UNGER'S CRITIQUE OF FORMALISM IN LEGAL REASONING: HERO, HERCULES, AND HUMDRUM

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> Doctrine can exist - the formalist says or assumes - because of a contrast between the more determinate rationality of legal analysis and the less determinate rationality of ideological contests.
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> This thesis can be restated as the belief that law making and law application differ fundamentally, as long as legislation is seen to be guided only by the looser rationality of ideological conflict ...
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> The modern lawyer may wish to keep his formalism while avoiding objectivist assumptions. He may feel happy to switch from talk about interest group politics in a legislative setting to invocations of impersonal purpose, policy, and principle in an adjudicative or professional one. He is plainly mistaken; formalism presupposes at least a qualified objectivism.[1]

1. Introduction

When, a decade ago, Professor Hart wrote his celebrated essay on 'American Jurisprudence Through English Eyes: the Nightmare and the Noble Dream',[2] he contrasted the 'nightmare' represented by the legal realist movement with the 'noble dream' represented by Professor Dworkin's rights thesis. Today, traditional lawyers find that the realists were, after all, a mere pea under the mattress. All but the tender-skinned could rest in peace. The true nightmare was yet to come.

The times are changing. American law faculties have been set by the ears by a ferment of self-conscious radicalism, which is beginning to spread throughout the common law academic world. The movement calls itself the 'critical legal studies movement'. It does this officially at well-attended conferences organised in its name. It expects radical commitment of some sort from its adherents, but it is not an exclusive club. If you

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1. R.M. Unger, 'The Critical Legal Studies Movement' (1983) 96 **Harvard Law Review** 561, 565.
2. H.L.A. Hart, 'American Jurisprudence through English Eyes: the Nightmare and the Noble Dream' (1977) **Ga. Law Review** 969 (reprinted in Hart: **Essays in Jurisprudence and Philosophy**, Clarendon Press, 1983, Ch. 4.

believe that the political and legal institutions of western democracies are in some sense bogus, and you are prepared to instantiate that belief by reference to any aspect of law, legal processes or legal education, you may call yourself a 'Crit.'.[3]

One of the things the realists were sceptical about was formalism in legal reasoning, the idea that solutions to legal problems could be rationally supported by appeal to the true meaning of legal concepts. Jerome Frank stigmatised such reasoning as 'word worship' and 'verbal mania'. He attributed its prevalence to the persistence among lawyers of medieval scholastic ways of thinking derived from Platonic metaphysical realism; and such persistence was due, he suggested, to the psychological need for certainty, which was a carry-over from childish dependence on a father figure.[4]

The advocates of critical legal studies endorse such scepticism about formalism in legal reasoning but they erect upon it a far more incisive political critique. The legal realists were, for the most part, New Deal liberals. They were moved to protest by those decisions of the Supreme Court in which moderate, reformist interventions by legislatures in the economic sphere had been ruled unconstitutional, on the alleged neutral basis of the concepts embodied in the Constitution.[5] However, despite certain flights of iconoclasm to be found in their writings, they were not generally committed to a political onslaught on American legal institutions. Even Frank, commonly considered to be an extremist in the realist camp, produced somewhat tame recommendations. He argued that informal tribunals, as compared with traditional courts, were not such a bad thing; and that judges, in exercising the discretion which the inconclusiveness of legal materials inevitably confers upon them, should be as explicit as possible in articulating the factors which 'really' determined their decisions. Karl Llewellyn, who was a more typical representative of the movement, ended by advocating the merits of a 'grand style' in common law adjudication as compared with a more circumscribed formal style of legal

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3. Cf. Allan C. Hutchinson and Patrick Monahan: 'Law, Politics, and the Critical Legal Scholars' (1984) 36 **Stanford Law Review** 199.
4. Jerome Frank: **Law and the Modern Mind**, Brentano, 1930, Chs. 7 and 8. For a recent espousal of metaphysical realism in law, see Michael Moore: 'A Natural Law Theory of Interpretation' (1985) 58 **Southern California Law Review** 279.
5. Cf. Edward A. Purcell, jr., **The Crisis of Democratic Theory**, Kentucky U.P., 1973, Chs. 5 and 9. Bruce A. Ackerman, **Reconstructing American Law**, Harvard U.P., 1984, Ch. 2.

reasoning.[6] Furthermore, the legal realists were not the only critics of formalism. Their contemporary and consistent opponent, Lon Fuller, also decried it, advocating instead what Robert Summers has called a 'processual theory of law', wherein the process values implicit in legal institutions should be the dominant factor in 'purposive' reasoning.[7] As with the realists, so with Fuller: criticism of legal formalism did not entail political radicalism.

It is otherwise with the critical legal studies movement. The attack on formalism is to be combined with an exposure of the false promises of liberalism.[8] The prescriptions of the law do not insulate the individual citizen from the political decisions of law-applying agents, as formalists claim they do; and since those agents man institutions which are ideologically and functionally designed to maintain social structures of hierarchy and subordination, nothing but a root-and-branch attack on existing legal institutions and processes, and the political framework that supports them, is appropriate.

Two caveats must be entered. First, not all those who call themselves 'crits' spell out their disillusionment with existing law in quite these stark terms. Second, those that do are usually coy in giving theoretical sketches of the new edifice which should replace the institutions we now have. Speculations on the latter question might produce distracting internal dissension within the movement. It is demolition - the 'rubbishing of the law' - which, if anything, unites the members of the critical legal studies movement.

Neither of these caveats applies to one of the movement's most inspiring and influential leaders, Professor Roberto Unger. In a powerful essay, he aims to capture the spirit of the movement and to bring it to full self-awareness.[9] Unger has no doubt that the existing political and legal institutions should be dismantled, and he provides a rough blueprint for what should replace them within a new 'empowered democracy'.

