antinomy of rules and values," which led some of the CLS writers to the conclusion that interpretation of legal rules can never be objective and neutral, is false. This antinomy juxtaposes the idea of "subjectivity of values" with the need to invoke them in order to understand and apply legal rules. The need to rely upon values in interpreting rules appears to be inevitable, as the latter tend to be abstract and have no plain reality-referents. Purposive legal interpretation cannot be confined to a single value (or purpose), since, according to CLS, there are always bound to be several relevant values (or purposes) which pull in different directions. Hence, any judicial choice between conflicting values would violate the liberal requirement of neutrality and objectivity (pp.62-63). Altman's response to this argument rests on the notion of "legal neutrality" (p.77). He maintains that:

"[O]nce the appropriate political processes have settled some normative clash and have declared authoritative (or have enacted) some particular rule, then the rule is interpreted and applied by public officials in a way that is insulated from the influence of any fresh assessment of the contending normative views." (p.76)

This way of interpreting and applying the law is characteristic of a legal system which requires, *as a matter of convention*, that Judges ground their decisions only on those principles which best fit the settled parts of the law. According to this convention, those moral principles which produce the most coherent explanation of existing legal rules and doctrines must be followed by Judges (pp.40-56; 89-90). They should constrain judicial choices not merely in interpreting the existing rules and doctrines, but also in all other gap-filling enterprises. These principles have to be followed not because they are believed to be intrinsically good. They should be followed because, epitomizing the system of reasons which both justifies and makes meaningful the web of authoritative legal materials, they are *relevant* from the legal point of view. It is in this special capacity that these principles preempt all other principles from being endorsed. Echoing Joseph Raz, one could argue that these principles exclude from consideration all other grounds for decision which may well be

morally relevant, but are not linked with legal authority.⁹ Lawyers' disagreements about principles would thus not entail independent moral judgments. Rather, they would generate competitions between different schemes of moral ideas which explain the settled parts of the law. Judges would referee such competitions by means of logic and fitness. The scheme which fits the settled parts of the law and scores the most on inner coherence and consistency would be declared the winner (although there may well be more than one winner in some instances). Within this framework, Judges would be able to form detached opinions about law in a great deal of cases.

This form of conventionalism constitutes a middle ground between positivist approaches to law and legal reasoning, such as that of Herbert Hart, and Ronald Dworkin's theory of "law-as-integrity." It is, in fact, congruent with the central positivist tenets. Broadly speaking, legal positivism embraces the following: first, true propositions of law can only be descriptive; second, there is no necessary connexion between law and morality; third, identification of law's contents does not require resort to moral arguments.¹⁰ Assuming that Altman's "dominant convention of fit" is, *as a matter of fact*, being practised by our community of interpreters, we shall be able descriptively to account for at least some of the legal principles which should be followed by Judges. We shall even be able to speak descriptively about hard questions of law that have not yet been settled authoritatively. In such cases, we would make a complex descriptive statement about empirically identifiable legal materials (called by Dworkin the "pre-interpretive data"), the interpretive convention of "fit" (which can also be proved empirically) and its logical consequences.

Arguing along these lines (but without invoking Raz's ideas about authority and pre-emptiveness), Altman draws heavily on

9. Cf., J. Raz, "Authority and Justification" (1985) 14 *Phil. & Pub. Affairs* 3. Raz himself seems to deny that moral principles can be transformed into the juridical in this way. See J. Raz, "Legal Principles and the Limits of Law" (1984) in M. Cohen, *Ronald Dworkin and Contemporary Jurisprudence*, London, 73; Dworkin: "A New Link in the Chain" (1986) 74 *Cal.L.Rev.* 1103.

10. See, eg, J. Raz, "The Purity of the Pure Theory," in R. Tur & W. Twining (eds), *Essays on Kelsen* (1986) Oxford, 79, 81ff.

