PHILOSOPHY OF LAW, PROBLEMS OF [ADDENDUM]

One of the dominant issues in philosophy of law since Hart's main entry was published has been the dispute between Hart and Ronald Dworkin about the best way to characterize a legal system and the modes of legal reasoning (especially by judges) most appropriate to it.

RULES AND SOCIAL PRACTICES

THE RULE OF RECOGNITION. Hart identified two main kinds of rules in a complex and mature legal system. There are rules that tell people what to do or not do (tax laws, criminal laws, traffic laws), and there are rules that tell people how to do certain kinds of things (in order to accomplish such legal transactions as making valid wills or binding contracts and conveying property). Among the latter kind of rules he identified a small set that he regarded as fundamental to all but the most primitive legal systems: These rules tell how to identify a particular legal system and, within it, how to make laws and adjudicate claims arising under law. Hart's main entry does not address these fundamental rules.

The first kind of fundamental rule Hart famously styled the “rule of recognition.” It identifies the primary sources of law (e.g., the Queen-in-Parliament) and it prioritizes these sources (e.g., statute law > common law > “customary law”). Because this and the other fundamental rules determine what is to count as valid law within that system, they have normative legal force there but are not themselves properly called valid laws.

SOCIAL PRACTICES AND LEGAL SYSTEMS. Hart's rule of recognition is more like a social practice (or, better, the presuppositions of such a practice) than it is like a black-letter rule of any sort. To follow or engage in a social practice is to conform reflectively to an existing, ongoing pattern or template as a matter of appropriate conduct. The practice functions as a standard and serves as a basis for criticizing deviations. Officials (almost all of them most of the time, in the standard case) simply follow the social practice: They presuppose it internally in what they actually do when they make and enforce given laws. They do so not out of fear of sanctions, but rather because so acting is the regular and expected thing to do. Ordinary citizens need not be aware of the authoritative sources of law (or the other fundamental rules) in their country; but they do need to know what the laws are, for it is these they follow or conform to. In the standard case, a substantial number of them do so in the same way as the officials do—by taking an internal point of view. This concordance between officials and ordinary citizens constitutes law as a social practice. One of Hart's main objects in invoking the idea of a social practice (or rule) is to say that a system of laws, as an exemplar of such a practice, is distinguishable from a large-scale scheme of coercion.

VALID LAWS AND JUDICIAL DISCRETION. Any legal system, insofar as it is a social practice, is an effective legal system, one where laws are conformed to most of the time by most of the people. When laws and court decisions in an effective system are made (or almost always made) in strict conformity to the fundamental rules, such a system would be a full and proper legal system. Here all the laws and court decisions that are made in accordance with the fundamental rules would be valid ones.

Hart does not think that a given law or decision (simply as valid) can cover and determine the correct outcome for all the instances that come within its proper range. For reasons that he spells out in the main entry, there will always be some such cases where the “law runs out.” In those cases judges and executive officials will have to use “discretion”; they will have to supplement the law with what he calls (in the main entry) “interstitial legislation.”

PRINCIPLES AND INTEGRITY

ONE RIGHT ANSWER: HERCULEAN JURISPRUDENCE. Ronald Dworkin was Hart's main critic in the last three decades of the twentieth century. One of his main criticisms is that legal systems have inbuilt features such that judges, taking the law as it is, can be said to have a duty to make the best decision. In simplest terms, then, Dworkin closes Hart's alleged gaps in law (which allow for judicial discretion) by turning to the character of legal reasoning itself, within a determinate legal system.