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6. Karl Llewellyn, **The Common Law Tradition**, Little, Brown and Co., 1960. Cf. William Twining, **Karl Llewellyn and the Realist Movement**, Weidenfeld and Nicolson, 1973. Alan Hunt, **The Sociological Movement in Law**, Macmillan, 1978, Ch. 3.
7. R.S. Summers, **Lon Fuller**, Edward Arnold, 1984.
8. Cf. Mark Tushnet, 'Following the Rules Laid Down: a Critique of Interpretivism and Neutral Principles' (1983) 96 **Harvard Law Review**, 781.
9. Unger n. 1 **supra**. For a comprehensive criticism of Unger's essay, see J.M. Finnis: "On 'The Critical Legal Studies Movement'", in John Eekelaar and John Bell (eds.), **Oxford Essays in Jurisprudence**, 3rd series, Clarendon Press, 1987.

The purpose of the present essay is to bring into sharp focus the contrast between Unger's vision, that of Ronald Dworkin, and the assumptions about formalism which underlie conventional legal thought.

2. Hero

Unger condemns formalism in legal reasoning on familiar sceptical grounds. Every lawyer knows, he says, that when a controverted legal question arises, any doctrinal argument supporting one answer can be matched by another doctrinal argument supporting the opposite answer. Therefore, since everything can be proved, nothing can.[10] However, the conclusion which he draws from this sceptical insight is one which other sceptics do not usually make explicit. It is that no line can be drawn between legal justification and 'open-ended disputes about the basic terms of social life'.[11] He equates formalism with contentions of any kind which seek to demonstrate that legal argument can be sustained without commitment to 'objectivism'. Objectivism is 'the belief that the authoritative legal materials ... embody and sustain a defensible scheme of human association'.[12] Objectivism, like formalism, must fail. Social-theoretical analysis and empirical inquiry combine to reveal that, in western democracies, the institutions of the state, including its legal institutions, sustain, and must inevitably sustain, a dehumanising structure of hierarchy and subordination. These structures must be replaced with informal communitarian institutions, within an overall framework of an empowered democracy. The empowered democracy would not be hampered, in its work of redistributing resources and abolishing social hierarchies and differentiations, by the contemporary array of institutional constraints (including conventional courts). There would emerge a new conception of law and a new kind of lawyer. The most important feature of the new law would be 'destabilization rights'.[13] The function of such rights would be to disrupt hierarchies and differentiations in social life and to ensure that they do not re-emerge. The new lawyer will employ a loose collection of legal, social and political skills in the service of the empowered democracy or of the various informal associations sheltering beneath it.[14]

Unger recognises that the transition from our present society to the empowered democracy can be attained only piecemeal. It is the job of all who share his vision to engage in any kind of political action designed to bring it about. But the legal scholar has a special additional role. He must make the failure of

10. Unger n. 1 **supra**, p. 573.
11. **Ibid.**, p. 564.
12. **Ibid.**, p. 565.
13. **Ibid.**, p. 600.
14. **Ibid** , p. 668.

formalism and objectivism explicit in relation to particular areas of law. He must engage in 'deviationist doctrine', whose object is to exacerbate, rather than to reconcile, the disharmonies of the law. He must show that, underlying the rules constituting any branch of law, there are equally matched principles and counter-principles, so that no recourse to principle can favour one interpretation of a rule against another. And he must demonstrate that, at a third level below the rules and the principles, there are incompatible and irreconcilable ideological assumptions about social life.[15]

> The crucial feature of deviationist doctrine is the willingness to recognise and develop the disharmonies of the law ... Critical doctrine does this by finding in their disharmonies the elements of broader contests among prescriptive conceptions of society.[16]

It appears that 'formalism', for Unger, represents a wide target. It encompasses any argument of the form: 'Whether our society is just or not, such-and-such is the law'. I have suggested that the kinds of reason which may be advanced to sustain legal arguments can be divided into four models of legal rationality: the will model, which appeals to historical information about the motives or intentions of those who created a legal rule; the natural-meaning model, which invokes the acontextual import of the words employed in the canonical formulation of a rule; the doctrine model, which prays in aid of a proposition (claimed to constitute part of the present law) some maxim belonging to an official tradition; and the utility model, which supports one legal proposition against another by reference to their respective consequences.[17] Within this typology, at least the first three could be classed as 'formalistic' in Unger's sense; for if it were true that lawyers could find sufficient warrant for legal conclusions in historic intention, the meaning of words or the outcome of settled doctrine, then it would be false that legal argument cannot be differentiated from untrammelled political controversy. Nevertheless, Unger concentrates his fire on doctrinal reasoning; and it is perhaps most common to employ the description 'formalistic' to reasoning within this mode.

In a recent essay, I investigated the part played in modern English land law by two subspecies of doctrinal reasoning, distinguished within Max Weber's sociology of law.[18] Weber claimed that it was of the essence of legal

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15. **Ibid.**, pp. 646-8.
16. **Ibid.**, p. 578.
17. J.W. Harris, **Law and Legal Science**, Clarendon Press, 1979, Ch. 5.
18. J.W. Harris, 'Legal Doctrine and Interests in Land', in John Eekelaar and John Bell (eds.), **Oxford Essays in Jurisprudence**, 3rd series, Clarendon Press, 1987.

reasoning that it is 'formal' in one or other of two ways. It might be 'casuistic', in the sense that support for a legal proposition was based on precedent or analogy; and such casuistry will be empirical or conceptual, depending on whether precedential or analogical force is thought to reside in similarity of facts or the meaning of concepts. Alternatively, legal reasoning might be 'logically formal', in that a proposition was derived from a notionally gapless set of abstract conceptual definitions. I argued that English land law exhibited formalism of both these kinds. I further maintained that there was nothing fundamentally irreconcilable, at the level of sociological analysis, between Weber's and Unger's depiction of law. For both, the concept of law (as we have it) encompasses doctrinal, including formalistic, reasoning. It is for that reason that the critical legal studies movement, as Unger interprets it, seeks to replace what we have with a new conception of law.