Rolf Sartorius as the chief exponent of this kind of legal conventionalism (pp.40-41).¹¹ Altman's account of adjudication admits that independent reasons of moral adequacy can be considered by Judges and become decisive when his "dominant convention of fit" breaks down. This might happen in marginal cases where the "maximum-coherence criterion" provides no uncontroversial solution, eg, in cases where two or more conflicting principles equally fit the settled law. There would be no single right answer in such cases, for there is no master-principle which could mediate between the conflicting ones. As a result, Judges in such cases would be left with strong discretion. This recognition of substantial indeterminacy of the law separates Altman's account from Dworkin's theory of adjudication. However, the scope of indeterminacy recognized by Altman is less than that implied by Hart's positivist theory and its core/penumbra dichotomy. Developed legal systems can, according to him, maintain the law/politics distinction in a significant number of cases, contrary to the view prevalent within CLS circles (pp.37-51).

Later, Altman proceeds to defending the liberal theory of adjudication against vehement attacks launched upon it by some CLS writers on the grounds of its contradictions. He divides these grounds into three core types: (1) the "patchwork thesis," (2) the "duck-rabbit thesis" and (3) the "truncation thesis." Although helpful, this taxonomy is heavily reliant upon metaphors and not everyone would adopt it on aesthetical grounds. The patchwork thesis maintains that in a pluralist society, legal doctrine consists of an unprincipled patchwork of norms which derive from incompatible ethical viewpoints. Stark controversies existing in the political arena translate themselves into the law and render it unamenable to rational and coherent reconstruction in terms

11. Altman pays no regard to the writings of David Lyons (eg, D. Lyons, "Principles, Positivism and Legal Theory" (1977) 87 *Yale LJ* 415), to Stephen Burton's article, "Ronald Dworkin and Legal Positivism" (1987) 73 *Iowa L.Rev.* 109, and to the book written by an Israeli Supreme Court Judge (and Professor) Aaron Barak (1989) *Judicial Discretion*, Yale University Press, New-Haven. These writers support similar kinds of legal conventionalism.

of its underlying principles. According to the duck-rabbit thesis, the structure of our legal doctrine is such that ethical polarities which form its core and periphery can easily be reversed if Judges just decided to perceive the doctrine differently. This could change the overall appearance of the law in accordance with what Judges regard as right from their subjective, and therefore non-neutral, viewpoints.

For example, in the law of contract, a possible shift from "individualism and self-reliance" to "altruism and co-operation" would dramatically change our view of different doctrines, eg, the doctrine of frustration. Our current understanding of that doctrine locates individualism and self-reliance at its core. Contracting parties are scarcely discharged from what they had taken upon themselves to perform, even when performance amounts to an unbearable hardship or loss as a result of newly emerging conditions that had originally not been expected.¹² Room for altruism and co-operation is allowed only exceptionally. But is it, indeed, a genuinely objective and neutral understanding of the doctrine of frustration? Why not say that risks of uncertainty, rather than being treated as if they were allocated in advance, should be shared by both parties on an *ad hoc* basis at the time when they materialize? If we were to treat contract not as a vehicle for using others as instruments for achieving one's individualistic goals, but as a framework of uniting with others for promoting some common betterment, the inversion of what presently stands for "core" and "periphery" of the frustration doctrine would seem to be inevitable. According to this doctrine's definition, events that could not reasonably be anticipated by the parties at the time of making their contract, would, if they emerge in a way that renders the existing obligations unduly cumbersome, exempt the parties from what they originally took upon themselves.¹³ It is apparent that this doctrine is heavily reliant upon judicial interpretation of the contract. Before deciding what could and could not reasonably be expected by

12. See, eg, P.S. Atiyah, *An Introduction to the Law of Contract*, 3rd ed. (1981) Oxford, 200ff; C. Fried, *Contract as Promise* (1981) Harvard University Press, Cambridge, Massachusetts, 58-69.

13. *Id.*

the parties at the time of entering into a contract, Judges have to ascribe an objective meaning to the parties' contractual obligations. They have to ascribe that meaning to what was communicated by one party to another, both explicitly and implicitly, and to the circumstances surrounding those communications. In performing this role, Judges, in fact, evaluatively categorize the substance of different contractual relationships as having either an individualistic or co-operative trait. They often do that in relation to contracts which, taken as combinations of texts and circumstances, could be understood in both ways.¹⁴ A more or less similar judicial freedom can be exercised in attributing a meaning to what passes for an "unexpected event rendering the contract's performance impossible or unduly cumbersome." Hence, both individualistic and co-operative understandings of the frustration doctrine (and, indeed, of several other contract law doctrines) are not impossible. Since there is nothing in that doctrine which intrinsically opposes its reinterpretation in a way which gives precedence to co-operation, one is apparently bound to conclude that the currently predominant meaning of the doctrine is a politically contingent reflection of what most Judges think about it.