Dworkin's theory, using a model judge (named Hercules) for purposes of illustration, is called “law as integrity.” Dworkin's main argument may be put this way: If two different judges, both committed to law as integrity agreed literally on everything—agreed “preinterpretively” on what counts as law in a given system (an agreement one can expect from all lawyers, judges, and jurisprudents in the determinate legal system within which they work, say, the United States or the United Kingdom); agreed on the relevant facts of the case; agreed on the law (the relevant propositions of law) and on the history of politics/law and on an interpretation of the political insti-
tutions in their country; agreed about the relevance of the same governing principles in the case at hand; and agreed about the main substantive principles embedded in their own legal system (especially justice [e.g., rights] and fairness [e.g., democratic decision making]) and about the interpretation and the preferred ordering of each of these—they’d reach the same decision. Thus, there is one (and only one) determinate decision a given Herculean judge would reach in a given case within the existing resources of the law, in a determinate legal system.

The theory that there is always one and only one right answer (though it may not always be reached) runs into real problems, however, when one considers a panel of such judges who must reach a single decision through discussion and voting. Here different judges, deploying somewhat different interpretive choices than Judge Hercules, may come up with answers that are significantly different from Hercules’s own answers. Such judges would reach their decisions in the right way, in accordance with the ideals and procedures of law as integrity; and each judge’s decision, based on convictions grounded in the law’s resources, would be a wholly sound one. There could in principle, then, be more than one right answer. Given the way the world is and given Dworkin’s own statement in the matter at the end of Law’s Empire (1986, pp. 412–413), there probably would in fact be more than one right answer.

This reading does not supplant the orthodox reading for a single judge; it continues to be the case here that there is, for that judge, one and only one determinate best answer in a given case. But it does force an amendment on the “one and only one right answer” thesis for a panel of judges, or for a whole judicial system. Here, though there continues to be no need for Herculean judges ever to go outside the law’s resources to reach a judicial decision, and no need for them to use discretion (or “interstitial legislation”) to fill in gaps in the law, more than one right answer is possible—indeed, is to be expected.

CONVERGENCES. Hart conceded, in the “Postscript” to his Concept of Law (1994), that he had not given sufficient attention to principles in the law or found an appropriate role for them in his theory. He also allowed that given legal systems could have a set of embedded substantive principles (a public morality, as Dworkin called it); such principles are, for Hart, typically enshrined in a written constitution and in judicial reasoning about that constitution.

On the other hand, Dworkin’s acknowledgment of the important place of near unanimous “preinterpretive” agreement on what counts as law in a given system marks an almost wholesale acceptance of Hart’s idea of the nature and importance of a rule (or norm) of recognition in a mature and complex legal system. And there’s much merit to Hart’s observation that “Dworkin’s later introduction of interpretive ideas into his legal theory [in Law’s Empire] … brought the substance of [h]is position very close to my own” in recognizing that the courts have to deal interpretively with underdetermination in the written law. Hart continues, “Arguably [though] before the introduction of interpretive ideas into his theory there seemed to be a great difference between our respective accounts of adjudication…” (Hart, “Postscript” to Concept of Law [1994], note to p. 272 on p. 307.)

UTILITARIANISM AND BASIC RIGHTS

Hart alluded in his main entry to difficulties utilitarianism had in accommodating within its normative frame the central issues of justice (that is, distribution of basic benefits and protections equally to all). But since the time at which Hart’s main entry was written, significant attempts have been made within utilitarianism (under the name “indirect” utilitarianism) to address and perhaps resolve this problem.

Many people in the 1970s and 1980s—including John Rawls, Ronald Dworkin, and even thinkers broadly sympathetic to utilitarianism, such as David Lyons—concluded that utilitarianism was somehow incompatible in particular with basic rights (human or constitutional), or at least with the priority habitually given to such rights.

The problem they see is that no one can think that acting in accordance with any given right (especially if the social rules that formulate such things are kept fairly simple and easy to follow) will on every occasion yield up a result that is compatible with the general happiness principle. Sometimes deviating from that policy will have the greater welfare value. And, given the general happiness principle itself, the principle that the greater benefit should be preferred to the lesser and that normative requirements on action can always be set to achieve the greater benefit, that deviation should be taken. Sometimes a right ought to yield to these considerations: It should do so when so doing holds the prospect of greater well-being.

