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PRINCIPLE, PRACTICE, AND PRECEDENT: VINDICATING JUSTICE, ACCORDING TO LAW

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ABSTRACT. *Legal judgment, I argue, entails moral judgment; legal obligations, correctly identified, are genuine moral obligations. Dworkin's legal theory is instructive, but problematic: his account of integrity fails to provide a convincing reconciliation of practice and principle. We can, however, defend a superior account in which the moral ideals that we invoke to justify legal practice – affirming its legitimacy under certain conditions – retain their force throughout our judgments about its specific demands in particular cases. Common law reasoning exemplifies that approach, reflecting the interdependence of practice and principle. It is an internal, interpretative inquiry, drawing on the moral resources of our own tradition, treated as an influential guide to the requirements of justice. The law is constituted, accordingly, neither by its socially authoritative sources, whatever their merits, nor by the moral* effects *of our legal practice. It is rather the scheme of justice we construct in our continuing efforts to bring our practice closer to the ideals that inspire and redeem it.*

KEYWORDS: *legal obligation, legal principle, legal practice, judicial precedent, common law adjudication, interpretative legal reasoning, law-as-integrity, Greenberg's moral impact theory.*

I. INTRODUCTION

In reflecting on the relationship between law and justice, we are confronted by opposing views. If we are unwilling to identify the law with its social sources, regardless of their moral merit, we may be tempted, instead, to regard it as the moral *consequences* of those sources. While, on one view, the law consists in the rules or rulings that derive their authority from an officially acknowledged source, on another view the law consists in the moral obligations arising in response to such rules or rulings. On the former view, associated with legal positivism, any correspondence

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between legal and moral obligation is fortuitous – the contingent result of fortunate circumstances.[1] On the latter view, by contrast, the connection between legal and moral obligation is conceptual: legal requirements are those that political morality affirms in the light of relevant features of social practice.[2] There are, in addition, intermediate positions available, incorporating elements of both views. We might say that while in one sense the law is the product of its officially recognised sources, in another sense it consists, in its ideal form, in the standards of justice that any government, properly respectful of human dignity or the common good, would uphold.[3]

Our ideal of justice according to law, however, is arguably found elsewhere; it is resistant to each of these analyses. It finds its characteristic expression in common law thought, being exhibited most clearly – if by no means exclusively – in common law adjudication. Or so I shall argue. The law is constituted neither by its socially authoritative sources alone nor by moral judgment about their consequences. It is, instead, a moral construction of legal practice – the product of a theory that interprets that practice as a collaborative quest for justice, seeking harmony between moral principle, on the one hand, and practical manifestation of principle, on the other. A proposition of law is sound or true only when derived from a general theory of law capable of showing not only which features of our practice are important – authentic instances of practice when correctly understood – but also how they reflect or embody the principles of justice we affirm as a matter of political morality.[4] Although legal obligations are genuine moral obligations, they form nonetheless a distinctive subset. They are the product of political obligation, applicable to people in their interactions with other members of the political community. In sharing a government people also share a political tradition. Their allegiance is implicit in the collaboration entailed by efforts, across the generations, to confine state power within the limits of legitimate authority.

Each of the opposing views of law we began by contrasting is compatible with moral realism. Each distinguishes, in principle, between legal facts and moral facts: they differ only in the way they articulate the distinction. The common law approach, by contrast, is more constructivist.[5] It assumes that the path to justice, at least initially, consists in making moral sense of our

[1] See H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994).

[2] See especially M. Greenberg, "The Moral Impact Theory of Law" (2014) 123 Yale L.J. 1288; Scott Hershovitz, "The End of Jurisprudence" (2015) 124 Yale L.J. 1160.

[3] See e.g. J. Finnis, *Natural Law and Natural Rights* (Oxford 1980), ch. 1, distinguishing between the "central case" of law and its more marginal instances.

[4] Like Greenberg ("The Moral Impact Theory of Law") I treat a theory of law as a constitutive explanation of the content of the law, showing how, in principle, legal rights, duties, powers and immunities are to be correctly ascertained.

[5] I use the term only to suggest the interpenetration of legal tradition and moral understanding, not to deny moral objectivity. If, as Dworkin suggests, we must interpret the shared practices in which moral concepts figure, our interpretative efforts must encompass both legal and moral practice. See R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA 2011), ch. 8.

own legal and political practice, giving presumptive if provisional force to the assumptions embedded, on careful analysis, within it. Legal practice is an important dimension of our political arrangements, within which we have learned to reflect on questions of justice – identifying and attempting to correct mistakes and deficiencies. It provides an institutional means of organising our debates over justice so as to offer practical remedies for specific grievances suffered by individuals. We hear each other's claims and complaints in the context of the historical record of governmental action. They are understood chiefly as demands for fair treatment, having regard to the general practice. The demand for justice is an appeal to fundamental *equality*, insisting that the differential treatment of different persons or groups be justified – consistent with the principles that we espouse as the appropriate criteria to determine the legitimate exercise of governmental authority.