The existing two forms through which goals and policies of the law can be realized - the judgment - independent "rules" on the one hand and discretionary "standards" on the other - generate a similar problem. Legal rules resting on fixed definitions are determinate and publicly reliable, but in so far as pursuit of their substantive purposes and the corresponding social goals is concerned, they tend to be either over-inclusive or under-inclusive. Legal rules not having such rigorous definitions move to the category of standards. Legal standards, in contrast, are flexible. They enable legal officials to appropriate their decisions to the specifics of particular cases and in this way advance the relevant social goals. This advantage of standards is not priceless. Standards are liable to abuse and provide no

14. This can be learnt, for example, by considering the decision delivered in the well-known case *Davis Contractors v. Fareham Urban District Council* [1956] AC 696 (HL).

clear-cut warning to citizens about future applications of public force against them. Hence, one who favours rules favours individualism, while those who endorse legal standards tend to commit themselves to the politics of socialism or altruism. Since legal reasoning is pervaded by form-related choices, the ubiquitous link between legal forms and their political substance has been claimed "to break down the sense that legal argument is autonomous from moral, economic, and political discourse in general."¹⁵ Altman (pp.126-139) identifies the common strategy of the first two critical theses. The basic strategy is: "(1) to specify a principle and a counter-principle in some area of doctrine, (2) to formulate (or invoke) two models of ethical thinking that are presumed to be logically incompatible, (3) to claim that there is a link between the principle and one model and the counter-principle and the other model, and (4) to conclude that the principles must be contradictory, since they are associated with incompatible ethical viewpoints, and that doctrine must therefore [either] be unamenable to rational reconstruction in terms of any consistent set of principles" (pp.126-127); or (5) be susceptible to hierarchical reordering in accordance with some new "deviationist doctrine" (pp.134-135). Altman shows that steps (3) and (4) of this argumentative strategy are most doubtful, whilst step (5) is an overstatement based upon a mistaken conception of liberal legal theory. What is deeply problematic with strategic steps (3) and (4) is, as he writes:

"... the claim of a link between the legal principles and the ethical models and the inference of a contradictory relationship between the principles. The strategy will not work unless one can show that for each pair of principle and counter-principle, one member of the pair can be defended on the basis of one model and the other only on the basis of the other model. If a given principle or counter-principle (or both) could be defended on either model or on the basis of some third model, the argumentative strategy would fall apart; it would then be possible to argue that doctrine

15. D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harv.L.Rev.* 1685, 1724.

derived from the consistent application of a single ethical model and to accept consistently both principle and counter-principle" (p.127).

In so far as step (5) is concerned, it has to be recognized that liberal theory requires that law be explicable as having *some* intelligible structure which is not dependent upon its judicial perception (p.137). It does not insist that this structure correspond to what Judges actually make of it in their practice. When law can rationally be understood as reflecting *some* ethical model which can be shown to score the most on both coherence and fitness, it is this understanding of the law that should be endorsed, whatever the substance of that model might be. The mere fact that law can be viewed differently is not yet a proof of radical legal indeterminacy which reduces law to politics. There may be more than one plausible way of understanding legal rules, but not each of these ways would pass the test of overall legal coherence. It might turn out, on examination, that only one understanding of the law would actually survive this test.

Therefore, CLS scholars subscribing to the "patchwork" and the "duck-rabbit" theses have to show that their account of liberal law as flawed, contradictory and radically indeterminate is the only one available.¹⁶ It has to be noted in this connexion that political pluralism does not automatically translate itself into the law: it may or may not be incorporated in it. For it is one of the main functions of law to provide individuals and groups combining a pluralist society with some medium level principles of co-operation, so as to enable them to form an orderly community by uniting around these principles.¹⁷ Why should it be postulated *rather than proved* that such principles do not exist and that liberal law is therefore doomed to mirror incompatible ethical positions? As no such assumption can be warranted without condescending to the legal system's particularities, both "patchwork" and "duck-rabbit" theses would have a very limited and even doubtful explanatory power. For it is only in those

16. Cf., R. Dworkin (1986) *Law's Empire*, London, 271-274.

17. Raz, *supra*, n.9, in 14 *Phil. & Pub Affairs* 23.

cases where Altman's reigning conventional criterion of "maximum-coherence" was exhausted that these theses could become moderately significant.