I sought to highlight the implications of deviationist doctrine by inventing a scholar (named Hero) who applies it to contemporary English land law. Hero shares Unger's social vision and accepts his methodology. In particular, he accepts two programmatic restraints which Unger places upon deviationist doctrine. Firstly, scorn for institutional deference: it is, for Hero, no objection to a frankly political analysis of doctrine that it is the sort of argument which could not be advanced before a court or adopted by a judge. It is of no moment that deviationist doctrine could not be employed in conventional courts:

> We have no stake in finding a preestablished harmony between moral compulsions and institutional constraints.[19]

Secondly, disdain for the conventional doctrinal crutch: Hero will not employ a conventional doctrinal argument even to support a legal interpretation which would favour the socially disadvantaged. Hero must resist any temptation to manipulate doctrine even to serve good ends, because to do so would only encourage the false formalist belief that sufficient reasons can be found in given legal materials to settle a question of law without reference to full-blown ideological debate.

> The appeal to a spurious conceptual necessity may prove tactically expedient. In the end, however, it always represents a defeat for our cause.[20]

Of course, Hero could never accept judicial office; and it is doubtful whether he, or any of his disciples, could even enter the legal profession. There might be a case for joining a law firm as a covert saboteur, hoping

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19. Unger n. 1, **supra**, p. 581.
20. **Ibid.**, p. 616.

that there he could disrupt cases by showing that no legal argument could be advanced without an equally strong comp the course advocated by some Marxist-revisionist scholars. He will not, as C.B. Macpherson argues we should, build on the prestige already accorded by liberal society to private property by seeking to expand the concept of property to include such social goods as welfare rights or rights to employment. Instead, as Unger puts it, he will seek the 'disaggregation of the consolidated property right'.

As things are, English land law doctrine, in the manner of Weberian logically formal rationality, admits the course advocated by some Marxist-revisionist scholars. He will not, as C.B. Macpherson argues we should, build on the prestige already accorded by liberal society to private property by seeking to expand the concept of property to include such social goods as welfare rights or rights to employment.[21] Instead, as Unger puts it, he will seek the 'disaggregation of the consolidated property right'.[22]

As things are, English land law doctrine, in the manner of Weberian logically formal rationality, admits two abstract definitional limitations on the recognition of novel interests in land. I have called these 'the doctrinal cleavage' and 'the doctrinal prescription'.[23] According to the former, a right must avail either against a land-owner personally, or it must be enforceable against all-comers to the land (with whatever qualifications are allowed by equitable doctrines and systems of registration). According to the latter, a fully-fledged interest in land must have three characteristics: enjoyment-content relating to land, general protection against all-comers, and transmissibility by the person entitled to it. Hero will begin by emphasising the emergence of informal putative interests in land, such as equitable co-ownership interests and interests arising from proprietary estoppel, and reject all those efforts made by conventional scholars to accommodate them within familiar categories. Then he will point to matched principles and counter-principles underlying such case law developments - for example, security of homes versus more efficient conveyancing. Beyond these, he will bring to light irreconcilable social visions - allocation according to need versus individualist market freedom. Nothing can be done, he will claim, to dissipate these contradictions. We must unpack the elements in the consolidated property right, not only for novel putative interests, but for all the more familiar estates and interests in land; and we must bring to bear on all transactions involving land-use

21. C.B. Macpherson, 'Capitalism and the Changing Concept of Property', in E. Kamenka and R. Neale (eds.), **Feudalism, Capitalism and Beyond**, Edward Arnold, 1975, at p. 122.
22. Unger n. 1, **supra**, p. 596.
23. Harris n. 18, **supra.**

the destabilisation right, wielded by the new lawyer, in the service of new communitarian institutions. When that day comes, whether I can exercise my 'provisional market right'[24] to sell or lease my house to you, and whether or not you may expel squatters who wish to share your dwelling, or erect fences to prevent the public taking a short cut through your garden, will be at the mercy of destabilisation rights. If (in the opinion of the new institution, advised by the new lawyer) such transactions would foster social hierarchy and differentiation, they will not be permitted.

3. Hercules

Hero was invented as a counterpoise to Ronald Dworkin's super-judge, Hercules. Hercules emerged in 1975 in Dworkin's essay on 'hard cases'.[25] He was presented as a paradigm for legal reasoning - both as an exemplar of what such reasoning ought to aspire to, and as an embodiment of assumptions (inexpertly and often inarticulately) contained within the reasoning-processes of real live judges. Hercules has matured since then. In his latest book, **Law's Empire**, Dworkin provides us with a much enriched profile.

