

Chapter 5

Critical Legal Theory

*Readings from Andrew Altman,
Roberto Unger, and Martha Minow*

Part I: Critical Legal Studies

All the types of jurisprudence studied so far share a common characteristic: they are cognitive theories of law in one way or another. Each one claims (1) that some particular kind of knowledge is possible that bears directly upon legal decision-making (whether knowledge of natural law, knowledge of positive law, knowledge of principles, or knowledge of what makes for an increase in the good for society) and (2) that legal judgments derived from that knowledge are objective in nature—that is, they are neither purely subjective nor arbitrary, but rooted in intersubjective understanding. As expressions of knowledge, legal propositions are understood as arguably either true or false, independent of whether any particular lawyer or judge thinks them so. As we have seen, various accounts of determining legal truth have been developed, and their adequacy has been the subject of controversy, but even these disagreements have been informed by cognitive assurances of one kind and another. Recall Posner's characterization of his brand of pragmatism: he is doubtful of finding objective truth in any area of inquiry; he elevates the process of inquiry over the results of inquiry¹; and he advocates a skeptical conception of the legal process.² But his skepticism is far from wholesale. The same passages in which various forms of philosophical and legal doubt are expressed reveal confidence in various forms of knowledge. His position is "skeptical, but decidedly not cynical," and his normative jurisprudence relies on empirical knowledge in combination with economic analysis. One of the main reasons why pragmatism is attractive to Posner is its emphasis on scientific virtues and empirical knowledge.

A distinguishing mark of critical legal theory is the absence of any central cognitive claim; its predominant theme is doubt about legal knowledge. The reasons for skepticism and the degree to which it is partial or wholesale vary considerably among its representatives, but all of the accounts of law studied in this chapter are remarkably non-cognitive, both with respect to the character of their claims and their theoretical underpinnings.

The first vigorous expression of non-cognitivism in American legal history is evident as early as the 1920s when a group of American lawyers and jurists developed cogent arguments against two prevailing ideas: (1) that established law is an identifiable body of knowledge and (2) that an adequate understanding of the law when combined with an adequate understanding of the facts produces a correct legal outcome. Realists argued, from personal experience, that careful observation plainly reveals that often considerations *additional to* legal and factual judgments enter into and determine legal outcomes. Their insights were based on what lawyers and judges *actually do*, thus winning for this group of jurists the label "realist."

It is now widely appreciated that American legal realists are responsible for recording an impressive phenomenology of adjudication—their collective work shows that in many instances, especially in appellate litigation, law is essentially indeterminate. The indeterminacy in question is a direct result of the fecundity of legal thinking, which, over a fairly long period, generates a plethora of rules, precedents, interpretations of rules, variations in procedure and the like, making it entirely possible for opposite sides of many legal cases to be equally correct under the law. In all but the easiest of cases, they argue, it is extra-legal considerations that finally determine legal outcomes. Which among many possible extra-legal factors (sociological, ideological, political, economic, or psychological) is determinative for adjudication can be a matter of disagreement; but notwithstanding this disagreement, realists hold firm to the conviction that established law is intrinsically indeterminate.

In the first set of readings in this chapter Andrew Altman argues that insufficient attention has been paid to the work of realists, especially to their arguments for legal indeterminacy. He traces this neglect directly to the influence of H.L.A. Hart's *The Concept of Law*, which is widely regarded as diminishing realist doctrine in two rather different ways. First, Hart advances arguments against what he considers realist "excesses," among them a "strong indeterminacy" claim. Second, he "absorbs" much realist insight into the phenomenology of adjudication through discussion of how jurists deal with the "open texture" of legal concepts. In the first reading Altman argues that neither aspect of Hart's work deals sufficiently with the most important source of legal indeterminacy recognized by realists.

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Reading 1

From Andrew Altman,
"LEGAL REALISM, CRITICAL LEGAL STUDIES
AND DWORKIN" IN *PHILOSOPHY AND
PUBLIC AFFAIRS*

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

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

The realist analysis of indeterminacy can be presented in two stages. The first stage proceeded from the idea that there was always a cluster of rules relevant to the decision in any litigated case. Thus, deciding whether an uncle's promise to pay his nephew a handsome sum of money if he refrained from smoking, drinking, and playing pool was enforceable brought into play a number of rules, for example, rules regarding offer, acceptance, consideration, revocation, and so on. The realists understood that the vagueness of any one of these rules could affect the outcome of the case. In any single case, then, there were multiple potential points of indeterminacy due to rule vagueness, not a single point as Hart's account sometimes seems to suggest.

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

situation in which he had to render a decision by choosing which of the competing rules was to govern the case. In other words, while the realists claimed that all cases implicated a cluster of rules, they also contended that in any cluster there were competing rules leading to opposing outcomes.

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

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

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

Hart's third concession to realism is that courts invariably engage in narrowing and widening the rules which precedents lay down. Yet he says that, despite this, the doctrine of precedent has produced "a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule." The problem with this claim, though, is that it misses the crucial realist point regarding the availability of competing rules: let each legal rule be as precise as is humanly possible, the realists insist that the legal system contains competing rules which will be available for a judge to choose in almost any litigated case. The claims made by Hart in his effort to domesticate the realist notion of legal indeterminacy all systematically fail to deal with this crucial realist point.

In Altman's view, realist's arguments for indeterminacy stand up well not only when compared with Hart's treatment of them, but also when compared with Dworkin's conception of legal indeterminacy. Reading 2 is a three-way comparison: of Hart's opposition to the realists, of Dworkin's opposition to Hart, and of Dworkin's differences with realism. As a result of this comparison Altman raises the possibility that Dworkin may have succeeded where Hart failed, that is, in defeating realist arguments for radical indeterminacy in law.

V

Reading 2

From Andrew Altman,
"LEGAL REALISM, CRITICAL LEGAL STUDIES
AND DWORKIN" IN *PHILOSOPHY AND
PUBLIC AFFAIRS*

To this point, I have portrayed the realists as focusing upon the choice of competing legal rules which judges in common-law cases must make. This may seem to leave the realist open to one of the principal criticisms which Dworkinians have made of Hart: the law is more than just legal rules. It is also the ethical principles and ideals of which the rules are an (albeit imperfect) expression, and it is these principles and ideals which help to guide judges to a determinate outcome. Indeed, the Dworkinian might try to use the realist indeterminacy analysis to his advantage: if the law were simply a collection of rules, as Hart thinks, it would be afflicted by exactly the kind of deep and pervasive indeterminacy which the realist posits. Yet, if the law were indeterminate to the degree suggested by the realist analysis, it would not be much more than a pious fraud: judges would be "legislating" not only in penumbral cases, but in all cases. Judges would always be creating law, in flagrant violation of their institutional duty to apply preexisting law. The Dworkinian may conclude that we face this choice: either include principles and ideals as part of the law in order to contain (and, perhaps, eliminate) the indeterminacy it would have were it simply a collection of rules or admit that common-law adjudication is a fraud. Although the latter choice is logically possible, assumptions shared by both Dworkin and his positivist critics make it an entirely implausible one from their point of view. The only plausible alternative may thus seem to be the acceptance of Dworkin's important idea that ethical principles be understood as part of the law even when they are not explicitly formulated in some authoritative legal text or clearly identifiable by the application of some noncontroversial, positivist rule for specifying authoritative legal norms in terms of their source. Thus, Dworkin argues that adjudication requires the invocation of principles which take judges "well past the point where it would be accurate to say that any 'test' of pedigree exists...." Moreover, such principles are, on Dworkin's view, binding on judges and so we must realize that "legal obligation ... [is] ... imposed by a constellation of principles as well as by an established rule." Indeed, it is this constellation of principles which must guide the judge to a determinate outcome when the relevant legal rules are in competition with one another. For instance, the principles could indicate to the judge the proper scope of application of each of the competing rules and thus resolve any apparent conflict by showing that just one of the rules was properly applicable in the case at hand.

Yet, which principles are legally binding? Dworkin's answer is that they are those which belong to the "soundest theory of the settled law." The settled law consists of those legal rules and doctrines which would be accepted as authoritative by the consensus of the legal community. The soundest theory is the most defensible ethical and political theory which coheres with and justifies those legal rules and doctrines. The coherence does not have to be perfect, for Dworkin allows that the soundest theory may characterize some rules and legal outcomes as mistakes, but coherence with most of the settled law is demanded. In principle, the soundest theory is to encompass every area of law: every branch of the common law, all statutes, the whole body of administrative law, and the entire range of constitutional law. Of course, Dworkin recognizes that no merely human judge could ever formulate and defend such a theory. But his character, Hercules, is intended to show us that, in principle, such a theory could be formulated and defended by a sufficiently great intelligence. Even though the fictional, judicial Hercules has powers far beyond those of mortal judges, Dworkin tells us that mortal judges are committed both to the logical possibility of such a character and to the task of trying to arrive at the

outcome he would arrive at were he to be hearing their cases. Mortal judges thus can and do appeal to principles in reaching determinate outcomes, and, in doing so, they are giving force to preexisting legal obligations, and not simply making a political choice among competing legal rules.

It should be noted that the realists were not blind to seeing legal rules as expressions of ethical principles. Nonetheless, there are tremendous differences between the way in which a realist such as Thurman Arnold viewed these principles and the way in which Dworkin and his followers see them. Arnold was thoroughly cynical about the ethical ideals in terms of which the law was understood: they were high-sounding phrases which appealed to people's emotions and satisfied their need to think of the legal order as more than just some arbitrary and contingent setup. But they had no meaning other than this emotive one and could not be the subject of any rational discussion or defense. Other realists, such as Felix Cohen, were not at all cynical and believed that ethical principles were amenable to rational discussion. Yet they did little to analyze carefully the ethical principles embedded in law or to examine the implications of the existence of such principles for the problem of indeterminacy.