The truncation thesis holds that as a result of various conflicts of interest compromised through law-making processes by countless "minds and wills working at cross-purposes,"¹⁸ moral principles standing behind explicit legal arrangements do not apply coherently across the board. They do not cover the full range of cases over which, if they were to be carried through consistently, they would exercise their authority. Altman concedes that this thesis is essentially correct. In particular, he criticizes Ronald Dworkin's idealized vision of law as integrity which strongly opposes this thesis. He argues, however, that truncation of legal principles is not inconsistent with liberalism. This, according to him, is so because liberalism stands for compromise and accommodation of conflicting political views and requires to respect each of them. Although it is wrong, in his opinion, to "take the existence of truncation to undermine the [liberal] legal theory" (p.147), truncation is -

"... an essential phenomenon in a liberal system of law, and CLS has provided some important insights into the character of liberal legal doctrine by highlighting and analyzing the phenomenon. Dworkin and other liberals certainly should acknowledge the CLS contribution on that score" (p.147).

In other words, the existence of truncation presents a serious problem to the liberal commitment to the basic principle of equal concern and respect. On this point, Altman concurs with the main tenets of Unger's critique of liberalism (pp.140-145).

Assuming that this diagnosis of truncation is correct, what would be its implications for liberal theory of adjudication? Altman is not very explicit on this point, but his general argument implies that there would be no radical indeterminacy even when the law's moral principles are truncated. This, perhaps, is too optimistic. Take, for example, the principle that

18. R.M. Unger, "The Critical Legal Studies Movement" (1983) 96 *Harv.L.Rev.* 561, 671.

like cases must be treated alike which originates from the more fundamental principle requiring the state to treat its citizens with equal concern and respect. As we know that any two people are alike in at least some respect and never similar in all respects, we ought to look for and find out the legal system's substantive criteria of moral likeness. Without these criteria we would not be able to apply this principle. As it should now be clear, if this principle were applicable to any two people that are similar in some respect, it would cover everyone; and if it were applicable only to people who are similar in all respects, it would apply to no one. This possibility is, of course, absurd. This absurdity is avoided by applying the substantive criteria of moral likeness embedded in the legal system. But when we learn about these criteria by looking at the legal system's rules and doctrines, no problems of equality arise since all these rules and doctrines can be applied directly without resorting to equality. Can it be concluded therefore that the principle of equality is superfluous?¹⁹ The answer to this question is in the negative. The principle of equality, requiring that any differentiation in the treatment of people by the state ought to be justified by cogent reasons, may be crucially important in hard cases. In cases which cannot be settled by a strictly logical application of legal rules equality can operate as a presumptive norm. This norm would expand the authoritative force of those moral reasons which most coherently justify the existing scheme of legal rules and doctrines. Reflecting the legal system's conception of equality, the combination of these reasons would make the law speak with one voice.²⁰

But how should hard (or "pivotal," in Dworkin's terms²¹) cases be resolved in a seriously truncated legal system? In such cases, as often happens, more than one solution is *prima facie* available to the Judges. Truncated legal systems display, *ex hypothesi*, no bias in favour of equality; nor do they entail any

19. P. Westen, "The Empty Idea of Equality" (1982) 95 *Harv.L.Rev.* 537.

20. Cf., K. Greenawalt, "How Empty is the Idea of Equality?" (1983) 83 *Colum.L.Rev.* 1167; S. Burton, Comment on "Empty Ideas: Logical Positivist Analysis of Equality and Rules" (1982) 91 *Yale LJ* 1136.

21. *Supra*, n.16, 41.

determinate criteria of likeness. Altman's "maximum-coherence" criterion would, for this reason, be of little assistance in those systems. Coherence of moral reasons is a logical relationship. It would not be discernible from truncated legal materials which defy logic.