Three features of Hercules' portrait, in particular, have been much more sharply drawn. In the first place, it is not the case - as some critics of Dworkin had supposed - that Herculean reasoning is appropriate only within a subdivision of all legal questions known as 'hard cases'. On the contrary, Hercules will, in principle, subject every legal issue to the same mixture of institutional fit and normative evaluation. Dworkin insists that there is no need to draw any line between hard and easy cases. It is just that, applying Hercules' twofold test, the answers to many questions will be so obvious that neither Hercules nor his real-life counterparts will be troubled long in finding them.[26]

Secondly, it now appears that the 'substantive dimension' - which Hercules takes into account along with the dimension of 'fit' in order to arrive at that theory which best justifies the settled law - is subdivided three ways. Commentators on the 'Hard Cases' essay were sometimes puzzled by the part which 'community morality' was supposed to play in Hercules' reasoning. It was made quite clear that this conception had nothing to do with

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24. Unger's empowered democracy would recognise, as well as destabilisation rights, provisional market rights, solidarity rights, and immunity rights. Only immunity rights, it seems, will be enforced by institutions resembling traditional courts.
25. R.M. Dworkin, 'Hard Cases' (1975) 88 **Harvard Law Review** 1057 (reprinted in Dworkin, **Taking Rights Seriously**, Duckworth, 1978, Ch. 4).
26. R.M. Dworkin, **Law's Empire**, Fontana, 1986, pp. 353-54.

counting heads, with opinion polls evidencing popular attitudes to morally controversial issues. Hercules was supposed, in the light of his definitional super-human competence in matters of moral and political philosophy, to arrive at the best theory of what the community's morality should be understood to amount to, given its peculiar institutional history. Did that mean that crude information about popular moral attitudes was no element at all within Hercules' calculations? If that were right, it might be good for Hercules' standing as an aspirational example, but it did appear to leave out of account one of the facets of experienced judicial reasoning - those occasions on which judges purport to defer to 'justice' as conceived by the ordinary man. We now know that it is not right. In **Law's Empire**, Dworkin tells us that the substantive dimension consists of justice, fairness and procedural due process. 'Fairness' is employed, stipulatively, to refer to that requirement of political morality which insists that widely shared moral opinions should be respected. Of course, it is only one element within the substantive dimension. Hercules is to take it into account alongside the requirement to give effect to substantive justice and the demands of due process.[27]

It is, however, the third filling-out of our picture of Hercules (presented in **Law's Empire**) which is of more immediate concern to the discussion of formalism in legal reasoning. It concerns the justification of Hercules' holistic approach to the law. In 'Hard Cases', Dworkin insisted that the litigant was entitled to demand that Hercules treat the law as a seamless web. He could not advance a solution to a hard case, however right in terms of political morality, unless it could be shown to have institutional support, to have some degree of fit with the existing law. But it was the law as a whole by reference to which fit must be tested, not some branch or sub-branch of it.

This holistic approach is re-asserted in **Law's Empire**. Where the legal materials relevant, for example, to some department of tort law allow for two or more equally plausible readings of the underlying principles, Hercules, in pursuit of fit, will turn to other areas of tort law, or related legal departments, or (if necessary) the whole of the law - bearing always in mind the substantive dimension as well.[28] He seeks an explanation of the entire body of law in force which will make it as coherent as it can be. He knows that perfect coherence is impossible. There will be some decisions which will run counter to that constellation of principles which, in the light of both dimensions, he finally concludes best justifies the law as a whole. These he will stigmatise as mistakes. If he has the power, he will overrule them (unless doing so would gravely affront the value of due

27. **Op. cit.**, pp. 164-65, 176-78, and **passim**.
28. **Op. cit.**, pp. 238-58.

process). If he cannot overrule them, he will acknowledge them as embedded mistakes. Given the 'chain of law' whose links consist of unrepealed statutes and unoverrulable judicial decisions, he must tell a historical narrative;[29] but it must be the best story the materials will bear.

Dworkin illustrates the process with examples drawn from Anglo-American law both in 'hard cases' and in **Law's Empire**. In the latter work, however, he offers an answer to an all-important 'why' question which hovers, unanswered, over the earlier essay. Why should Hercules be holistic? As Unger insists - and many before him: why should we assume that the legislative and judicial outcomes over a historical period, representing **ad hoc** policy compromises reached by diverse individuals and institutions, turn out to embody coherence of any kind?

An answer might be sought, analytically, by appeal to the concept of legal rationality itself. This is Neil MacCormick's approach. He argues that coherence is part of the idea of legal reasoning we have. That idea includes the requirement that a proposition (x) cannot be advanced as part of the law if, even though it is not in logical conflict with a legally valid proposition (y), it could not sensibly be put forward in conjunction with (y). If the foreseeable consequences of x and of y are such that no one, whatever his goals, could aim at both, then x and y are not mutually coherent.[30]

Dworkin does not appeal in this way to the concept of legal reasoning as a justification for the requirement of coherence; and indeed it is not this kind of coherence which he wishes to justify. He distinguishes between the 'strategic' or 'instrumental' coherence which might be entailed by a conventionalist conception of law and the 'coherence of principle' which follows from his own favoured conception of 'law as integrity'. Coherence for Hercules is not a matter of propositions working as pairs. It resides in the support a concrete proposition receives from a battery of principles which together instantiate a theory which shows a society to be just.

Dworkin's grounds for justifying Hercules' search for holistic coherence within the law are founded on a complex mixture of arguments drawn from jurisprudence and political philosophy. 'Law', he says, is not a concept to be discovered by paying attention to the language we use in referring to certain institutional processes or institutional products. To suppose that it is, is to be guilty of submission to the 'semantic sting'. Law is an interpretive concept. There is, to be sure, a pre-interpretive stage at which we recognise that everyone

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29. **Op. cit.**, pp. 225-38. Cf. R.M. Dworkin, "'Natural' Law Revisited" (1982) 34 **Flo. L. Review** 165.
30. N. MacCormick, **Legal Reasoning and Legal Theory**, Clarendon Press, 1978.

agrees that certain institutions and precepts associated with coercion by the political community are part of what we mean by 'law'. But then comes the all-important interpretive stage at which we advance a conception of law which best explains the phenomena recognised at the pre-interpretive stage. Since our conception of law aims at the best justification of these phenomena, the concept of law which we deploy is that of 'justified coercion'.[31]