In this section, I have raised the possibility that Dworkin's jurisprudential project succeeds where Hart failed in defeating the radical realist indeterminacy thesis. However, it would be premature to make a judgment regarding the success of Dworkin's project in this respect, for scholars in the Critical Legal Studies movement have picked up and elaborated realist ideas in a way that seriously threatens the foundations of Dworkinian jurisprudence. It is to CLS that I shall turn presently. One important point should be made before I do that, however. For the most part, proponents of CLS and Dworkinians have ignored one another's positions. There are some passing references to CLS in some pieces by avowed Dworkinians, such as Charles Fried. And there is some treatment of Dworkin in the CLS literature. Yet, neither side seems to do anything more than make very superficial, highly polemical points against the other. The interchange of ideas between Dworkinians and CLSers is one which I have constructed with the deliberate aim of avoiding the superficial polemics which have thus far characterized the few occasions on which the one side has deigned in print to deal with the position of the other.

V

We pause now in our review of Altman's account of legal indeterminacy for a brief legal and philosophical interlude made appropriate by several factors. First, Altman bases his defense of realist views on what he calls elaborations developed within the CLS movement. It turns out that these elaborations are part and parcel of a comprehensive and fairly systematic interpretation of contemporary social and political thought. While this interpretation has had considerable influence, from a student's point of view it is difficult to understand; its central claims are sometimes counter-intuitive and it challenges several deep-seeded assumptions and beliefs.

The CLS movement began in the 1970s when a group of scholars, many of them connected with Harvard Law School, advanced the idea that law, as currently practiced, is the expression of an identifiable set of intellectual commitments specific to modern culture, beliefs about nature, and about the relation between persons and the rest of nature. This scheme of commitments is radically different from pre-modern beliefs. One example, mentioned in Chapter 2, involves the modern rejection of final cause as an explanation of natural processes. Other differences involve ways of thinking about social and political life, and these have particular relevance to an understanding of law.

At the center of CLS understanding of these differences is the work of Roberto Unger who, in *Knowledge and Politics* argues that what passes as modern understanding is in fact not as distinct from pre-modern understanding as we normally assume. Contemporary thought, including moral, political, and legal thought, turns out to be a blend or amalgam of beliefs and attitudes whose sources can be traced *both* to pre-modern and to modern cultures. Unger finds quite understandable the fact that contemporary thinkers are neither willing nor able to abandon pre-modern ways of thinking—modern, and especially scientific, conceptual schemes are inadequate for many purposes, especially those having to do with human aims and goals. It is thus useful, perhaps even necessary, to employ premodern ideas, but problems arise when we do because ancient and modern conceptions of nature and human experience are not only different but clearly inconsistent. For Unger the uncertainties of modern political and legal thought can be traced directly to its incorporation of contrasting elements of pre-modern

thought. “Traced directly” in the sense that (1) modern and ancient conceptions of nature and human experience cannot both be true at the same time and in the same way; and that (2) incompatible as these conceptual schemes are, we are both unable and unwilling to give up either in its entirety.

Unger provides an example of how this general understanding of modern culture applies to law in *The Critical Legal Studies Movement*.³ First, he draws attention to the fact that modern moral and political thought is based on an “individualistic” vision of social life; that is, it accords priority to individual freedom, self-reliance, and other essentially individual norms and values. Second, however, he observes that this *same* moral and political thought is “altruistic” in the sense that it accords priority to social solidarity, stability, and communal norms and values. Considered as ultimate sources of social and legal value, individualism and altruism are mutually exclusive and contradictory in their implications for legal decision-making. In Unger’s view the content of any area of law harbors an essentially antithetical structure; that is, its content consists of a series of principles and counterprinciples derived from conflicting priorities of value like those inherent in individualistic and altruistic visions of social life.

In contract law, for example, he invites us to examine two different explanatory models of how we decide whether a contract has been formed. On one model, this issue is determined by reference to the principle that no one has assumed any obligation to anyone else until there has been an offer and an overtly communicated acceptance of the offer. According to Unger this principle is derived from assumptions about individuality and freedom; that is, the idea that one is free to contract with whomever, under whatever conditions one chooses. However, on another, equally established model, a decision on this issue is determined by reference to a different principle, namely that once a party has begun to negotiate with another party about possible terms of a contract, she or he incurs a duty to negotiate in “good faith.” For Unger this way of thinking about the existence of a contract can be traced to communal values rooted in an altruistic rather than an individualistic vision of social life.

What Unger seeks to demonstrate in this example is that the law as such does not decide a case at bar. It cannot because the content of law is essentially indeterminate with respect to questions such as exactly how and under what conditions a contract is formed. The problem in answering such questions is not that law is vague in the way all abstract and general statements are vague with respect to their application—Aristotle had pointed this out. Nor is it merely that legal concepts are “open-textured” in Hart’s sense. The problem is more serious than this: law is internally conflicted and inconsistent. If this state of affairs can be shown to exist in the way Unger claims, the jurisprudential implications are large. Among other things it entails an account of legal decision-making fundamentally different from the accounts reviewed in previous chapters. Any given instance of adjudication will turn out to involve a *forced* choice between plausible, but conflicting, principles for justifying the decision made in a case at hand. And what will determine this choice? Not “the law,” because “the law” is nothing but an amalgam of conflicting visions.

It is important to recognize that Unger declines to recommend any moral or social vision over any other. Nor does he see the possibility of some reconciling synthesis among them: we are, as it were, “conceptually stuck” where we are. In an early work, *Knowledge and Politics*, he discusses an important conclusion which follows from recognition of our plight: *just because* legal theory is inherently conflicted to the core, objectivity in legal judgment is something beyond our conceptual reach. According to Unger the kind of legal indeterminacy brought to attention by American legal realists is symptomatic of our legal-theoretic condition. Given this indeterminacy, judges and law-makers have no alternative but to rely on something far short of legal objectivity. But upon what should they rely? Unger cannot say because strictly speaking his legal theory lacks positive normative content. The point of his writing is enlightenment, that is, recognition and acknowledgement of the protean forms which theoretical inconsistency and conflict take in law. When successful, such enlightenment results in what he calls “total criticism,” and in the following passage he explains how his legal studies forced him beyond the usual idea of criticism to something more comprehensive and radical.

Total criticism arises from the inability of partial critiques of a system of thought to achieve their objectives and from the desire to deal with the difficulties the partial critiques themselves produce. It was in just such a manner that the present work was conceived. Having turned my mind to some familiar matters of

jurisprudence, I soon found that these were so closely tied to one another that the answer to any of them would be the answer to all. Then I discovered that the solutions generally offered to each of the problems fall into a small number of types, none adequate by itself, yet none capable of reconciliation with its contenders. Thus the house of reason in which I was working proved to be a prison-house of paradox whose rooms did not connect and whose passageways led nowhere.⁴

Unger's jurisprudence is a paradigm case of critical legal theory – no knowledge claims are advanced to resolve outstanding problems in legal philosophy; the only claims defended are that these problems have not been properly understood and that as properly understood they are both unavoidable and intractable.

When grasped for the first time, the non-cognitive, thoroughly critical feature of Unger's thought can have a defamiliarizing effect on typical legal readers. He challenges us to think about adjudication absent any supposed legal objectivity, a thoroughly *unfamiliar* way of thinking. Reading 3 is particularly important in this regard because it helps make plausible this unusual way of thinking about law. In this reading Unger presents the staging-ground for a *thoroughly critical* jurisprudence, that is, the philosophical and epistemological presuppositions upon which it depends. Briefly put, the staging ground consists of three interconnected claims. Unger's originality consists neither in originating these claims nor in developing arguments for their support (he considers them well-established). It consists, rather, in appreciating their *combined* implication for law and legal decision-making. The claims are: (1) that all concepts are theory-laden and theory-determined, including the concept of fact; (2) that all theories contain antinomies, paradoxes, and other kinds internal inconsistency; and (3) that while it is true that theories are what make all understanding possible, any such understanding must be regarded as partial and limited *just because* its theoretical underpinning contains some form of incoherence. When combined in the way Unger suggests, these claims support his main conclusion: that total understanding is never possible, only total criticism.

In studying the passage that follows notice how important the idea of theory-determination is for thoroughgoing criticism as a general framework of thought. In the final paragraph Unger asks why the tensions at work in contemporary thought are so often overlooked or ignored. His answer is that we do not attend to theoretical strain and inconsistency because we believe *falsely* that, when these aspects of thought are encountered, we can step outside the theory wherein the conflict resides and assess it from some "neutral" or "objective" point of view. But if we have seen to the theory-relative core of knowledge and understanding, we recognize that this is impossible. Any assessment of theoretical conflict must itself be theoretical; there is no theory-independent realm for us to enter.

V

Reading 3

From Roberto Unger, *KNOWLEDGE AND POLITICS*

Imagine the world as a field of space and a continuum of time that are the scene of facts or objects-events. An object exists through time as a succession of events. The world constituted by space, time, and objects-events has the following characteristics. There are an indefinite number of objects-events. Events succeed one another constantly and objects collide with each other in certain ways. The occurrence of a set of events will be followed by the occurrence of another set. The regularities that exist or that we suppose exist among events are different from the events themselves, or from the objects whose temporal aspect those events represent. A causal law of nature is distinct from the phenomena it joins together. Regularities are general; object-events particular. Object-events exist independently of our perception of what they are or of what they should be. Either we assume that everything that happens in nature happens necessarily, or we say that we do not know why things happen. The latter conception, however, implies unintelligible chance, which is also a kind of necessity. So, in either case, the field of object-events is given to us as a necessity. We call this necessity experience.