Following Dworkin, however, one should discriminate between two kinds of political settlements: (1) ones that lead to an internally compromised (and therefore "truncated") scheme of justice; and (2) ones which bring about an external compromise as to what scheme of justice to adopt.²² The external type of political compromises rejects truncated checkerboard solutions, demanding that those moral principles that would finally be endorsed apply across the board. Without attempting to refute this distinction, Altman criticizes Dworkin for not accounting for the implications of "robust pluralism of moral, religious and political positions" as one of the salient characteristics of modern liberal societies (p.146). Following the logic rigorously employed by Altman himself, what he identifies as a robust pluralism may or may not be translated into the law and may or may not end up in a compromised system of justice. A pluralist community, as has already been mentioned, may well have sound reasons for adopting an external compromise of one kind or another.

If so, how are we to test the veracity of the truncation thesis? Is truncation interpretively unavoidable? When it cannot be proved by logic, can it be verified by experience, if at all? It seems that the only plausible way of testing truncation is to embark upon interpretive analysis of concrete legal rules and doctrines with a view to ascertaining their possible meanings. It should be noticed that when these meanings are found to convey morally incompatible ideas, that would imply *one* of those two:

- (1) the legal system under examination is hopelessly truncated; or
- (2) there is something wrong with the particular way in which that system was analyzed, so that other possible meanings of its rules and doctrines are to be looked at.

22. *Ibid.*, 178-184.

It is only when no coherent explanation of the legal system is interpretively possible that it can be regarded as being truncated. In any event, the truncation thesis can never be adequately established without condescending to particularities of the legal system. Legal examples which support this thesis have to be singled out and critically analyzed.

I am far from suggesting that checkerboard compromises never take place. They do take place, but are, perhaps, far from being as pervasive as CLS scholars would have us to believe. It has to be remembered, in addition, that checkerboard statutes, even when they exist, would not necessarily be supportive of this thesis. Although such statutes ought to be followed by Judges, they may well be regarded within the legal system as a defect rather than the desirable outcome of a political compromise. They would thus carry no interpretive bearing on novel legal questions which arise in hard cases.²³ As long as this would be possible, Judges would treat their legal system as expressing a coherent set of moral principles, and it is open to CLS scholars to prove, by analyzing the existing legal arrangements rather than the pre-legal clashes of diverse political views, that there is no such possibility. If this cannot be proved, the CLS's diagnosis of truncation is bound to fail.

CLS and Socio-Legal Theory

In his closing chapter, Altman discusses the CLS claims concerning social reality and their implications on the rule of law. He exposes the CLS's rejection of the naturalistic idea that some well-determined social order is programmed into human nature and the CLS's perception of society as a contingent human artifact (pp.155-164). He goes on to delineate the differences between the two principal routes of the critical legal thought which diverge from this point onwards. Following Unger, he identifies one of them as "ultra-theory" and another as "super-theory." He shows that it is only the former, but not the latter, that actually challenges the liberal idea of the rule of law (pp.164-

23. *Ibid.*, 217-218.

176). The ultra-theory is a robust denial of the existence of any social frameworks capable of constraining and channelling individual behaviour and thought. Hence, social past is incapable of exerting any control on social future; social institutions and rules, including legal rules, are textures of openness and thus have no power to control individual choice. As a result, legal reasoning is an activity where "everything goes" and "... because everything can be defended, nothing can."²⁴ This most radical form of rule-scepticism views law as what the men in power deem it to be. Those who attempt to externalize the currently dominant social and legal structures by attributing to them existence and control over and above human choices are either engaged in self-deception or conspiring to objectify the contingent power-relations by presenting them as natural or necessary (pp.165-168).

The super-theory does not go that far. Emphasizing both context-dependent and context-transcendent capacities of human beings, it agrees that social structures like law impose certain constraints on private and public powers. It maintains, however, that these constraints are unduly naturalized by liberal legal thinkers who, by employing the sharp law/politics distinction, attempt to conceal the pervasiveness of political conflict in setting and enforcing the terms of human association (pp.168-176). Classical liberalism has, according to this theory, to be replaced by *SUPERLIBERALISM*. Superliberalism is a leftist political framework which, like liberalism, advocates the rule of law, but offers its own conception of that ideal. According to that conception, law's limitations on the transforming powers of democratic politics ought to be weakened, so that the law could "settle in only a very tentative and provisional manner the basic terms of life" and leave "much of the social order open to radical transformation" (p.176).