INDIRECT UTILITARIANISM. In an effort to deal with the problem the critics had identified, this new version of utilitarianism shifts the focus of attention from Jeremy Bentham, who did not countenance the idea of basic moral rights, to J. S. Mill, who did. Roughly, the theorists
of indirect utilitarianism assert that direct appeals to general welfare are self-defeating, all things considered, and that putting standing constraints on the principle—such as a system of moral rules (typically relatively simple and easily followable rules) or a coherent set of civil or constitutional rights justifiable by the standard of general happiness—in fact produces the greater well-being.

Indirect utilitarians do not, however, assert that moral rules should never be overridden nor individual rights ever broached. Rather, on their view, where rules or rights conflict (as they inevitably will, many have argued), some sort of appeal to the general happiness is in order.

Here is where the notion of an indirect utilitarianism comes crucially into play. Its advocates argue that the principle of general happiness should not directly determine what is to be done even here. Rather, the principle operates only indirectly in all such cases. It bears down, not on individual actions per se but on the rules themselves. Here the general welfare principle is used merely to help determine which rule is weightier, a determination that occurs gradually (over time and with experience) and cumulatively, or used to help determine a policy (a second-order rule of conduct), all things considered, for conduct when these particular moral rules (or these particular rights) conflict.

Thus, on their account it is possible to have policies for action (to have both moral rules and rights) that are justifiable by the standard of general happiness and at the same time to shield these policies from direct confrontation with (and possible overthrow by) the happiness principle on individual occasions. Thus, indirect utilitarianism (if all its arguments and presumptions are allowed) seemingly establishes that utilitarianism is compatible with basic constitutional rights and their priority—at least in the case of those rights that are themselves justifiable in accordance with the general happiness principle.

CRITICISM. But considerations of corporate good and of aggregate welfare (including those that amount to nothing more than the increased well-being of some individuals at the expense of others) can and do in fact override constitutional rights on given occasions. Indirect utilitarians cannot really deny this. If they do, then the jumping-off point of indirect utilitarianism would disappear along with the problem it was designed to solve. There would simply be no point to a strategy of shielding moral rules and constitutional rights from being overridden by corporate or aggregate political policies on those occasions when such policies were arguably supported as preferable by direct reference to the standard of general happiness.

Thus, indirect utilitarians are in effect forced to admit that social policies could override constitutional rights, within the utilitarian frame they have devised. After all, social policies in their view merely reflect, cumulatively, the results of applying general welfare considerations to occasions of acting in accordance with those policies. And they have admitted, necessarily, that sometimes corporate or aggregate political policies would in fact be supported as preferable over moral rules and constitutional rights by direct reference to the standard of general happiness.

If this is so, the general happiness principle could not support the assignment of constitutionally guaranteed benefits and protections to each and every individual person in advance, so to speak, and across the board. It could not do so if, in effect, such rights tied the utilitarian politician’s hands against allowing corporate or aggregate interests to override or supersede constitutional rights when, cumulatively and all things considered, those aggregate interests could be seen to conduce to greater benefit. Indirect utilitarians cannot allow for politically fundamental constitutional rights that have a built-in, standing, and overriding priority over corporate or aggregate considerations. To this degree, then, philosophical utilitarianism is incompatible with the notion of basic rights (human or constitutional rights) as that idea is commonly understood.

RECENT CRITICAL PHILOSOPHY OF LAW: MODERN AND POSTMODERN

Recent decades have witnessed the birth of several noteworthy developments or movements within the philosophy of law. Broadly these divide into two camps. Those belonging to the first remain more or less faithful to a generally modernist and liberal orientation to legal philosophy. They include law and economics and the liberal humanist strand of feminist jurisprudence. Those belonging to the second camp take up a generally postmodernist and postliberal orientation to legal philosophy. They include critical legal studies in its various manifestations along with the more radical strands of feminist jurisprudence and critical race theory.