It is possible to divide the world in an indefinite number of ways. No one way of dividing it describes what the world is really like. That is because things lack intelligible essences. Something has an intelligible essence if it has a feature, capable of being apprehended, by virtue of which it belongs to one category of things rather than to another category. According to such a view, a stone is different from a plant because it has a quality of stoneness, if you like, which we can grasp immediately. Some say that the essence can be understood directly as an abstract category, quite apart from concrete things that exemplify it. Others claim that it can only be inferred or induced from its particular instances. On the latter view, we learn to distinguish the quality of stoneness by looking at particular stones.

Many, though not all, of the metaphysical systems of ancient and medieval Europe accepted the view of knowledge whose keynote is the idea that all things in nature have intelligible essences. Hence they taught that the mind can understand what the world is really like. Now this doctrine is truly a master principle, for its friends have drawn from it conclusions about language, morals, and politics. They have reasoned that because everything has an essence, everything can be classified under the word which names its category. And the supporters of the doctrine of intelligible essences have gone on to hold that the standards of right and wrong must also have essences which thought can comprehend. Plato's ethics and Aquinas' theory of natural law exemplify this line of argument.

The modern conception of nature and of the relation of thought to nature that I am describing rejects the doctrine of intelligible essences. It denies the existence of a chain of essences or essential qualities that we could either infer from particular things in the world or perceive face to face in their abstract forms. And it therefore insists that there are numberless ways in which objects and events in the world might be classified.

We cannot decide in the abstract whether a given classification is justified. The only standard is whether the classification serves the particular purpose we had in mind when we made it. Every language describes the world completely, though in its own way. On the modern view of nature, there is no basis for saying that one language portrays reality more accurately than another, for the only measure of the "truth" of language is its power to advance the ends of the communities of men who speak it. The theories of science are partial languages because they classify things in the world. Their claims to acceptance must therefore rest on their ability to contribute to particular ends, like the prediction or control of events, rather than on their fidelity to a true world of essences.

This simple idea, the denial of intelligible essences, leaves no stone of the preliberal [i.e. premodern] metaphysic standing. Its consequences for our moral and political views are as far-reaching as they are paradoxical....

If there are no intelligible essences, there is no predetermined classification of the world. We can distinguish among objects-events only by reference to a standard of distinction implicit in a theory. It is the theory that determines what is to count as a fact and how facts are to be distinguished from one another. In other words, a fact becomes what it is for us because of the way we categorize it. How we classify it depends on the categories available to us in the language we speak, or in the theory we use, and on our ability to replenish the fund of categories at our disposal. In whatever way we view the play of tradition and conscious purpose in the manipulation of the categories, there is no direct appeal to reality, for reality is put together by the mind.

Yet we also believe that the history of science is progressive and that ultimately one can make a rational choice among conflicting theories about the world. Some theories describe the world more accurately than others. This belief is just as firmly grounded in the traditional conception of nature as the principle that insists we can never step outside the categories of a particular language or theory to see the world naked. Its basis is the proposition that things are what they are no matter what we think they are or ought to be. How can we sustain confidence in the possibility of an ultimate comparison of theory and fact unless we are willing to qualify the principle that the world of facts is constructed by the mind according to its purposes? The conception that there is a realm of things, independent of the mind, and capable at some point of being perceived as it truly is, seems necessary to the notion of science. Yet this conception also appears to rely on the doctrine of intelligible essences or of plain facts, assumed to be inconsistent with the modern idea of science.

In its simplest form, the antinomy of theory and fact is the conflict of the two preceding ideas: the mediation of all facts through theory and the possibility of an independent comparison of theory with fact. Each of the principles seems plausible in its formulation and absurd in its consequences. They contradict one another, but to

qualify either of them would seem to require a drastic revision of the view of nature and thought from which both are drawn. Here is a conundrum that appears to imply the incoherence of our idea of science, indeed of knowledge in general.

Why then are we not struck by the incoherence? Why are we not more frequently disturbed by the antinomy of theory and fact? Perhaps the reason for our misguided assurance is that the theories with which we work are always partial theories. They are not, like languages, descriptions of the whole world. Consequently, it always seems possible to stand apart from the particular theory we are considering. We forget that when we do this we are stepping into another theory rather than into the realm of plain facts.

V

In Reading 2 Altman suggested that Dworkin's conception of indeterminacy and its role in adjudication might be capable of defeating realist claims of radical legal indeterminacy. In the section to follow Altman follows up on this possibility. He argues that in light of the particular development of those arguments by critical legal studies scholars, the doctrine of radical indeterminacy holds up in ways which, so far at least, resist the criticism of positivists like Hart, constructivists like Dworkin, or for that matter conventional legal philosophers "of any stripe."

V

Reading 4

From Andrew Altman,
"LEGAL REALISM, CRITICAL LEGAL STUDIES
AND DWORKIN" IN *PHILOSOPHY AND
PUBLIC AFFAIRS*

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

The Dworkinian response would be to deny that legal indeterminacy follows from the fact that the law contains principles which pull in opposing directions. One of Dworkin's major points in his account of principles is that they have differing weights. Thus, even if we have a case in which two competing principles appear applicable, for example, "A person should not be held liable unless she was at fault" versus "As between two innocents, the one who caused the harm should pay," Dworkin will argue that, in all likelihood, one of those principles will carry greater weight in the case at hand and it is that principle which determines the correct legal outcome. Dworkin does allow for the possibility that there may be a case in which the weights of all applicable principles are exactly equal, leaving the legal outcome truly indeterminate, but goes on to claim that such cases will be extremely rare in any developed legal system.

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

Now, one line of CLS attack against Dworkin is to argue that there is no discoverable metaprinciple for assigning weights. Duncan Kennedy suggests this line in discussing the possibility of using moral theory to justify legal doctrine. Kennedy admits that, in the context of the fact situation of a particular case, opposing principles do not necessarily carry the same weight: "We are able to distinguish particular fact situations in which one side is more plausible than the other. The difficulty, the mystery, is that there are no available metaprinciples to explain just what it is about these particular situations that make them ripe for resolution." Actually, Kennedy's point should be put in a less sweeping way: no one has come up with such metaprinciples, and it is implausible to think that it can be done. When put in these terms, the CLS position becomes an essentially reactive one which awaits Dworkinian efforts and then reacts against them: Dworkinians put forth their rational/ ethical reconstructions of the law (or some portion of it), complete with metaprinciples for assigning weights to principles, and then CLSers and others attempt to show that the reconstruction is inadequate and incoherent. The burden of production thus seems to be on the Dworkinians. What have they produced?....

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

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

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

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

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

One possible line of CLS argument is that legal doctrine is so internally inconsistent that it is implausible to believe that there is any single, coherent theory capable of justifying enough of it to satisfy the Dworkinian fit requirement. Consistently applying any of the theories embodied in some significant portion of the law across the entire body of doctrine would, the argument goes, involve such substantial doctrinal reconstruction that it would violate the Dworkinian mandate that any theory invoked to decide cases fit or cohere with the bulk of the settled law. Thus, ethically principled reconstruction of any substantial portion of doctrine is ruled out by the law's internal contradictions, such contradictions being symptomatic of the law's conception in ideological compromise and struggle and of its tendency to reflect the range of political conflict present in the culture. This means that there simply is no soundest theory of the settled law, and so the Dworkinian efforts to rescue legal determinacy by appealing to such a notion fail....

In this respect the CLS position may be usefully analogized with Alasdair MacIntyre's diagnosis of the ethical thought of modern culture. MacIntyre argues that such thought is internally incoherent. This state of incoherence is due to the fact that modern ethical thought amounts to an amalgam of fragments of irreconcilable ethical views. Conventional philosophers not only fail to perceive the utter incoherence of modern ethical thought, but operate on the assumption that it is largely in good order. For them the issue is the best way to systematize that thought, not whether it is so self-contradictory that systematization is impossible. The result is that the debates fought out among conventional ethical philosophers, such as Rawls and Nozick, do not join the issue with MacIntyre's position. He repudiates the assumptions which the conventional antagonists share. In a very similar way, the debate between Dworkin and his conventional critics fails to join the issue with CLS. They assume a doctrinal coherence which CLS repudiates, and so the conventional debate takes place in terms which are largely irrelevant to the CLS position.

Duncan Kennedy makes the CLS position on doctrinal incoherence plain in his description of a private law field which he takes to be representative of doctrine in general:

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

Given the terms in which the CLS position has been stated, it is clear what the Dworkinian reply must be in order to join the issue: that doctrine is not as internally contradictory as CLS claims. The main argument would have to be that any internal inconsistencies in legal doctrine are merely marginal, capable of characterization as "mistakes" without any substantial rupture to the fabric of doctrine. This argument would be supplemented, I think, by one to the effect that CLS exaggerates the degree to which theory must fit the settled law in order to be said to fit well enough. To make out these arguments would not be at all easy. CLS analyses have sought to exhibit the deep and pervasive incoherence of doctrine in such areas as constitutional law, labor law, contract law, administrative law, and criminal law, to name only a few. Indeed, I think it is accurate to say that CLS has, through these analyses, made a much more thorough and stronger case for the incoherence of legal doctrine than

MacIntyre has made for the incoherence of ethical thought. Meanwhile, Dworkinians have done little to respond to these CLS analyses....