Dworkin distinguishes three schools of thought which all employ this concept, although they have different conceptions of it - that is, they take contrasting lines on the question of how (if at all) the coercive phenomena of the law can be justified. The conventionalists suppose that coercion is justified either if it is warranted by some clear rule laid down in advance, or if it is directed by some duly authorised court; and so they define law as rules plus discretion. The pragmatists believe that past institutional decisions provide no justification for current coercion, and so they deny that there is any real law - although they find it expedient, in various contexts, to pretend that there is. Dworkin himself advances the conception of 'law as integrity'. Coercion is justified if, and to the extent that, the personified community behaves towards its citizens with that virtue which, in an individual, we recognise as integrity. We may disagree with another man's opinions; but if we see that he has a well-thought-out system of values which he applies consistently, we grant that he has integrity. In the same way, Hercules personifies the community and attributes to it the virtue of integrity. The community which stands behind all the law now in force must speak with one voice. It must have some conception of justice in accordance with which it seeks to allocate rights in a coherent way (though it may make mistakes).[32]

But why should we personify the community, let alone attribute to it anything so humanly intimate as integrity? Dworkin answers this further question by appeal to the political value of fraternity. Citizens appropriately share a sense of responsibility for what is done in their name. This entails that they suppose that community institutions are trying to extend equal concern and respect to all on a basis of equality; and it is this attributed endeavour which alone makes community force into legitimate coercion, that is, 'law'.[33]

The political gulf between Dworkin and Unger is vast and seemingly unbridgeable. They both speak the language

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31. Dworkin n. 26, **supra**, Chs. 1-3.
32. **Op. cit.**, pp. 166, 176-78, 261, and **passim.**
33. Dworkin recognises that it may be appropriate to deploy the concept in other ways in the case of wicked regimes. There is, in his view, no need for a unitary concept of law across time and place - **op cit**, pp. 101-8.

of communitarianism, but they draw diametrically opposed conclusions from it. They both recognise glaring injustices in the societies they describe, but whereas Dworkin believes that a partial vision of true community can be fitted to the institutions we have, Unger is certain that those institutions must be demolished. Above all, they diverge on the part to be played by rights within a humane association. For Dworkin, a just society would extend rights to all on a basis of equal concern and respect; and such rights would, in general, trump community policy goals. For Unger, the dominant conception of rights is anathema. He describes it as the freedom of a licenced gunman to 'shoot at will in his corner of town'.[34] The empowered democracy would reject the spurious distinction between the private and the public sphere, and would entrench on social and family life wherever that was necessary to disrupt, or to prevent the re-emergence of, social hierarchy and differentiation.

The incompatibility of their social visions perhaps explains why these two luminaries of modern American jurisprudence have not engaged with one another in any published controversies. Unger, in his essay on critical legal studies, does not mention Dworkin by name, but is content to dismiss attempts to provide an objective foundation for law by the 'rights and principles school' as 'all this hocus pocus'.[35] Dworkin, in **Law's Empire**, briefly discusses the critical legal studies movement. He says of some of its adherents - again, not mentioning Unger by name - that they have avoided the difficult task of showing that a coherent exposition of legal doctrine is impossible by taking a short cut. They have claimed that it must be impossible since liberalism contains internal contradictions. Such arguments, says Dworkin, 'have so far been spectacular and even embarrassing failures'.[36]

However, although they differ about 'objectivism', their adverse reactions to formalistic reasoning may not be so far apart. As we now know, Hercules does not recognise any class of case which is so easy as to be insulated, in principle, from general political controversy. On the other hand, even in the hardest case, Hercules understands there to be a social life and disputation over a question of law. Just how important this difference will be depends on our understanding of the relationship, within the substantive dimension, of the three elements of justice, fairness and procedural due process, and also on our interpretation of the metaphor of 'fit'. To what extent will Hercules tailor the demands of justice to his perception of the community's positive morality? How much of the institutional materials may he reject as mistakes, and

34. Unger n. 1 **supra**, p. 597.
35. **Ibid.**, p. 575.
36. Dworkin, n. 26 **supra**, p. 274.

still satisfy the dimension of fit? Dworkin indicates that fit is not a question of counting institutional details. He rejects the suggestion that where two views have equal fit as regards all the legal materials save for one precedent, but that precedent supports view x against view y, then x has the better fit. Is it then the case that, given sufficient superiority on the substantive dimension, a mere toehold of fit will do? That question remains unanswered in **Law's Empire**, and in consequence it is unclear what degree of formalism is contained within Herculean reasoning. What is clear is that for Dworkin, as for Unger, there can be no formalism without objectivism.

4. Humdrum

Are Hero's demolition strategy and Hercules' mix of politics and authority the only alternatives? Must we conclude that, if we want to answer questions of law, we must justify our political institutions - that, only if we can show how the community exhibits integrity, can we purport (with Hercules) to know the law: and if we cannot show this, we must (with Hero) rubbish the law?

I should like now to introduce a judge (or he might be an academic lawyer) whom I shall call 'Humdrum'. Humdrum does not share Hero's despair about current politics, nor his optimism about the empowered democracy. Unlike Hero, he accepts a social theory according to which the products of social experiment will inevitably reflect, to some degree, the patterns of the past so that, in assessing them in advance, history matters.[37] On the other hand, he is sceptical about Hercules' aspiration to tell a story about the community's acting towards all its citizens 'in the best light'. He accepts social critiques to this extent: it may well be true that there are disadvantaged minorities ('have-nots') whose treatment by community institutions can only appear in a very poor light - the neglect of whose interests can only be seen, not as mere mistakes, but as a systematic lack of integrity on the community's part.