Characteristic of modernist liberal legal philosophy are the following assumptions:

(i) human reason is univocal and universal;
(ii) language represents reality and truth is correspondence to reality;
(iii) knowledge requires justification from foundations;
(iv) the methodological path to foundations is analysis (often drawing on methodological individualism or social atomism in the social sciences);
(v) all persons share some morally significant basic freedom and equality;
(vi) to be legitimate government must be constitutional and limited;
(vii) law serves legitimate government through its institutional subordination of power to reason; and
(viii) the true path to historical and moral progress is that marked by the rule of law.

Characteristic of postmodern and postliberal legal philosophy is the rejection of several if not all of these assumptions. Thus: human reason is multivocal and relativistic; language shapes or determines reality; truth is largely coherence; knowledge does not require justification from foundations; and so on. The most significant and general feature of postmodernist and postliberal legal philosophy, however, is its unwillingness to affirm the rule of law as either an empirical possibility or normative goal. On the postmodernist and postliberal view, it is not reason, but power, will, desire, the subconscious, the chance of history, or the forces of nature to which law is always in the end subordinate and through which any historical or moral progress must ultimately be won.

LAW AND ECONOMICS
As a development or movement within legal philosophy, law and economics took flight in the 1970s with Richard Posner's The Economic Analysis of Law (published originally in 1973). But its roots reach back to work in the early 1960s by Guido Calabresi, Ronald Coase, and others, as well as to legal realism's instrumentalist stance toward law and associated efforts to bring economic analysis to bear on legal issues in the early twentieth century. What unifies the law and economics movement is a commitment to putting the concepts, methods, and principles of microeconomics to work center stage in the study of law. Several law and economics theses have been advanced.

One thesis was straightforwardly descriptive. Some or all of the law was said to be best described exclusively or primarily in terms of economic efficiency. The law of tort, for example, was best understood as an institutional attempt to minimize the costs of accidents overall for society, including the cost of preventing accidents. A second thesis was straightforwardly normative. Some or all of the law was said to be properly criticized or evaluated exclusively or primarily in terms of economic efficiency. Wherever the law failed to promote or realize economic efficiency, it was to be criticized and reformed. Subsequent theses claimed that considerations of economic efficiency were the key to making accurate predictions of future legal developments, or to explaining legal history, or to giving the best interpretation of various legal systems (e.g., the United States or the United Kingdom). The normative thesis remains today the most widely affirmed and discussed. But taken as a thesis about the primary or overriding aim of law it is not compelling.

ECONOMIC EFFICIENCY. Economic efficiency is a property of transactions or relations between persons and was developed as a proxy for aggregate utility, which was thought unmeasurable given the impossibility of interpersonal utility comparisons. If a transaction or relation makes all those it affects better off or at least no worse off by their own lights, then there is good reason to believe that it increases aggregate utility (though it is not possible to know by how much). Such a transaction or relation is Pareto superior to its status quo ante. Any state of affairs from which no Pareto superior transactions or relations is possible is Pareto optimal. The set of Pareto optimal states of affairs marks the limit of our ability rationally to act so as to improve aggregate utility.

Of course, some non-Pareto optimal states of affairs may actually represent gains in aggregate utility over any or all Pareto optimal states of affairs. But without being able to do interpersonal utility comparisons, there is no way of reliably picking them out. From a utilitarian perspective, then, using the law to facilitate or produce Pareto superior transactions and relations up to but not beyond a point of Pareto optimality is a normatively sound ambition. The law may do this in at least three ways: (i) distributing legal rights and entitlements to those who value them most; (ii) redistributing the costs and benefits of some transaction or relation so as to render it efficient on the Pareto criteria; or (iii) sustaining an open and transparent market with low transaction costs and few incentives for strategic holdout behavior so that persons can voluntarily exchange until they arrive at a Pareto optimal state of affairs (which, according to the Coase theorem, they will do).