Dworkin is concerned to defend the legitimacy of judicial decision making that invokes controversial principles of ethical or political philosophy. The Dworkinian judge is licensed to rely on such principles because, as Dworkin well realizes, it is inevitable that a judge who, in a hard case, seeks to enunciate and invoke the principles embodied in the settled law will fail to find principles on which everyone can agree. If the judge is to guide her decision by the principles she thinks are embodied in the law, then the reliance of adjudication on controversial principles is inescapable, at least for many cases. In this sense, Dworkin is willing to acknowledge that adjudication is "political." Yet, he thinks that such an acknowledgment does nothing to impugn the legitimacy of the adjudication.

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

Certain CLS claims regarding the law/politics distinction can be parlayed into an argument against this Dworkinian defense of the legitimacy of adjudication in hard cases. What makes this CLS argument particularly interesting for current purposes is that it does not hinge on the adequacy of the patchwork-quilt argument examined in the preceding section. Indeed, it can be construed as granting, *arguendo*, that there is a unique soundest theory of the law which does dictate the correct legal outcomes in hard cases. Let us set the stage for such a CLS argument.

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

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

CLS supports these contentions regarding the range of ideological conflict within legal doctrine and argument by analyses of doctrinal principles and the kinds of arguments found in judicial decisions. Consider again Kennedy's description of the structure of contract law. Doctrines from the "solidarity" side of contract law, for example, those of duress, unconscionability, and reasonable reliance, are taken to embody the principles of

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

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

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

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

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

In this article, I have not aimed at providing the last word on the points of contention between CLS and Dworkinian jurisprudence. I have tried to locate some of the more important issues within a frame that recognizes the influence of legal realism on contemporary legal thought. CLS has picked up and elaborated upon the realist contention that the law largely fails to determine the outcome in cases which are brought to litigation.

Among the important advances of the CLS analysis over that of their realist forerunners are: the effort to take seriously and to analyze the conflicting ethical visions and principles which infuse legal doctrine; the painstaking attempts to display doctrinal inconsistencies and incoherencies; and the effort to show how debates in the political arena are replicated in unsuspected corners of private-law doctrine. I believe that these are substantial advances on the realist position and that they can be parlayed into powerful arguments which are thus far unmet by Dworkinians or indeed by conventional legal philosophers of any stripe. It is well past the time when legal philosophers can justifiably ignore the body of work associated with the Critical Legal Studies movement.

QUESTIONS

1. Is Hart's view on indeterminacy adequate? Why or why not?
2. In what sense, if any, does Unger acknowledge the superiority of Dworkin's theory over Hart's? On what do Dworkin and Unger agree and disagree?
3. What danger is there in allowing judges openly and candidly to follow their feelings and hunches? What if their feelings lead to evil decisions?
4. It has been suggested that the realist insistence on the almost complete indeterminacy of the law resulted from a distorted or skewed perspective, one explained by the so-called selection hypothesis: Those cases that reach the appellate court level, and upon which legal scholars (like the realists) tend to focus, are just those cases in which the law is uncertain and in which the opposing arguments are fairly equally balanced. The great bulk of the law, however, the argument continues, is far more stable and determinate than the realists would admit. Does this explanation undermine legal realism?
5. Does the realist indeterminacy thesis express a necessary feature of law or legality? Or is it simply a contingent claim about a specific legal system or legal culture, namely, our own?
6. What exactly does Altman mean when he says that Dworkin's jurisprudential project may be understood as succeeding where Hart's project fails?
7. What does Unger mean by the antinomy of rules and values?

Part II: Feminist Jurisprudence

Critical legal theory does not depend, of course, on acceptance of the "internal inconsistency" claim advanced by Unger and others. Legal realism, for example, does not depend on that claim and neither does most feminist legal theory. In the readings to follow, Martha Minow is concerned with an assumption tacitly operative throughout legal history to the disadvantage of women: that the experience of men can and should serve as the standard for individual rights. She says that feminist scholars have done much to reveal the persistence and influence of this assumption, and in her view that revelation is a good thing. Her own approach to the problem of legal discrimination against women differs markedly from some feminist writers, however. She is concerned that in elaborating the idea of "women's experience" as a mode of experience distinct from that of men, some feminist analyses have recreated the primary problem they set out to address, that is, the problem of discrimination. In "Justice Engendered," from which these selections are taken, she claims no special mode of knowledge gained through the experience of women upon which to build a feminist-specific jurisprudence. Rather her arguments are directed toward analysis and critique of concepts such as objectivity and neutrality in legal judgment—a critique that links her argument to those of Unger and the critical legal studies movement as well as to legal realism.

Minow's central question is: What exactly would it *mean* to take feminist theory seriously in law? Her answer is that feminist issues belong to a class of issues that arise from the general problem of

“difference” in law – difference between individuals, difference in religion, difference in race, difference in handicapping conditions, as well as difference in gender. She asks: What differences should matter in law? And how are litigators to give them their proper significance? Until we have greater insight into how such questions should be answered as a practical matter, she thinks little progress can be made in resolution of the issues with which feminist legal scholars are concerned. The passages below are directed toward increasing such insight.

In the first reading Minow conducts an analysis of the concept of difference and how it enters into adjudication. She is particularly concerned with what she calls the “dilemma of difference,” presenting, as it turns out, difficult choices in the legal domain. There are, she says, three versions or forms the dilemma can take, but they all converge on a single point: in cases involving differences of various sorts the Court is faced with a choice between two alternative decisions against *both* of which convincing legal arguments can be made. How that dilemma was dealt with in the 1986 term of the Supreme Court and how, more generally, it should be dealt with is the subject in what follows.

V

Reading 1

From Martha Minow, “JUSTICE ENGENDERED”

What’s the Difference?

The use of anesthesia in surgery spread quickly once discovered. Yet the nineteenth-century doctors who adopted anesthesia selected which patients needed it and which deserved it. Both the medical literature and actual medical practices distinguished people’s need for painkillers based on race, gender, ethnicity, age, temperament, personal habits, and economic class. Some people’s pain was thought more serious than others; some people were thought to be hardy enough to withstand pain. Doctors believed that women, for example, needed painkillers more than men and that the rich and educated needed painkillers more than the poor and uneducated. How might we, today, evaluate these examples of discrimination? What differences between people should matter, and for what purposes?

The endless variety of our individualism means that we suffer different kinds of pain and may well experience pain differently. But when professionals use categories like gender, race, ethnicity, and class to presume real differences in people’s pain and entitlement to help, I worry. I worry that unfairness will result under the guise of objectivity and neutrality. I worry that a difference assigned by someone with power over a more vulnerable person will become endowed with an apparent reality, despite powerful competing views. If no one can really know another’s pain, who shall decide how to treat pain, and along what calculus? These are questions of justice, not science....

The Problem and the Argument

Each term, the Supreme Court and the nation confront problems of difference in this heterogeneous society. The cases that present these problems attract heightened media attention and reenact continuing struggles over the meanings of subgroup identity in a nation committed to an idea called equality. The drama of these cases reveals the enduring grip of “difference” in the public imagination, and the genuine social and economic conflicts over what particular differences come to mean over time. During the 1986 term, litigators framed for the Court issues about the permissible legal meanings of difference in the lives of individuals, minority groups, and majority groups in cases involving gender, race, ethnicity, religion, and handicap.

Uniting these questions is the dilemma of difference. The dilemma of difference has three versions. The first version is the dilemma that we may recreate difference either by noticing it or by ignoring it. Decisions about employment, benefits, and treatment in society should not turn on an individual's race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. If women's biological differences from men justify special benefits for women in the workplace, are women thereby helped or hurt? Are negative stereotypes reinforced, and does that matter? Focusing on differences poses the risk of recreating them. Especially when used by decision makers who award benefits and distribute burdens, traits of difference can carry meanings uncontrolled and unwelcomed by those to whom they are assigned. Yet denying those differences undermines the value they may have to those who cherish them as part of their own identity.

The second version of the dilemma is the riddle of neutrality. If the public schools must remain neutral toward religion, do they do so by balancing the teaching of evolution with the teaching of scientific arguments about divine creation—or does this accommodation of a religious view depart from the requisite neutrality? Governmental neutrality may freeze in place the past consequences of differences. Yet any departure from neutrality in governmental standards uses governmental power to make those differences matter and thus symbolically reinforces them.

The third version of the dilemma is the choice between broad discretion, which permits individualized decisions, and formal rules that specify categorical decisions for the dispensing of public—or private—power. If the criminal justice system must not take the race of defendants or victims into account, is this goal achieved by granting discretion to prosecutors and jurors, who can then make individualized decisions but may also introduce racial concerns, or should judges impose formal rules specifying conditions under which racial concerns must be made explicit to guard against them? By granting discretion to officials or to private decision makers, legislators and judges disengage themselves from directly endorsing the use of differences in decisions; yet this grant of discretion also allows those decision makers to give significance to differences. Formal rules constrain public or private discretion, but their very specificity may make differences significant.

I believe these dilemmas arise out of powerful unstated assumptions about whose point of view matters and about what is given and what is mutable in the world. "Difference" is only meaningful as a comparison. I am no more different from you than you are from me. A short person is different only in relation to a tall one. Legal treatment of difference tends to take for granted an assumed point of comparison: Women are compared to the unstated norm of men, "minority" races to whites, handicapped persons to the able-bodied, and "minority" religions to "majorities." Such assumptions work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world. The term *working mother* modifies the general category *mother*, revealing that the general term carries some unstated common meanings (that is, a woman who cares for her children full time without pay), which, even if unintended, must expressly be modified. Legal treatment of difference thus tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored, rather than acknowledging that the problem of difference can be described and understood from multiple points of view.