Humdrum is not a political eunuch; but he believes that, in questions of law, there is usually a distance between his judgments and his politics. Unlike Hercules, he is not shy of the semantic sting. He does not suppose that we can construct a concept of law merely by noticing the ways in which the word 'law' is employed across all fields of discourse. He does suppose, however, that there are institutional arrangements, aspects of which, in different contexts, are picked out with relative

37. It appears that this used to be Unger's view also - see R.M. Unger: **Law in Modern Society**, Free Press, 1976. In his essay on critical legal studies, he claims that human beings can imagine and construct a society bearing no resemblance to any that has gone before - n. 1, **supra**, pp. 648-55.

precision when appeal is made to 'law'. When a textwriter announces that the 'law' he describes is that in force at a certain date, he is referring to a set of rules emanating from certain listable and rankable sources, and systematised in accordance with the logical principles of descriptive legal science.[38] When the rule of 'law' is invoked as political critique, it refers to a set of procedural standards by reference to which institutional structures may be measured. When doctrinal reasoning is invoked, the 'law' appealed to as the depository of materials from which reasons may be drawn is a congeries of rules, principles and other maxims already constituting part of the tradition of a body of officials. And when Humdrum J. takes his judicial oath to uphold 'the law', he commits himself to applying the conclusions of descriptive legal science where these clearly cover a case, and, where they do not, to relying on some mix of the four models of legal rationality.[39]

Humdrum does not suppose that there is a complete divorce between law and politics. He recognises that the rules in force at any particular time may incorporate standards or values whose implementation calls for political judgment. He knows that, in applying the utility model of legal reasoning, his assessment of, and his choice between, the consequences of alternative rulings may involve controversial issues of social evaluation. Nonetheless, he differs from both Hercules and Hero in believing that, in many situations, it is possible to arrive at conclusions of law whilst remaining completely agnostic about the justice of society. We may speculate biographically about Humdrum, and conclude that he would not have been appointed to, or accepted, judicial office unless he thought (differing from Hero) that his community's institutions did embody a defensible scheme of human association. Humdrum believes, however, that the law he undertakes to administer will often provide answers without any necessity, even in principle, to reflect on how such a defence might be articulated. He considers that there are occasions (consonant with the will model of rationality) where the goals aimed at by those who promoted legislation are so indisputable that a case may be resolved in their light. But he will defer to the legislature in this way because such deference is part of what is entailed by his oath to uphold the law, not because he subscribes to (and could, if necessary, spell out) a theory according to which it is right that legislators should have just the power they do. Again, if (consonant with the natural-meaning model) he applies a rule in accordance with the acontextual meaning of its terms, he does so because he believes that 'applying the law' entails taking this course in this situation, not because he has a theory about the justness of 'mechanical jurisprudence'.

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38. Cf. Harris n. 17, **supra passim.**
39. **Supra**, pp. 6-7.

When it comes to doctrinal reasoning, Humdrum believes that there are sometimes sufficient reasons to be found in a body of received legal materials for disposing of controverted questions about the present law, and that he will be upholding the law if he finds them. Even when such reasons are not sufficient to dispose of a case, they operate to restrict the rulings between which a choice must be made, and in that way distance his judgment from open-ended ideological controversy. His experience falsifies Hero's assumption that 'everything can be proved'.

The test which determines whether a proposition is or is not part of the legal doctrine is, for Humdrum, one of history, not one of political philosophy: is the proposition contained in some source-material which the tradition of his court regards as embodying law? Unlike Hercules, he believes that he can interpret doctrine without developing a theory about the conception of justice to which his community is committed. Even if he has such a theory, it may not be relevant to doctrinal interpretation; for the source-materials need not be confined to those produced by the institutions of his jurisdiction. They may comprise provisions contained in supra-national instruments which have been effectively incorporated into the local tradition. Or they may encompass the case of law of other jurisdictions, by virtue of the supra-national connotations of broad systemic concepts such as 'the common law' or 'equity'. Humdrum will recognise the necessity of a community conception of justice only in the case of broad statements of political aspiration contained in his own juridiction's constitutional provisions. He will accept that the interpretation of such provisions may involve philosophical controversy. Even in such instances, however, Humdrum searches for traditional continuity in interpretation, rather than for ideal truth.

Humdrum believes in the separation of powers. He considers that there are political questions which only the legislature ought to decide. At the same time, he regards himself as free to embark on controversial adjudications of the highest political moment, where the consequentialist choice between two rulings (consonant with the utility model of rationality) is of a kind courts can assess, or where sufficient warrant can be found in received doctrine. Humdrum also considers that doctrinal reasoning furthers the certainty and predictability of legal outcomes, precisely in that it eliminates or narrows the scope for unrestricted political controversy. Above all, he is committed to a conception of the rule of law whereby, wherever the

present law is unclear, solutions are to be sought by reference to 'law' (in the sense of historic systems).[40]

5 Formalism

The propositions embodied in doctrinal legal materials are of many logical types, including conceptual definitions. Conceptual formalism has a bad press today.[41] Nevertheless, as I have argued, it is frequently to be met with, at least in the context of English land law. It usually takes the form of Weberian conceptual casuistry, but sometimes[42] even that of 'logically formal' rationality. Even when consequentialist reasoning takes centre stage, as in **Williams and Glyn's Bank Ltd. v. Boland,**[43] the requirement of conceptual consistency limits the rulings between which a choice must be made.

In that case, the House of Lords decided that an equitable co-ownership interest subsisting under an implied trust for sale was, notwithstanding the doctrine of conversion, an overriding interest in land for the purposes of the **Land Registration Act 1925.** Their reasons were consequentialist. Wives in the position of the defendants should be protected against banks in the position of the plaintiff mortgagees. But because their ruling had to be based on a decision, one way or the other, of the conceptual point, they were not able to incorporate into it the sorts of policy-discriminations which a legislature might choose, for instance, that only some kinds of equitable co-owners should have interests binding only some kinds of mortgagees. Humdrum might have made the consequentialist balance turn out the other way - indeed, it is just possible that the House of Lords will itself some day overrule the **Boland** case in the exercise of its 1966 Practice Statement powers.[44] But he would certainly agree that applying the law entailed giving a universalisable decision on the conceptual question: either equitable interests under trusts for sale are, or they are not, interests subsisting in reference to land for the purpose of the statutory provision.