The Pareto criteria of economic efficiency have limited application because most transactions or relations between persons generate transaction costs or adverse third-party effects. The Kaldor-Hicks criterion of effi-
ciency accounts for this by picking out as efficient any transaction or relation in which those who gain enough that they could in principle (but need not actually) compensate from their gain those who lose, such that no person impacted by the transaction or relation would be made worse off by it relative to its status quo ante. The Kaldor-Hicks criterion, however, is problematic at the level of application because two different states of affairs may be reciprocally Kaldor-Hicks efficient (the Scitovsky paradox). As more refined criteria of efficiency continue to be introduced, the underlying idea remains the same: Economic efficiency is a proxy for aggregate utility.

DESCRIPTIVE THESIS. Whereas it is possible superficially to describe many areas of the law in terms of economic efficiency, the extent to which the law is well described in such terms is difficult to determine. It may be more efficient (reduce costs overall) for the law to deal with accidental harms through liability rather than property rules because the latter would require those who cause accidents to undertake the costly project of reaching agreements with their victims ex ante. But, because of the complexity and general unavailability of the information required, it is nearly impossible to defend any particular liability rule as privileged from the point of view of economic efficiency. The expected costs associated with any particular rule will be a function not just of the degrees and probabilities of harm from accidents covered by the rule, but also of such things as the costs of the care required to avoid liability and of administering and enforcing the rule. The descriptive thesis advanced by law and economics becomes less compelling as the picture of law to which it is applied is made more realistic and fine-grained.

NORMATIVE THESIS. Attention has shifted over recent years to the normative claim that regardless of how the law as it stands is best described, surely it ought primarily to aim at economic efficiency. This claim is problematic. First, prescriptions that make use of highly simplified economic models inattentive to the kinds of information alluded to above are of marginal use. But the costs (e.g., of information gathering) of building more useful models are likely prohibitive. Second, it is not clear why efficiency should be taken as normatively primary for the law. Whereas there may be good utilitarian reasons to insist that legal reforms always be efficient relative to their status quo ante, there are no good utilitarian reasons to insist that legal reforms either be Pareto optimal regardless of the path to them or be Kaldor-Hicks efficient, because neither guarantees a gain in aggregate utility over the status quo ante. It is unlikely that there are any other good moral reasons (of fairness, or consent, or respect for autonomy) to privilege Pareto optimality or Kaldor-Hicks efficiency as the overriding aim of the law. Thus, the case for grounding legal criticism and reform exclusively in considerations of economic efficiency is weak. Still, economic efficiency may (and probably should) play a subordinate role in legal criticism and reform.

FEMINIST JURISPRUDENCE

Characteristic of feminist jurisprudence are two claims, one descriptive and explanatory, the other normative. The former is that the patriarchal oppression of women is fundamentally realized through law. The latter is that the ending of patriarchal oppression must rank at or near the top of the list of aims in terms of which the law is properly criticized and reformed. Apart from these claims, however, there is little general consensus within feminist jurisprudence. Positions vary with respect to whether women and men share the same fundamental interests, whether those interests are rooted in a biologically or psychologically given human nature, the extent to which those interests are malleable regardless of their genesis, and the proper relationship of the law to those interests.

Liberal humanist feminists generally regard the abolition of patriarchy as a substantially completed task, the completion of which is possible without radical change to the basic structure of modern liberal legal institutions and theory. They aspire to an egalitarian humanism realized under the rule of law. They endeavor to reveal and reform those remaining areas of the law—for example, rape law, employment law, and marriage law—through which patriarchal oppression continues to operate. Progressive feminists also generally regard the abolition of patriarchy as a substantially completed project, the completion of which is possible under the rule of law. But they argue for more radical substantive changes to modern liberal legal theory—for example, the recognition of special rights for women as distinct from men, or the redrawing of the lines marking a private domain presumptively immune to state intervention. These more radical changes to substantive law may be argued for on the grounds that women possess at least some fundamental interests distinct from men, or that under current conditions privacy merely secures a social space for the unchecked reproduction of patriarchal self-understandings.