Noticing the unstated point of comparison and point of view used in assessments of difference does not eliminate the dilemma of difference; instead, more importantly, it links problems of difference to questions of vantage point. I will argue that what initially may seem to be an objective stance may appear partial from another point of view. Furthermore, what initially appears to be a fixed and objective difference may seem from another viewpoint like the subordination or exclusion of some people by others. Regardless of which perspective ultimately seems persuasive, the possibility of multiple viewpoints challenges the assumption of objectivity and shows how claims to knowledge bear the imprint of those making the claims.

Difference may seem salient not because of a trait intrinsic to the person but instead because the dominant institutional arrangements were designed without that trait in mind. Consider the difference between buildings built without considering the needs of people in wheelchairs and buildings that are accessible to people in wheelchairs. Institutional arrangements define whose reality is to be the norm and make what is known as different seem natural. By asking how power influences knowledge, we can address the question of whether

difference was assigned as an expression of domination or as a remedy for past domination. In so doing, we can determine the risks of creating a new pattern of domination while remedying unequal power relationships.

The commitment to seek out and to appreciate a perspective other than one's own animates the reasoning of some Supreme Court justices, some of the time. It is a difficult commitment to make and to fulfill. Aspects of language, social structure, and political culture steer in the opposite direction: toward assertions of absolute categories transcending human choice or perspective. It is not only that justice is created by, and defeated by, people who have genders, races, ethnicities, religions—people who are themselves situated in relation to the differences they discuss. It is also the case that justice is made by people who live in a world already made. Existing institutions and language already carve the world and already express and recreate attitudes about what counts as a difference and who or what is the relevant point of comparison. Once we see that any point of view, including one's own, is a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point. Then we can expose for debate what the starting points should be. The task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances....

V

In the next reading Minow deals with a series of cases before the Supreme Court during the 1986 term. What these cases show, she argues, is that dealing with problems of difference presents the Court with exactly the set of problems identified in the first reading. Discussion of the cases here is very brief, and students should read her account of each case carefully in order to understand clearly how each of the cases exemplifies one of the three versions or forms of the dilemma of difference.

V

Reading 2

From Martha Minow, "JUSTICE ENGENDERED"

A Case of Differences

Arguments before the Supreme Court engage all three versions of the difference dilemma and cut across cases otherwise differentiated by doctrine and contexts. The dilemma arises in both equality and religion cases, and in statutory and constitutional contexts. This section explicitly draws connections across these seemingly disparate cases and explores the dilemma in cases decided in the 1986 term.

The Dilemma of Recreating Difference Both by Ignoring It and by Noticing It

California Federal Savings & Loan Association v. Guerra (Cal Fed) presented in classic form the dilemma of recreating difference through both noticing and ignoring it. Petitioners, a collection of employers, argued that a California statute mandating a qualified right to reinstatement following an unpaid pregnancy disability leave amounted to special preferential treatment, in violation of Title VII's prohibition of discrimination on the basis of pregnancy. Writing an opinion announcing the judgment for the Court, Justice Marshall transformed the question presented by the plaintiffs: instead of asking whether the federal ban against discrimination on the basis of pregnancy precluded a state's decision to require special treatment for pregnancy, the majority asked whether the state could adopt a minimum protection for pregnant workers while still permitting employers to avoid treating pregnant workers differently by extending similar benefits to nonpregnant workers. Framing the problem this

way, the majority ruled that “Congress intended the PDA [Pregnancy Discrimination Act] to be ‘a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.’” The majority acknowledged the risk that recognizing the difference of pregnancy could recreate its stigmatizing effects, but noted that “a State could not mandate special treatment of pregnant workers based on stereotypes or generalizations about their needs and abilities.” Thus, despite the federal antidiscrimination requirement, the majority found that states could direct employers to take the sheer physical disability of the pregnancy difference into account, but not any stereotyped views associated with that difference. The majority gave two responses to the problem of difference: first, accommodating pregnant workers would secure a workplace that would equally enable both female and male employees to work and have a family; second, the federal and state statutes should be construed as inviting employers to provide the same benefits to men and women in comparable situations of disability.

Writing for the dissenters, Justice White maintained that the California statute required disability leave policies for pregnant workers even in the absence of similar policies for men. It thus violated the PDA, which “leaves no room for preferential treatment of pregnant workers.” In the face of this conflict, the federal statute must preempt the state law. The commands of nondiscrimination prohibit taking differences into account, Justice White argued, regardless of the impact of this neglect on people with the difference. Justice White acknowledged the majority’s argument that preferential treatment would revive nineteenth-century protective legislation, perpetuating sex role stereotypes and “imped[ing] women in their efforts to take their rightful place in the workplace.” For Justice White, however, such arguments were irrelevant, because the Court’s role was restricted to interpreting congressional intent and thus would not permit consideration of the arguments about stereotyping. Yet to some extent, the issue of stereotypes was unavoidable: the dilemma in the case, from one point of view, was whether women could secure a benefit that would eliminate a burden connected with their gender, without at the same time reactivating negative meanings about their gender.

In two other cases in the 1986 term, the Court confronted the dilemma of recreating difference in situations in which individuals claimed to be members of minority races in order to obtain special legal protections. By claiming an identity in order to secure some benefit from it, the individuals faced the dilemma that they might fuel negative meanings of that identity, meanings beyond their control. Although racial identification under federal civil rights statutes provides a means of legal redress, it also runs the risk of recreating stigmatizing associations, thereby stimulating prejudice.

In *Saint Francis College v. Al-Khazraji*, a man from Iraq who had failed to secure tenure from his employer, a private college, brought a claim of racial discrimination under 42 U.S.C. section 1981. His case foundered, however, when the lower courts rejected his claim that his Arab identity constituted racial membership of the sort protected by the federal statute.

In *Shaare Tefila Congregation v. Cobb*, members of a Jewish congregation whose synagogue was defaced by private individuals alleged violations of the federal guarantee against interference with property rights on racial grounds. The difference dilemma appeared on the face of the complaint: the petitioners argued that Jews are not a racially distinct group, and yet they claimed that Jews should be entitled to protection against racial discrimination because others treat them as though they were distinct. The petitioners thus demonstrated their reluctance to have a difference identified in a way that they themselves could not control, while simultaneously expressing their desire for protection against having that difference assigned to them by others. To gain this protection, the petitioners had to identify themselves through the very category they rejected as a definition of themselves. Both the district court and the court of appeals refused to allow the petitioners to be included in the protected group on the basis of the attitudes of others, without some proof of well-established traits internal to the group. The court of appeals reasoned: “although we sympathize with appellant’s position, we conclude that it cannot support a claim of racial discrimination solely on the basis of defendants’ perception of Jews as being members of a racially distinct group. To allow otherwise would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants.”

In contrast, one member of the appeals panel, dissenting on this point, argued: “Misperception lies at the heart of prejudice, and the animus formed of such ignorance sows malice and hatred wherever it operates without restriction.”

Is the cause of individualized treatment advanced by allowing groups to claim legal protections by dint of group membership, however erroneously assigned by others? Conversely, may denying these claims of legal protection against assigned difference allow the Supreme Court to avoid addressing the dilemma and thereby reenact it? In both *Shaare Tefilala* and *Saint Francis*, the Court asked only whether the legislators adopting the anti-discrimination legislation shortly after the Civil War viewed Jews and Arabs as distinct races. The Court answered the question affirmatively in both cases but based its conclusion on a review of the legislative histories and contemporaneous dictionaries and encyclopedias instead of tackling the difference dilemma directly.

The Court's historical test for membership in a minority race effectively revitalized not just categorical thinking in general, but the specific categorical thinking about race prevailing in the 1860s, despite considerable changes in scientific and moral understandings of the use of abstract categories to label people and solve problems. Whether the issue is gender, religion, or race, reviving old sources for defining group difference may reinvigorate older attitudes about the meanings of group traits. Denying the presence of those traits, however, and their significance in society, deprives individuals of protection against discrimination due to outmoded or unsubstantiated conceptions of group difference.

Neutrality and Nonneutrality: The Dilemma of Government Embroilment in Difference

The dilemma of difference appears especially acute for a government committed to acting neutrally. Neutral means might not produce neutral results, given historic practices and social arrangements that have not been neutral. For example, securing neutrality toward religious differences is the explicit goal of both the First Amendment's ban against the establishment of religion and its protection of the free exercise of religion. Thus to be truly neutral, the government must walk a narrow path between promoting or endorsing religion and failing to make room for religious exercise. Accommodation of religious practices may look nonneutral, but failure to accommodate may also seem nonneutral by burdening the religious minority whose needs were not built into the structure of mainstream institutions.

The "creation science" case, *Edwards v. Aguillard*, raised the question of how the government, in the form of public schools, can respect religious differences while remaining neutral toward them. In *Edwards*, parents and students claimed that a Louisiana statute requiring public schools to teach creation science whenever they taught the theory of evolution violated the establishment clause. Community members subscribing to fundamentalist religious beliefs, however, have argued that public school instruction in evolution alone is not neutral, because it gives a persuasive advantage to views that undermine their own religious beliefs. Relying on similar arguments, the state avowed a neutral, nonreligious purpose for its statute.

The majority, in an opinion by Justice Brennan, concluded that the legislation was actually intended to "provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety." By contrast, the dissenting opinion by Justice Scalia, which was joined by Chief Justice Rehnquist, expressly tangled with the neutrality problem, noting the difficult tensions between antiestablishment and free exercise concerns and between neutrality through indifference and neutrality through accommodation. In the end, the dissent was moved by the state's attempt to avoid undermining the different views of fundamentalist Christian students, while the majority was persuaded that the statute gave an illegal preference to a particular religious view. For both sides, however, the central difficulty was how to find a neutral position between these two risks.