What would Hercules have done? Perhaps he would have appealed, along the substantive dimension, to just

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40. I have examined the distinction between momentary and non-momentary (or historic) legal systems, in **Law and Legal Science**, n. 17, **supra**, especially pp. 10-14, 41-43, 65-73, 97-102, 111-22.
41. Cf. N.E. Simmonds: **The Decline of Juridical Reason**, Manchester U.P., 1984.
42. Harris n. 18, **supra.**
43. (1981) A.C. 487.
44. See the implied regrets about the Boland decision contained in the judgment of Lord Templeman in **Winkworth v Edward Baron Development Co Ltd.** (1987) 1 All E.R. 114.

those social considerations mentioned in the judgments in order to demonstrate that the community must, as a matter of integrity, recognise that people in the position of the defendants have a background right to security which prevails over any competing rights of mortgagees. However, such background rights would hardly explain why Lord Wilberforce, delivering the leading judgment, found it appropriate to disapprove the decision in **Cedar Holdings Ltd. v. Green.**[45]. In that case the Court of Appeal had held that a husband who procured his wife's forged signature on a mortgage of their jointly-owned house did not succeed in transferring even his own equitable co-ownership share to the mortgagee-bank, so that the bank could not assert as against the wife that it held a charge over the property. The court reached this conclusion on the basis that, since the husband's beneficial interest subsisted behind a trust for sale, it was, by virtue of the conversion doctrine, an interest only in money; and in consequence it fell outside the terms of Section 63(1) of the **Law of Property Act 1925** (which provides that every conveyance is effective to pass any interest which the conveying party has in the property).

Since the decisions in **Boland** and in **Cedar Holdings** were construing different statutory rules, there was no logical conflict between them. More importantly for Hercules, they were mutually coherent in principle. In both cases, innocent wives were protected against duped banks. On the basis of some conception of justice which favours the rights of occupiers in such circumstances, the decisions are manifestly consistent. Yet Lord Wilberforce disapproved **Cedar Holdings.** He did so because it proceeded on a conceptual basis which he wished to deny, the assumption that interests under statutory trusts for sale are not interests in land.

At least in Boland there were socially-evaluative arguments capable of being understood Hercules' way. It is difficult to see how that was so in a more recent decision of the House of Lords concerned with the vexed field of the distinction between licences and tenancies. In **Street v. Mountford,**[46] the House of Lords allowed an appeal by an occupier who had signed a licence agreement in respect of a house. The Court of Appeal had held that, since the parties had expressed unequivocally their intention to create only a licence, the defendant was a mere licensee and not a tenant, so that she did not have the security of tenure which the rent acts confer upon tenants of dwelling-houses. It was open to the House of Lords either to approve or disapprove this ruling.

How would Hercules have proceeded? He would have asked what background rights of occupiers does the community recognise, as evidenced by the rent acts and

45. (1981) Ch. 129.
46. (1985) A.C. 809.

other laws, and what competing rights of freedom to transact. And how, in the light of justice, fairness and due process, should these be balanced? Perhaps earlier decisions of the Court of Appeal and judges of first instance could be interpreted as applying some such rights-adjusting process. Since the early 1950's, these decisions had, in effect, sought to draw a line between those cases in which landlords deserved to be exempted from the rent acts and those in which they did not. In the end, however, it turned out that there was no adequate conceptual machinery to express this distinction. On the one hand, it had been reiterated that a transaction was not a licence merely because the parties so labelled it; whilst on the other hand, it would be a licence if that was the relationship the parties really intended. The difficulty was that, granted that the parties had intended a letting of exclusive possession at a rent, and if one ignored their label for the transaction, there was no element of substance distinguishing licences from tenancies to which their real intention could be directed.[47]

This conceptual point had become clear by the time of the litigation in **Street v. Mountford.** It placed a formal constraint on the issue. Either such a letting was to be classified according to the parties' labelling of it, or else it was to be regarded as a tenancy irrespective of the parties' intentions. The Court of Appeal opted for the former alternative, the House of Lords for the latter. Lord Templeman's language is that of conceptual formalism:

> If the agreement satisfied all the requirements of a tenancy, then it produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.[48]

This is Humdrum reasoning, certainly. Is it - appearances to the contrary notwithstanding - also Herculean? As critics of Dworkin's rights thesis are aware, its descriptive claims are so malleable that it is the Devil's own job to find a copper-bottomed counter-example. Perhaps all that I have said about the continued prevalence of conceptual reasoning in English land law could be explained on the first Herculean dimension: it all has to do with 'fit'. Yet if Herculean reasoning has any significance, it must be because it makes judicial politicking respectable.[49] In

47. Cf. J.W. Harris: 'Licences and Tenancies - the Generosity Factor' (1969) 32 M.L.R. 92.
48. (1985) A.C. at p. 819.
49. Cf. R.M. Dworkin: **A Matter of Principle**, Harvard U.P., 1985, Ch. 1.

principle, the second dimension is always in play since otherwise there would be - as Dworkin now says there is not - a line to be drawn between easy and hard cases. My contention is that there are cases - even quite hard cases like **Street v Mountford** - where justice, fairness and procedural due process play no part, because the issue is resolved by doctrinal, formalistic, reasoning. The modern lawyer is not, as Unger claims in the passage cited at the beginning of this essay, 'plainly mistaken' when, in such instances, he keeps his formalism while avoiding objectivist assumptions.