Meeting the super-theory with a qualified welcome, Altman argues that this theory is incapable of shattering the foundations of the liberal theory of law and can, in fact, be accommodated within liberalism (pp.193-201). It is disappointing, however, that

24. Unger, *supra*, n. 18, 570.

the more precise items of the superliberalism's political programme have been left by him in a state of ambiguity. Not long ago, the inventor of superliberalism had been criticized (*inter alia*) on these grounds,²⁵ but there lacked a cogent reply.

The ultra-theory, by contrast, is strongly opposed by Altman. According to him, the major flaw of the ultra-theorists is their -

"... ill-conceived reliance on the metaphysical categories of contingency and necessity. They reason that the social future is contingent, that it does not have to be a certain way; in particular, it does not have to be a repetition of the social past. They fallaciously conclude that the social past can exert no control over the social future. Underlying this fallacious inference is the mistaken belief that there can be a relation of control between x and y only if x's prescription that y behave in a certain way necessarily leads to y behaving in that way" (p.178).

In other words, social control is a matter of degree, not necessity, and the rules' power to constrain human behaviour is not dependent on "...some mysterious social ontology that attributes to [them] an existence in some Platonic heaven having a reality independent of the world of concrete individuals" (pp.180-181). Rather, echoing Hart's account,²⁶ the power of social rules can be exercised only through particular individuals who collectively adopt an internal critical perspective towards deference to the messages conveyed by those rules.

Similarly to the CLS deconstructionists, the ultra-theorists have endorsed an exclusively external perspective for ascertaining the nature of existing social rules. This perspective is coupled with what can be described as the "Cartesian Anxiety," a philosophical position positing the grand seductive Either/Or:

25. See W. Ewald, "Unger's Philosophy: A Critical Legal Study" (1988) 97 *Yale LJ*, 665, 733ff.

26. H.L.A. Hart (1961) *The Concept of Law*, Oxford, 54-60.

"Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos."²⁷

Apart from being self-refuting, this position is logically flawed because it does not allow for the third possibility which rejects the very opposition of objectivism and relativism.²⁸ Assuming that society and its rules are artifacts, why not treat them as useful notional inventions that, without claiming to mirror the external world, are loaded with shared understandings that form the relationships existing within a particular group of individuals? If, as a matter of experience, these particular relationships are most effectively communicated and realized through the artifacts of "society" and "rules," this would provide a good reason for internally employing them.²⁹ From this internal perspective, the idea of rules as exerting constraints is no more "reified" by Dworkin and other liberals than the idea of corporate personality was "reified" by L.C.B. Gower and other company lawyers. None of these individuals has ever suggested that the forms of human association standing behind these artifacts possess some kind of natural and supra-contractual power of constraint. They do not possess any such power, but they do constrain human behaviour independently of the will of any particular individual who participates in that social practice.³⁰ The external CLS sceptics may, if they so wish, call

27. R. Bernstein (1983) *Beyond Objectivism and Relativism*, Oxford, 18.

28. This line of critique against radical streams of CLS scholarship has been developed by Joan C. Williams, "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells" (1987) 62 *NYUL Rev.* 429. This article has apparently been omitted by Altman.

29. This argument gains support from Bentham's utilitarian approach to epistemic categories which he regarded as "fictitious." See G. Postema, "Fact, Fictions and Law: Bentham on the Foundations of Evidence" (1983) in W. Twining (ed), *Facts in Law*, 16 *ARSP* 37, 45-54, Wiesbaden.

30. Cf., with Teubner's thesis of law as an autopoietic social system of communication. G. Teubner "How the Law Thinks: Toward a Constructivist Epistemology of Law" (1989) 23 *Law & Soc.Rev.* 727,

such practices and the ideas which shape them a "conspiracy," and Altman provides examples of this sort of scepticism (pp.167-168). This "conspiracy," however, does not pretend to have uncovered any eternal truth. It stands for what currently passes for justice, and it is open to CLS scholars to put forward their alternatives. For any such alternative to be constructive, it ought to be political rather than metaphysical.