In a second case, *Hobbie v. Unemployment Appeals Commission*, the neutrality problem arose when the Court reviewed a state's decision to deny unemployment benefits to a woman under an apparently neutral scheme. Hobbie was discharged from her job when she refused to work during her religious Sabbath. The state argued that Hobbie's refusal to work amounted to misconduct related to her work and rendered her ineligible for unemployment benefits under a statute limiting compensation to persons who become "unemployed through no fault of their own." The Court rejected this emphasis on the cause of the conflict, because the "salient inquiry" was whether the denial of unemployment benefits unlawfully burdened Hobbie's free exercise right. The Court also rejected the state's claim that making unemployment benefits available to Hobbie would unconstitutionally establish religion by easing eligibility requirements for religious adherents. By requiring accommodation for free

exercise, despite charges of establishing religion, the Court's solution thus framed a dilemma of neutrality: How can the government's means be neutral in a world that is not itself neutral?

A facially neutral state policy on unemployment compensation also figured in *Wimberly v. Labor & Industrial Relations Commission*. Wimberly had taken a pregnancy leave from her job with no guarantee of reinstatement, and upon her return the employer told her that there were no positions available. Her application for unemployment benefits was denied under a state law disqualifying applicants unless their reasons for leaving were directly attributable to the work or to the employer. Wimberly argued that a federal statute forbidding discrimination in unemployment compensation "solely on the basis of pregnancy or termination of pregnancy" required accommodation for women who leave work because of pregnancy.

The Supreme Court unanimously rejected Wimberly's claim that this denial of benefits contravened the federal statute. The Court found that the state had not singled out pregnancy as the reason for withholding unemployment benefits; instead, pregnancy fell within a broad class of reasons for unemployment unrelated to work or to the employer. The Court interpreted the federal statute to forbid discrimination but not to mandate preferential treatment. In the Court's eyes, then, it was neutral to have a general rule denying unemployment benefits to anyone unemployed for reasons unrelated to the workplace or the employer.

In essence, the Court interpreted the federal statutory scheme as granting discretion to state legislatures to define their own terms for disqualification from eligibility for benefits. Although many states provide unemployment benefits for women who leave their jobs because of pregnancy, subsuming it under terms like "good cause," along with other compelling personal reasons, injury, illness, or the federal ban against refusing benefits "solely on the basis of pregnancy" does not, according to the Court, compel such coverage. A state choosing to define its unemployment eligibility narrowly enough to disqualify not just those who leave work due to pregnancy but also those who leave work for good cause, illness, or compelling personal reasons may thus do so without violating federal law.

The Court in *Wimberly* rejected the argument that ignoring the difference of pregnancy produces illicit discrimination under an apparently neutral unemployment benefits rule. In *Hobbie*, on the other hand, the Court embraced the view that ignoring a religious difference produces illicit discrimination under an apparently neutral unemployment benefits rule. In both cases, the Court grappled with the dilemma of whether to give meaning to neutrality by recognizing or not recognizing difference.

Discretion and Formality: The Dilemma of Using Power to Differentiate

The Court's commitment to the rule of law often leads it to specify, in formal terms, the rules that govern the decisions of others. This practice can secure adherence to the goals of equality and neutrality by ensuring that differences are not taken into account except in the manner explicitly specified by the Court. Although likely to promote accountability, this solution of formal rules has drawbacks. Making and enforcing specific rules engages the Court in the problem of reinvesting differences with significance by noticing them. Specifically requiring the Court to articulate permissible and impermissible uses of difference may enshrine categorical analysis and move further away from the ideal of treating persons as individuals. One way for the Court to resolve the difference dilemma is to grant or cede discretion to other decision makers. Then the problems from both noticing and ignoring difference, and from risking nonneutrality in means and results, are no longer problems for the Court but, instead, matters within the discretion of other private or public decision makers. This approach simply moves the problem to another forum, allowing the decision maker with the discretion to take difference into account in an impermissible manner. The tension between formal, predictable rules and individualized judgments under discretionary standards thus assumes heightened significance in dilemmas of difference.

This dilemma of discretion and formality most vividly occupied the Court in *McCleskey v. Kemp*, in which the Court evaluated charges of racial discrimination in the administration of the death penalty in Georgia's criminal justice system. A statistical study of over two thousand murder cases in Georgia during the 1970s, submitted by the defendant and assumed by the Court to be valid, demonstrated that the likelihood of a defendant's receiving the death sentence was correlated with the victim's race and, to a lesser extent, the defendant's race. According to

the study, black defendants convicted of killing white victims “have the greatest likelihood of receiving the death penalty.” Should the Court treat a sentencing “discrepancy that appears to correlate with race” as a defect requiring judicial constraints on prosecutorial and jury discretion, or as an unavoidable consequence of such discretion? In making this choice, the majority and the dissenters each latched onto opposing sides of the dilemma about discretion and formality.

Justice Powell, for the majority, began by asserting that the discretion of the jury is critical to the criminal justice system and operates to the advantage of criminal defendants because it permits individualized treatment rather than arbitrary application of rules. Because of the importance of discretion, unexplained racial discrepancies in the sentencing process should not be assumed to be invidious or unconstitutional. In the majority’s view, recognizing claims such as McCleskey’s would open the door “to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender” or physical appearance. This argument, perhaps meant in part to trivialize the dissent’s objections by linking physical appearance with race, sex, and ethnicity, implied that discrepancies in criminal sentences are random and too numerous to control. Furthermore, in the majority’s view, any attempt to channel discretion runs the risk of undermining it altogether: “It is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice.”

Justice Brennan, in dissent, approached the problem of discretion and formality from the other direction. Like the majority, Justice Brennan asserted that imposition of the death penalty must be based on an “individualized moral inquiry.” To Justice Brennan, however, the statistical correlation between death sentences and the race of defendants and victims showed that participants in the state criminal justice system had, in fact, considered race and produced judgments “completely at odds with [the] concern that an individual be evaluated as a unique human being.” Justice Brennan argued that “discretion is a means, not an end” and that, under the circumstances, the Court must monitor the discretion of others. Justice Brennan also responded to the majority’s fear of widespread challenges to all aspects of criminal sentencing: “Taken on its face, such a statement seems to suggest a fear of too much justice.... The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role.”

Justice Stevens, also in dissent, argued that there remains a middle road between forbidding the death penalty and ignoring, in the name of prosecutorial and jury discretion, the correlation between the death penalty and the defendant’s and victim’s races. He urged a specific rule: The class of defendants eligible for the death penalty should be narrowed to the category of cases, identified by the study, in which “prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender.”

For the majority in *McCleskey*, constricting prosecutorial and jury discretion would push toward so regulated a world that the criminal justice system would no longer produce particularized, individualized decisions about defendants. For the dissenters, the Court’s acquiescence in unmonitored prosecutorial and jury discretion, in the face of sentencing disparities correlated with race, condoned and perpetuated racial discrimination and thereby allowed racial stereotyping to be substituted for individualized justice.

Debate among the justices last term in an entirely different context exposed a similar tension between rules and discretion. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (*Presiding Bishop*), the Court considered whether the federal statute exempting religious organizations from nondiscrimination requirements in their employment decisions arising out of nonprofit activities violated the establishment clause. The Court’s majority endorsed the legislative grant of discretion to religious organizations while rejecting the discharged engineer’s claims that such state accommodation unconstitutionally promotes religion.

The opinions in the case clearly illustrate the dilemma of discretion. The majority reasoned that under the exemption the preference for religion was not exercised by the government but, rather, by the church. Justice O’Connor, however, pointed out in her concurring opinion that allowing discretion to the private decision maker to use religion in his decisions inevitably engaged the government in that differentiation. The Court could not, simply by protecting the discretion of religious organizations, escape consideration of the tension between the constitutional command against promoting religion and the constitutional demand for free exercise of religion. Instead, Justice O’Connor argued, in distinguishing constitutional accommodation of religion from

unconstitutional assistance to religious organizations, the Court must evaluate the message of the government's policy as perceived by an "objective observer."

Justice Brennan's separate opinion also treated this tension as unavoidable. Yet Justice Brennan focused on the risk that case-by-case review by the Court would chill the very freedom assured to religious organizations. He therefore endorsed a categorical exemption from the ban against religious discrimination in employment for the nonprofit activities of religious organizations but argued for reserving judgment as to profit-making activities. Like Justice Stevens in *McCleskey*, Justice Brennan searched for a formal rule that could preserve discretion for other decision makers while also implementing the Court's special commitment to protect individuals from categorical, discriminatory treatment.

The Dilemmas in Sum

Other cases before the Court have raised one or more aspects of the difference dilemma. The Court's voluntary affirmative action cases, during the 1986 term and earlier, directly present dilemmas about recreating difference, risking non-neutral means to transform nonneutral ends, and choosing between rules and discretion in an effort to avoid categorical decisions. Decisions about handicapped persons also raise perplexing issues about when the Court should permit public and private decision makers to make the difference of handicap matter. The Court comes down one way or another in each case, but the splits between majority and minority views persist and recreate the dilemmas....

V

In a portion of her work not included here, Minow argues that the difference dilemma in one or another of its forms appears both inescapable and unresolvable. The reason it appears so is that we make certain false assumptions about the nature of difference. She lists five of these.

Assumption 1: Difference Is Intrinsic, not Relational.