So, for example, whereas liberal humanist feminists insist that the free speech and privacy rights common to
men and women properly protect the private consumption of pornography, progressive feminists typically endorse legal restrictions on the private consumption of pornography, or at least that pornography that depicts women as mere sexual objects or as subordinate to men. The call for a “battered woman’s syndrome” defense to homicide is also a progressive feminist initiative; it is a carefully limited but substantively radical revision to a particular legal doctrine (concerning intent) necessary if the fundamental interests of women are to be secured under the rule of law.

Whereas liberal humanists and progressive feminists divide over the means necessary and appropriate to a final victory over patriarchy, they both seek that victory within and through the rule of law and thus share a modernist orientation toward the law. Radical feminists are different. They argue that patriarchy depends on and is at least partially constituted through the rule of law. They reject the modernist aspiration to historical and moral progress through law and seek a more radical revision to the legal status quo ante. Radical feminists argue that the categories most basic to modern liberal legal theory and practice—such as due process, equal rights, fairness, state neutrality, consent, individual responsibility, privacy, justice, objectivity, impartiality, and rules—underwrite and obscure patriarchal oppression. They seek both to illuminate this fact and to suggest alternative, typically non-legal or extralegal, frameworks for thinking about and realizing social order.

Feminist jurisprudence has been and remains theoretically diverse and rich. This is in part because it remains politically and methodologically open. Feminist legal theorists have often allied themselves with and drawn on the work of those pursuing other emancipatory political agendas. In its various strands, feminist jurisprudence draws on neo-Marxist and poststructuralist critical theory, queer theory, race theory, neopragmatism, Lacanian psychoanalytic theory, and rational choice theory.

CRITICAL LEGAL STUDIES

Critical Legal Studies (CLS) grew out of a conference in the 1970s that sought to bring together the New Left politics of the 1960s, American Legal Realism’s instrumentalist stance toward law, and European social theory (structuralism and poststructuralism). At its inception, then, CLS was divided between modernist and postmodernist orientations toward the law, drawing from Nietzsche, Marx, Weber, Habermas, Foucault, and Derrida. In time, this division was settled in favor of a postmodernist orientation. What began as a radical critique of law under conditions of modern capitalism became a more radical critique of the idea of law itself. At its most provocative, at least in the United States, CLS called into question the possibility of realizing justice under or through law.

Though CLS had some presence in England and Germany, it was and remains (to the extent that it remains at all) primarily an American development. Throughout its history, CLS organized itself generally around two theses. The first was that legal systems, both in their content and operations, were best understood as ideological systems of legitimation. The second was that legal systems were indeterminate and thus incapable of subordinating the exercise of coercive political power to reason. Together these theses underwrite the proposition that law is always and everywhere only the politics of power by another name.

CLS, like American Legal Realism, understood the content and structure of the law to derive in the end from nonlegal normative commitments. And, again like Legal Realism, it sought honesty about that fact. Just as legal realists had undertaken to show that much of American law was determined by a laissez-faire political ideology rather than any science of legal reasoning, so too did CLS scholars. What was not so determined was determined, on the CLS view, by patriarchal or racist or other morally suspect political commitments. Of course, legal realists sought to expose the ideological bases of law so as to place law in the service of morally more reputable non-legal or extralegal political commitments (generally utilitarian and progressive). CLS scholars generally rejected this instrumentalist approach to law. They tended to argue that the law was always an effect, and could never be the genuine cause, of underlying political, social, and economic change. The point of demystifying the law and exposing it as ideological in nature was not to put it in the service of a more noble cause, but rather to encourage non- or extralegal means to social reform.

That the content and methods of mature legal systems almost always underdetermine the answer to at least some legal questions is neither a radical nor particularly controversial claim. By the 1960s, few legal philosophers thought mature legal systems were or could be fully autonomous and possessed of sufficient internal resources to generate, mechanically as it were, a single determinate answer to every legal question. The existence of so-called hard cases was taken for granted. That all cases were hard cases, however, was not. It is this thesis that CLS, in its most ambitious moments, advanced: that mature legal systems (or at least particular legal systems, e.g., the United States and the United Kingdom) are rad-
ically indeterminate and, accordingly, that the rule of law is impossible.