It seems therefore that Altman has rightly separated the moderate and the radical strands within CLS. The former strand is far from refuting the basic tenets of liberal legal thought, but makes, by its way of confrontation, a significant intellectual contribution to elucidating the nature of liberal commitments and limitations. The latter strand rests on indefensible ideas. Liberalism, Altman concludes, remains worthy of allegiance (p.201). Its noble dream is bound to be interrupted by self-reflecting insomnia, but is far from being reduced to nightmare.³¹

Some Critical Remarks

In what follows, some general remarks will be made in respect of Altman's study. Altman portrays CLS by concentrating primarily on American writers such as Boyle, Dalton, Gabel, Gordon, Kairys, Kelman, Kennedy, Klare, Peller, Singer, Tushnet and Unger. If, as some might think, CLS is a peculiarly American phenomenon, it was, perhaps, worth clarifying the links between CLS and its background political and legal culture. Altman makes no attempt in that direction and at the same time leaves the non-American critical legal scholarships under-represented.³² Feminist legal methods³³ have also not been covered by his

739ff.

31. Cf., H.L.A. Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, 123.
32. See, eg, a British collection of articles reproduced in P. Fitzpatrick and A. Hunt (1987) *Critical Legal Studies*, Oxford.
33. See, recently, Katharine T. Bartlett, "Feminist Legal Methods," (1990) 103 *Harv.L.Rev.* 829.

study of CLS and no reasons are given for that exclusion. It may well be that feminist scholars associated with CLS are associated with it mainly by subscription,³⁴ and that, in Altman's view, their writings are not inconsistent with liberalism. If this is the case, it should have been made explicit.

A rather more serious problem arises in connexion with Altman's model of legal conventionalism. Altman appears to be advocating a kind of anti-reductionist idea, namely, that legal reasoning based upon explicit law, its underlying moral principles and their inner coherence is a special kind of reasoning which cannot be reduced to politics, economics or other extrinsic discipline. Legal reasoning would thus have an immanent rationality of its own.³⁵ If this is so, an apprehension of the fact that logical methods alone are hardly sufficient for procreating legal principles from the explicit law raises the need to clarify the nature of Altman's "interpretive coherence." It is unfortunate, in my view, that this notion, entailing more than logical consistency, admitting of different understandings and thus leaving room for discretion,³⁶ has been left unspecified. What precisely is denoted by "best coherence," and is it not the case, as Posner recently put it, that any such criterion is bound to collapse into one of the extra-legal disciplines, such as ethics, politics and economics?³⁷ A possible answer to this should, in my view, rest on the distinction between an object of interpretation and interpretive tools. Extra-legal knowledge is indeed essential for coming to grips with legal phenomena, but the meanings of those phenomena would not become extra-legal for this reason alone.

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34. See Deborah L. Rhode, "Feminist Critical Theories" (1990) 42 *Stan.L.Rev.* 617, an article which shows that many feminist legal writers are in fact closer to liberal legalism than to CLS.
35. Cf., E. Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 *Yale LJ* 949.
36. See, eg, R. Alexy and A. Peczenic, "The Concept of Coherence and its Significance for Discursive Rationality," (1990) 3 *Ratio Juris* 130.
37. R. Posner (1990) *The Problems of Jurisprudence*, Harvard University Press, Cambridge, Massachusetts, 423 ff. See also R. Posner, "Conventionalism: The Key to Law as an Autonomous Discipline?" (1988) 38 *U. Toronto LJ* 333 and R. Posner, "The Jurisprudence of Skepticism" (1988) 86 *Mich.L.Rev.* 827.

A cognizance of legal doctrine X by employing the knowledge taken from M, P and E would not eliminate the structuring power of X and would thus not reduce X to M, P or E. Legal doctrine constrains Judges not only by its linguistic structure, but also by other parts of the legal system and the inner moral harmony between their underlying ideas. When this harmony rests on a particular conception of "best coherence" which is shared within the appropriate community of interpreters, this conception must have its own unifying meaning. To understand this meaning, one has to comprehend its substantive moral appeal, that is, the moral sense that it makes to those who endorse it and practise it.