The legal analyst tends to treat the difference question as one of discovery rather than of one made by choice. The judge asks, "Into what category does a given person or feature belong?" The distinguishing features we employ in critical perception and classification themselves appear natural rather than chosen.¹

Assumption 2: The Unstated Norm.

When women argue for rights, the implicit reference point often used in discussions of sameness and difference is the privilege accorded some males. This reference point can generate powerful arguments for overcoming the exclusion of women from activities and opportunities available to men. For example, reform efforts on behalf of women during both the nineteenth and the twentieth centuries asserted women's fundamental similarities to privileged, white men as a tactic for securing equal treatment. Unfortunately for the reformers, embracing the theory of "sameness" meant that any sign of difference between men and women could be used to justify treating women differently from men. Men remained the unstated norm.²

Assumption 3: The Observer Can See Without a Perspective.

Judges often see difference in relation to some unstated norm or point of comparison and fail to acknowledge their own perspective and its influence on the assignment of difference. This failure prevents us from discovering who is doing the labeling, but it does not negate the effect of the labeling itself. Veiling the standpoint of the observer conceals its impact on our perception of the world.³

Assumption 4: The Irrelevance of Other Perspectives.

Some justices, on some occasions, have tried to see beyond the dominant perspective and reach an alternative construction of reality. In many instances, however, the justices presume that the perspective they adopt is either universal or superior to others. A perspective may go unstated because it is so powerful and pervasive that it may be presumed without defense; it may also go unstated because it is so unknown to those in charge that they do not recognize it as a perspective.⁴

Assumption 5: The Status Quo Is Natural, Uncoerced and Good.

From this assumption follow three propositions: first, the goal of governmental neutrality demands the status quo because existing societal arrangements are assumed to be neutral. Second, governmental actions that change the status quo have a different status than omissions, or failure to act, that maintain the status quo. Third, prevailing social and political arrangements are not forced on anyone.⁵

Minow's point in exposing these false assumptions is to encourage, promote, and develop better ways of making the inescapable choices, by acknowledging the fact that no truly "neutral" point of view is possible. Her program of "engendering justice" depends on such recognition. In the final section below she discusses the problem of "choice among divergent demands;" she argues that understanding differences, important as this is, does not by itself determine legal outcomes: judges must still decide which differences are important, which differences should control the outcome of a case. So far as legal outcomes are concerned, judges make decisions in a way or ways "committed to meaning" and this is the most we can hope for in adjudication since there are no such things as impartial and neutral points of view. It should be obvious that Minow's reasoning comports well with some key ideas of critical jurisprudence presented in this chapter: no normative theory is advanced, no source of knowledge is identified that can assure justification of legal decisions, and there is no way to avoid loss of some kind when dilemmas of difference are addressed and resolved by courts—we must acknowledge the "tragedy" of nonneutrality. Her position also accords well with Unger's notion that choice based on theory is "partial" since theories are inevitably "partial" in the sense of being essentially selective and incomplete.

V

Reading 3

From Martha Minow, "JUSTICE ENGENDERED"

The dissenting justices in *McCleskey* asked how defendants would react to the statistical disparity in capital sentencing by race, breaking out of the tendency to see the challenge only as a threat to the discretion and manageability of the criminal justice system. In *Saint Francis College*, *Shaare Tefila*, and *Arline*, members of the Court struggled over whose perspective should count for purposes of defining a race and a handicap, reaching conclusions that refused to take the usual answers for granted.

Efforts to adopt or imagine alternate perspectives are also reflected in opinions from previous terms. For example, Justice Stevens assessed an equal protection challenge to a zoning restriction burdening mentally retarded people by expressing sensitivity to a point of view other than his own: "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case." Still earlier, Justice Douglas invited inquiry into the experience of non-English-speaking students sitting in a public school classroom conducted entirely in English. Similarly, litigants have sometimes tried to convince the Court to adopt their perspective. Justice Harlan's dissent in *Plessy v. Ferguson* may have been assisted by Homer Plessy's attorney, who had urged the justices to imagine themselves in the shoes of a black person:

Suppose a member of this court, nay, suppose every member of it, by some mysterious dispensation of providence should wake to-morrow with a black skin and curly hair ... and in traveling through that portion of the country where the "Jim Crow Car" abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result... What humiliation, what rage would then fill the judicial mind!

It may be ultimately impossible to take the perspective of another completely, but the effort to do so may help us recognize that our perspective is partial and that the status quo is not inevitable or ideal. After shaking free of these unstated assumptions and developing a sense of alternative perspectives, judges must then choose. The process of looking through other perspectives does not itself yield an answer, but it may lead to an answer different from the one that the judge would otherwise have reached. Seen in this light, the difference dilemma is hard but not impossible....

The nineteenth-century American legal system recognized only three races: “white,” “Negro,” and “Indian.” Californian authorities faced an influx of Chinese and Mexicans and were forced to confront the now complicated question of racial categorization. They solved the problem of categorizing Mexicans by defining them as “whites” and by according them the rights of free white persons. Chinese, however, were labeled “Indian” and denied the political and legal rights of white persons. Similarly, in 1922, a unanimous Supreme Court concluded that Japanese persons were not covered by a federal naturalization statute applicable to “free white persons,” “aliens of African nativity,” and “persons of African descent.”

In retrospect, these results seem arbitrary. The legal authorities betrayed a striking inability to reshape their own categories for people who did not fit. Of course, it is impossible to know what might have happened if some piece of history had been otherwise. Still, it is tempting to wonder: What if the California legal authorities had changed their racial scheme, rather than forcing the Chinese and Mexican applicants into it? The officials then might have noticed that nationality, not race, distinguished these groups. What if these officials and the justices in 1922 had tried to take the point of view of the people they were labeling? Perhaps, from this vantage point, the justices would have realized the need for reasons—beyond racial classification—for granting or withholding legal rights and privileges.

... Trying to take seriously the point of view of people labeled *different* is a way to move beyond current difficulties in the treatment of differences in our society. This ... statement ... is addressed to people in positions of sufficient power to label others different and to make choices about how to treat difference. If you have such power, you may realize the dilemma of difference: by taking another person’s difference into account in awarding goods or distributing burdens, you risk reiterating the significance of that difference and, potentially, its stigma and stereotyping consequences. But if you do not take another person’s difference into account—in a world that has made that difference matter—you may also recreate and reestablish both the difference and its negative implications. If you draft or enforce laws, you may worry that the effects of the laws will not be neutral whether you take difference into account or you ignore it. If you employ people, judge guilt or innocence, or make other decisions affecting lives, you may want and need the discretion to make an individualized assessment, free from any focus on categorical differences. But if that discretion is exercised without constraint, difference may be taken into account in a way that does not treat that person as an individual—and in a way that disguises this fact from view.

These dilemmas ... become less paralyzing if you try to break out of unstated assumptions and take the perspective of the person you have called *different*. Once you do that, you may glimpse that your patterns for organizing the world are both arbitrary and foreclose their own reconsideration. You may find that the categories you take for granted do not well serve features you had not focused upon in the past. You may see an injury that you had not noticed or take more seriously a harm that you had otherwise discounted. If you try to take the view of the other person, you will find that the “difference” you notice is part of the relationship or comparison you draw between that person and someone else, with reference to a norm, and you will then get the chance to examine the reference point you usually take for granted. Maybe you will conclude that the reference point itself should change. Employers do not have to treat pregnancy and parenthood as a disability, but instead as a part of the lives of valued workers. You may find that you had so much ignored the point of view of others that you did not realize that you were mistaking your point of view for reality. Perhaps you will find that the way things are is not the only way things could be—that changing the way you classify, evaluate, reward, and punish may make the differences you had noticed less significant, or even irrelevant, to the way you run your life....

Impartiality and Partial Truths

It is a paradox. Only by admitting our partiality can we strive for impartiality. Impartiality is the guise partiality takes to seal bias against exposure. It looks neutral to apply a rule denying unemployment benefits to anyone who cannot fulfill the work schedule, but it is not neutral if the work schedule was devised with one religious Sabbath, and not another, in mind. The idea of impartiality implies human access to a view beyond human experience, a “God’s eye” point of view. Not only do humans lack this inhuman perspective, but humans who claim it are untruthful, trying to exercise power to cut off conversation and debate. Doris Lessing argues that a

single absolute truth would mean the end of human discourse but that we are happily saved from that end because any truth, once uttered, becomes immediately one truth among many, subject to more discourse and dispute. If we treat other points of view as irritants in the way of our own vision, we are still hanging on to faulty certainty. Even if we admit the limits of our view, while treating those limits as gaps and leaving the rest in place, we preserve the pretense that our view is sufficiently rooted in reality to resist any real change prompted by another.

Acknowledging partiality may cure the pretense of impartiality. But unless we have less capacity to step outside our own skins than I think we do, we then have a choice of which partial view to advance or accept. Whose partial view should resolve conflicts over how to treat assertions of difference, whether assigned or claimed? Preferring the standpoint of an historically denigrated group can reveal truths obscured by the dominant view, but it can also reconfirm the underlying conceptual scheme of the dominant view by focusing on it. Similarly, the perspective of those who are labeled different may offer an important challenge to the view of those who imposed the label, but it is a corrective lens, another partial view, not absolute truth. We then fight over whether to prefer it. "Standpoint theories" may also deny the multiple experiences of members of the denigrated group and create a new claim of essentialism.