Three lines of argument were advanced for this thesis. The first and least ambitious rooted the indeterminacy of the law in the formal structures of law. Legal rules competed not only with one another, but with more flexible standards and principles. Precedents, often diverse themselves, could always be read narrowly or broadly. Principles of statutory construction pointed in multiple directions. And so on. While sufficient to debunk any vision of legal reasoning as scientific or mechanical, this argument is not sufficient to establish the radical indeterminacy of law. The sheer number of easy cases never litigated suggests that legal reasoning is not inherently radically indeterminate.

A second and more ambitious argument rooted the indeterminacy of the law in the inconsistency or incoherence of liberal political morality (presumably foundational at least in the United States and the United Kingdom and other contemporary liberal democracies). Liberal political morality valued both individual self-interest and the collective or common good, saw the individual as ultimately free and responsible and socially constituted, and committed itself to state neutrality while privileging secular modernist humanistic conceptions of the good. It was, in short, inconsistent and incoherent. But competing principles and commitments are not necessarily inconsistent or contradictory. Liberal political morality may indeed express and undertake to mediate rationally and reasonably the tension between several competing principles and commitments. It need not, for all that, be reducible to an irrational self-contradiction or to incoherence.

The third and most ambitious argument for the indeterminacy of the law appealed to the structure of language and thought itself. The argument here, drawn from poststructuralist linguistic and social theory, was that the possibility of language and thought, the possibility of meaning itself, presupposed for any particular utterance or expression the existence of a multiplicity of meanings. If legal language could mean even one thing, then, it must necessarily mean or potentially mean many things. For several years many CLS scholars made the case for this proposition by using “deconstructive” strategies of critical reading to “trash” legal propositions privileged within the conventional order of legal reasoning. But this argument ultimately proved to be its own undoing. It dissolved the purposeful human subject in an endless proliferation of meanings and reduced progressive politics to the obscure mysticism of such slogans as “deconstruction is justice.”

The future of CLS as a movement in legal philosophy remains unclear. Its most provocative claims have been largely abandoned, whereas its more modest but also more plausible claims (about the relationship of law to politics and underdetermination within the law) have been largely assimilated into more mainstream jurisprudential thinking.

See also Bentham, Jeremy; Derrida, Jacques; Dworkin, Ronald; Feminist Legal Theory; Foucault, Michel; Habermas, Jürgen; Hart, Herbert Lionel Adolphus; Humanism; Justice; Legal Positivism; Legal Realism; Marx, Karl; Mill, John Stuart; Nietzsche, Friedrich; Philosophy of Law, History of; Rawls, John; Responsibility, Moral and Legal; Rights; Utilitarianism; Weber, Max.

Bibliography

HART AND DWORKIN ON SOCIAL PRACTICES AND PRINCIPLES

UTILITARIANISM AND BASIC RIGHTS
Lyons, David. “Utility as a Possible Ground of Rights.” Nous 14 (1980): 17–28. This essay and “Utility and Rights” criticize the thesis that indirect utilitarianism is compatible with basic rights, but many of his earlier essays support that compatibility.
The concept of biological variability derives its useful sense from the relativity of normal. Biological variability makes generalization problematic in a way that generalizing from one billiard ball to any such object is not. Biological variability—meaning that no two organisms are exactly alike—is trivially true. It is unhelpful, except as a reminder that generalization is problematic.

Diseases are real to the extent that they are stable departures from normality (sometimes called “baseline”) as defined above. Obviously, diseases are not like traditional physical objects. They can overlap and be in two places at the same time. (Mental diseases present their sorts of problems, which parallel issues in philosophy of mind and philosophy of psychology.) Diseases are real in that they cause real pain, disability, or both; they are real in the sense that they can be reduced to physiological occurrences. Diseases are theoretical in the sense that they are not traditional physical objects, and they are identified only relative to a value structure that then becomes part of the medical theory. For example, given the current medical theory of European and North American sci-