Altman is seemingly bound to take up this line of defence, but by doing so he would have to endorse Dworkin's general theory of interpretation.³⁸ Altman's approach, if modified along these lines, would require Judges to elicit general principles from legal materials in a way which goes beyond logic and pays regard to substantive moral factors. From this perspective, the appeal of Altman's approach and its "best coherence" criterion would lie not merely in their conformity with logic. It would lie in the fostering of decision-making which makes the legal system speak with one voice and thereby treat citizens with equal concern and respect. Hence, the general principle of law as integrity comes into play, supplementing the principle of logical fitness. This approach would thus further eliminate legal indeterminacy. What prevents a legal system from following Dworkin's theory of adjudication as a matter of convention? Why not endorse that theory by expanding the conventional requirement that like cases must be treated alike?

Altman does not consider that possibility, for he is not content to find his interpretive approach in the category described by Dworkin as "soft conventionalism," a "very abstract, underdeveloped form of law as integrity."³⁹ Soft conventionalism, according to Altman, is an interpretive practice

38. See Dworkin, *supra*, n. 16, ch.2. Altman (p.35, n. 19) considers this approach not to be very helpful. See also A. Altman, "Legal Realism, Critical Legal Studies and Dworkin" (1986) 15 *Phil. & Pub. Affairs*, 205.

39. Dworkin, *supra*, n. 16, 127-128.

which treats as part of the law those principles that score highest "on some combination of both logical coherence and inherent ethical soundness" (p. 47, n. 41). He thus distances his approach, which is founded solely on coherence and pays no regard to moral soundness, from soft conventionalism. Having rejected Dworkin's theory of law as integrity, he appears to be in agreement with Dworkin's renunciation of that kind of conventionalism on the grounds of its alleged "softness." That kind of conventionalism is said to be "soft" because it requires Judges to look for reasons that go beyond "hard" legal conventions which are both specific and empirically identifiable.

But is that kind of "softness" a demerit? Altman's position implies, unwarrantedly, in my opinion, that elicitation of moral reasons from explicit legal materials must either be based on logical rigour or collapse into an extra-legal argument about inherent ethical soundness. This seems to be a rather restrictive view of both interpretive rationality and legal development. Long ago, Jeremy Bentham (an early "soft-conventionalist"!) wrote:

"Let the laws be accompanied by justificatory reasons ... [They] ... would serve as a kind of guide in those cases in which the law was unknown: it would be possible ... by knowing the principles of the legislator, to place oneself by imagination in his situation; to divine or conjecture his will in the same manner as we conjecture what would be the determination of a reasonable being with whom we had long lived, and with whose maxims we were well acquainted. ... There are truths which is necessary to prove; not for their own sakes, because they are acknowledged, but that an opening may be made for the reception of other truths which depend upon them. It is necessary to demonstrate certain palpable truth, in order that others, which may depend upon them, may be adopted. It is in this manner we provide for the reception of first principles, which, once received, prepare the way for admission of all other truths."⁴⁰

40. J. Bentham, "Promulgation of Reasons" (1859) in J. Bowring (ed), *The Works of Jeremy Bentham*, vol. I, Edinburgh, 160, 161, 161-162.

This less restrictive interpretive approach, which allows more room for judicial imagination and informed conjectures, would not reduce law to ethics or politics. It would exclude on the grounds of irrelevancy moral and political reasons (which may well be intrinsically good) and give precedence only to those reasons that can rationally be related to the ultimate legal authority. The relevancy of moral reasons for juridical purposes would rest on the conventional understanding of the law's inner morality by the relevant community of interpreters. In a legal system accustomed to speak with one voice, this approach would subscribe to integrity of the law as a matter of convention. It might even be consistent with legal positivism, but this is another story.

The foregoing discussion is far from exhausting all the details of the CLS thought and its liberal critique into which Altman introduces his readers with lucidity and analytical rigour. CLS is an immensely complex and non-homogeneous movement. Its unifying ideas may well outnumber those which are internally contested. One of the remarkable achievements of Altman's study is his organization of these complex ideas around the core facets of liberal legal theory and their clear and accessible presentation. This makes his book an important contribution to jurisprudence and a most valuable introductory vehicle for students of law. Altman's order and clarity may have reduced some complexities at the expense of comprehensiveness, and he made at the outset an appropriate disclaimer to that effect (p.6). This, however, by no means detracts from the reliability of his account. As to his model of legal reasoning, this, in my opinion, could be sustained if it were coupled with "soft conventionalism." Altman, like Dworkin, was too quick to reject this interpretive approach. His refusal to embark upon it has seriously weakened the foundations of his own model.