Instead of an impartial view, we should strive for the standpoint of someone who is committed to the moral relevance of contingent particulars. Put in personal terms, if I pretend to be impartial, I hide my partiality; however, if I embrace partiality, I risk ignoring you, your needs, and your alternative reality—or, conversely, embracing and appropriating your view into yet another rigid, partial view. I conclude that I must acknowledge and struggle against my partiality by making an effort to understand your reality and what it means for my own. I need to stop seeking certainty and acknowledge the complexity of our shared and colliding realities, as well as the tragic impossibility of all prevailing at once. It is this complexity that constitutes our reciprocal realities, and it is the conflict between our realities that constitutes us, whether we engage in it overtly or submerge it under a dominant view.

Moral action ... takes place in a field of complexity, and we act ethically when we recognize what we give up as well as what we embrace. The solution is not to adopt and cling to some new standpoint but, instead, to strive to become and remain open to perspectives and claims that challenge our own. Justice, like philosophy, ought to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one....

The Problem of Deference

This call to be open, to canvas personal experience, applies to all legal controversies but it is especially important in the context of cases that present the dilemma of difference. Here the judicial mainstays of neutrality and distance prove most risky, for they blind judges to their own involvement in recreating the negative meanings of difference. Yet the dangers of making differences matter also argue against categorical solutions. By struggling to respond humanly to the dilemma in each particular context, the judge can supply the possibility of connection otherwise missing in the categorical treatments of difference.

Choosing Among Divergent Demands

Urging judges to allow themselves to be moved by the arguments may seem misguided. A judge who identifies with every perspective may simply feel indecisive and overburdened. Would feeling the tugs in all directions render us powerless to choose? It may be just this fear that explains our attachment to simplifying categories, stereotypes, and fixed ways of thought. Some of us may fear being overwhelmed by the world, others fear being too moved by it, others fear being powerless before it. Challenging familiar categories and styles of reasoning may threaten the search for order, decisiveness, and manageability that maintain the predictability in our lives. But there are other ways to hold things together than the methods we have used in the past.

Some may aspire to a jurisprudence of individualism, never treating any individual as a member of a group. Yet, resonant as it is with many American traditions, individualization is a myth: because our language is shared and our categories communally invented, any word I use to describe your uniqueness draws you into the classes of people sharing your traits. Even if ultimately I produce enough words so that the intersection of all classes you belong in contains only one member—you—we understand this through a language of comparison with others. This language, however, seems to embroil us in the dilemma of difference.

What could we do instead? I believe we should welcome complexity and challenge complacency—and stop fearing that we will be unable to make judgments. We can and do make judgments all the time, in a way committed to making meaning, rather than recreating or ignoring difference. We make commitments when we make decisions; we reconfirm or remake current understandings by reflecting so deeply and particularly about a new situation that we challenge presumptive solutions. Instead of trying continually to fit people into categories, and to enforce or deny rights on that basis, we can and do make decisions by immersing in particulars to renew commitments to a fair world.

Thus, one reason we can still decide, amid powerfully competing claims, is that immersion in particulars does not require the relinquishment of general commitments. The struggle is not over the validity of principles and generalizations—it is over which ones should prevail in a given context. The choice from among principles, in turn, implicates choices about which differences, and which similarities, should matter. These are moral choices, choices about which voices should persuade those who judge.

Even when we understand them, some voices will lose. The fundamentalist Christians who supported the Balanced Treatment Act in Louisiana deserve respect and understanding: their view of the world may well be threatened by the curriculum taught to their children in the public schools. However, this is what the fight is about. Whose view of reality should prevail in public institutions? This deep conundrum involves the conflicts between the worldview animating any rule for the entire society, and the worldviews of subgroups who will never share the dominant views. I am tempted to propose a seemingly “neutral” rule, such as a rule that judges interpreting the commitment to respect difference should make the choice that allows difference to flourish without imposing it on others. If exclusion of their worldview from the biology curriculum creates an intolerable choice for the fundamentalists, they do and they must have the choice to establish their own educational institutions, and their own separate community. Yet this seemingly “neutral” position is a comfortable view for a nonfundamentalist like myself, who cannot appreciate the full impact of the evolution science curriculum as experienced by at least some fundamentalists. Rather than pretending to secure a permanent solution through a “neutral” rule, I must acknowledge the tragedy of non-neutrality—and admit that our very commitment to tolerance yields intolerance toward some views. If the fundamentalists lose in this case, they can continue to struggle to challenge the meaning of the commitment to separate church and state, and they may convince the rest of us in the next round. Although it may be little solace for the minority group, its challenge achieves something even when it loses, by reminding the nation of our commitment to diversity, and our inability, thus far, to achieve it fully.

Thus, choices from among competing commitments do not end after the Court announces its judgment. Continuing skepticism about the reality endorsed by the Court—or any source of governmental power—is the only guard against tyranny.

The continuing process of debate over deeply held but conflicting commitments is both the mechanism and the promise of our governmental system. Within that system, the Supreme Court’s power depends upon persuasion. As Hannah Arendt wrote: “The thinking process which is active in judging something is not, like the thought process of pure reasoning, a dialogue between me and myself, but finds itself always and primarily, even if I am quite alone in making up my mind, in an anticipated communication with others with whom I know I must finally come to some agreement.” The important question is, with whom must you come to agreement? In a society of diversity with legacies of discrimination, within a polity committed to self-governance, the judiciary becomes a critical arena for demands of inclusion. I see the judicial arena as a forum for contests over competing realities. The question remains, however, whose definitions of realities will govern in a given case and over time.

Court judgments endow some perspectives, rather than others, with power. Judicial power is least accountable when judges leave unstated—and treat as a given—the perspective they select. Litigation before the Supreme Court sometimes highlights individuals who otherwise seldom imprint their perspective on the polity.

In eliciting these perspectives and accepting their challenge to the version of reality the justices otherwise would take for granted, the Court advances the fundamental constitutional commitment to require reasons before exercises of power, whether public or private. Growing from our history, wrought from many struggles, is the tradition we have invented, and it is a tradition that declares that the status quo cannot be immune from demands for justification. Litigation over the meanings of difference represents demands for such accountability. By asking how power influences knowledge, the Court can address whether a “difference” has been assigned through past domination or as a remedy for past domination. In this way, the Court can solicit information about contrasting views of reality without casting off the moorings of historical experience, and in this inquiry, the Court can assess the risk of creating new patterns of domination while remedying inequalities of the past. As we compete for power to give reality to our visions, we confront tragic limits in our abilities to make meaning together. Yet we must continue to seek a language to speak across conflicting affiliations.

We need settings in which to engage in the clash of realities that breaks us out of settled and complacent meanings and creates opportunities for insight and growth. This is the special burden and opportunity for the Court: to enact and preside over the dialogue through which we remake the normative endowment that shapes current understandings.

When the Court performs these roles, it engenders justice. Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them. Rather than securing an illusory universality and objectivity, law is a medium through which particular people can engage in the continuous work of making justice.... Legal decisions engrave upon our culture the stories we tell to and about ourselves, the meanings that constitute the traditions we invent. Searching for words to describe realities too multiple and complex to be contained by their language, litigants and judges struggle over what will be revealed and what will be concealed in the inevitable partiality of human judgment. Through deliberate attention to our own partiality, we can begin to acknowledge the dangers of pretended impartiality. By taking difference into account, we can overcome our pretended indifference to difference, and people our worlds with those who can surprise and enrich one another. As we make audible, in official arenas, the struggles over which version of reality will secure power, we disrupt the silence of one perspective, imposed as if universal. Admitting the partiality of the perspective that temporarily gains official endorsement may embolden resistance to announced rules. But only by admitting that rules are resistible—and by justifying to the governed their calls for adherence—can justice be done in a democracy. It is only through the variety of relations constructed by the plurality of beings that truth can be known and community constructed. Then we can constitute ourselves as members of conflicting communities with enough reciprocal regard to talk across differences. We engender mutual regard for pain we know and pain we do not understand.

QUESTIONS

1. What is the role of “difference” in feminist legal thought?
2. Is there a “feminist point of view” when it comes to questions of law? Must one be a female to have such a view?
3. Evaluate Minow’s feminist tools in her evaluation of the cases she discusses.
4. What is the role of “perspectivism” in feminist legal thought?
5. Ought law to be “sexist” in some regards? That is, should men and women be treated unequally in some respects? For example, ought the law to prohibit women of child-bearing years from working in conditions that would harm their reproductive capacities or a fetus? Ought the law to prohibit women from entering into “surrogate-mother” contracts? Should women but not men be legally entitled to work leave on the birth of a child?¹ Posner, *Problems of Jurisprudence*, Id. at p. 28.

2. Ibid., p. 26. ## TYPES OF LEGAL PHILOSOPHY CRITICAL LEGAL THEORY ## TYPES OF LEGAL PHILOSOPHY CRITICAL LEGAL THEORY ## TYPES OF LEGAL PHILOSOPHY CRITICAL LEGAL THEORY ## TYPES OF LEGAL PHILOSOPHY 3. Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1983), see especially pp. 66–88. CRITICAL LEGAL

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THEORY ## TYPES OF LEGAL PHILOSOPHY*Roberto Unger, "The Critical Legal Studies Movement," 571 *Harvard Law Review* 96
(1983).CRITICAL LEGAL THEORY #*Duncan Kennedy, "The Political Significance of the Structure of the Law School Curriculum," 15 *Seton
Hall Law Review* (1983).# TYPES OF LEGAL PHILOSOPHYCRITICAL LEGAL THEORY ## TYPES OF LEGAL PHILOSOPHYCRITICAL
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2. *Ibid.*, p. 228.
3. *Ibid.*, p. 229.
4. *Ibid.*# TYPES OF LEGAL PHILOSOPHY5. *Ibid.*CRITICAL LEGAL THEORY ## TYPES OF LEGAL PHILOSOPHYCRITICAL LEGAL
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