It may appear that Humdrum's reasoning will always be more circumscribed than that of Hercules. That may not be so in one respect at least. Humdrum is a judge in a common law jurisdiction and therefore he believes that he is applying the law when he reasons, doctrinally, from 'the common law' conceived as a supra-national system. The tradition of the court of which he is a member includes rules, principles, definitions, etc., set forth, as part of common law adjudication, not only by his national courts, but also by courts throughout the common law world. He can understand how, in the controversial decision of the Australian High Court in **State Government Insurance Commission v. Trigwell,**[50] the members of the court were applying the law. They accepted that a rule exempting occupiers of land from liability for negligence in respect of animals straying on the highway was part of the common law, and hence part of current South Australian law, on the authority of the decision of the House of Lords in **Searle v. Wallbank.**[51] When Dworkin discusses case law reasoning, he does so in order to demonstrate how Hercules would find, underlying the cases in his own jurisdiction, principles indicating to which background rights Hercules' own community is committed. The targets for Dworkin are any suggestion that judges apply policy (like 'Herbert'),[52] or economic analysis (like 'Hermes').[53] As we have seen, the justification for Hercules' holistic approach to the law is the personification of his community and the attribution to it of the virtue of integrity. The same justification could hardly apply in the context of a supra-national common law. We would have to assume that, to the extent that questions are still governed by common law or equity, Hercules personifies some composite community embracing all common law countries.

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50. (1979) 142, C.L.R. 617.
51. (1947) A.C. 341.
52. Dworkin n. 25, **supra**. Cf. R.M. Dworkin: **Taking Rights Seriously**, n. 25, **supra**, pp. 294-301. R.M. Dworkin in Marshall Cohen ed.: **Ronald Dworkin and Contemporary Jurisprudence**, Rowman and Allanheld, 1984, pp. 263-68.
53. Dworkin n. 26, **supra**, Ch. 8. Cf. R.M. Dworkin, **A Matter of Principle**, n. 49, **supra**, Chs. 12 and 13.

We have already discussed Hero's general approach to questions of property law. What would he have made of the particular issue in **Street v. Mountford**? He would have argued (with considerable plausibility) that the line of Court of Appeal decisions over the preceding 35 years on the question of the distinction between licences and tenancies exhibited the following incompatible principle and counter-principle: 'The parties'' transactional intention must be respected; 'The label' which the parties choose for their transaction is irrelevant. Because of his programmatic commitment to disdain for the doctrinal crutch, he would not have argued that common law doctrine (properly understood) required re-instatement of the traditional dichotomy between licences and tenancies in terms of exclusive possession. He would have resisted this temptation even though he believed that anything that could be done to strengthen the position of tenants against private landlords would weaken, in some small degree, the social hierarching with which our society is cursed.

Hero shares Unger's view that property rights 'involving as they do an essentially unlimited control of the divisible portions of social capital ... create in some people[54] ... power to reduce other people to dependence'. This opinion, however, would not enable him to support the reasoning in a decision of the House of Lords which has had the effect of greatly extending security of tenure. In particular, he would point to the fact that Lord Templeman, in drawing his distinction between tenants and licencees, deployed the concept of ownership itself (in the sense of that open-ended set of user-privileges which is the incident of a legal estate in land).[55]

> The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions.[56]

Hero's aim is to disaggregate such conceptions. He cannot afford himself ever to employ them.

More generally, Hero would refuse to concede that either in this case, or anywhere else in the law, formalistic reasoning could provide a determinate solution. He would insist that the question must be

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54. Unger n. 1, **supra**, p. 655.
55. Cf. J.W. Harris, 'Ownership of Land in English Law', in N. MacCormick and P. Birks, eds., **The Legal Mind: Essays in Honour of Tony Honore**, Clarendon Press, 1986.
56. (1985) A.C. at p. 816.

placed in an untrammelled political arena; and that, once there, it is unanswerable. He would argue that, as the matching principle and counter-principle demonstrate, our society is shot through with irreconcilable ideological commitments - on the one hand, to individualistic self-assertion which supports freedom of contract; and on the other hand, communitarian concern for the under-privileged, which supports security of tenure. Deviationist doctrine would leave the matter at that.

Humdrum has, then, an advantage over Hero in that he can achieve piecemeal amelioration of social distress in a way which Hero cannot conscientiously recommend. He must concede to Hero, however, that this can only be achieved at what Hero regards as the cost of buttressing existing institutions. Humdrum, it will be recalled, shares some of Hero's scepticism about the ability of these institutions to deal justly with the under-privileged. Nevertheless, Humdrum believes that to ditch legal reasoning in favour of deviationist doctrine would be to throw out the baby with the bath water. He considers that the rule of law, the separation of institutional powers and the relative predictability which comes from insulating adjudication from open-ended ideological disputation have much more to recommend them - even for those our society cruelly neglects - than have the uncharted seas of the empowered democracy.

As against Hercules, Humdrum has one crucial disadvantage. Unlike Hercules, he is without guidance in those cases where the four models of legal rationality leave a legal question completely unresolved and where, in consequence, he is confronted with the fearsome burden of choice. Hercules believes that reasons never run out,[57] and he knows that he at least can always find the right answer in terms of his two dimensions. Humdrum lacks this assurance. On the other hand, he believes that there are many instances in which his lack of superhuman wisdom will not matter, since the law itself, rules plus received doctrine, will supply the answer. Hercules is superhuman, Humdrum is not. Humdrum therefore, although he lacks Hercules' glamour, has the prosaic advantage that he can (and I think does) exist.

57. Cf. J.W. Harris, **Legal Philosophies**, Butterworth, 1980, Ch. 14.