While Ronald Dworkin's idea of political integrity, grounded in the basic equality of citizens, signals the appropriate connection between history and morality, it concedes too much to legal positivism.[6] On the one hand, Dworkin acknowledges the requisite search for coherence on the basis of legal principle; on the other hand, he is willing to grant the validity of rules and rulings that threaten that coherence, even to the extent of abrogating rights otherwise treated as fundamental. While rightly making legal interpretation responsive to the need to justify the exercise of state coercion, linking legal and moral reasoning, Dworkin nevertheless supposes that certain rules or rulings impose genuine legal obligations inconsistent with morality. The "grounds" and moral "force" of law may diverge, even if only in unusual cases.[7] Legal practice must be understood as an endeavour worthy of the allegiance of participants, whether officials or private citizens; it allows even taken-for-granted paradigms to be challenged in pursuit of a unified moral vision.[8] Yet, on Dworkin's account of interpretation, there are requirements of "fit" – including an independent "threshold" test of fit – that allow certain "brute facts" of legal history to stand in the way of a theory of law, in its local manifestation, that might otherwise garner support as an attractive conception of justice.[9] That view may be questioned. If political integrity requires "that the various standards governing the state's use of coercion against its citizens be consistent in the sense that they express a single and comprehensive vision of justice", as Dworkin contends,[10] we must challenge the validity or salience of pur-

[6] R. Dworkin, *Law's Empire* (London 1986).
[7] Ibid, at pp. 108–13.
[8] For the role of paradigms in legal argument, see ibid., at pp. 72–73, 88–92, 138–39.
[9] Ibid, at p. 255.
[10] Ibid, at p. 134.

ported measures inconsistent with that vision: the best interpretation of law excludes them.[11]

When, in his last major work, Dworkin suggests that law and morality should be treated as parts of a unified normative domain, rejecting what he calls the "two-systems account", he implicitly acknowledges the force of at least some of these objections. While the Fugitive Slave Acts, for example, were widely treated as valid US law in the years before the American Civil War, raising questions about the moral legitimacy of adherence to law, Dworkin observes that the "integrated account all but erases the difference" between "the questions of what the law is and whether judges should enforce that law".[12] He fails, however, to follow through the logic of this perception. He concedes that the acts, if valid, granted the slaveholders the legal rights they claimed, suggesting that these rights were overridden, nevertheless, by a "moral emergency". But that solution overlooks the central focus of interpretation on meaning rather than validity. If the meaning of any single act or provision is always context-dependent, reflecting broader legal principle – and, hence, the moral consequences of applying a general rule to the particular circumstances immediately in view – a judge has ample resources in practice to prevent iniquity, as Dworkin himself had once observed.[13] An integrated account, grounding law in political morality, must not concede that the law, as correctly construed, infringes human dignity. Political obligation tracks political morality, which underpins and informs our interpretation of legal practice.

Our debates over justice are structured by mutual adherence to a shared tradition; we interpret both statutes and precedents in the light of that tradition. Our principles are reflected in our practice, when correctly conceived: they are illuminated by concrete examples – legal as much as moral. But their legal standing does not make these principles any less moral. They are the standards of justice that we affirm in invoking familiar case law examples, exhibiting the principles that structure our theory of law – moral as much as legal. There is no question of legal principles being moral only in *form*, or being only the best principles that can fit a structure of autonomous rules identified solely by reference to their source or pedigree.[14] Common law rules, at least, must be understood as summary

[11] See further T.R.S. Allan, "Interpretation, Injustice, and Integrity" (2016) 36 O.J.L.S. 58.
[12] Dworkin, *Justice for Hedgehogs*, p. 410.
[13] R. Dworkin, "The Law of the Slave-Catchers", *Times Literary Supplement*, London, 5 December 1975, p. 1437.
[14] Stephen Perry distinguishes between "rationalisation" and "normative primacy" models of principle, the former providing the best justification for binding legal rules and being morally "second-best", capable of justifying the rules only if the rules themselves are morally valid: S.R. Perry, "Two Models of Legal Principles" (1997) 82 Iowa L.Rev. 787, at 795–96.

generalisations only – working approximations to justice, as currently perceived.[15]

If, moreover, we acknowledge the legitimacy of our practice – we honour it as an acceptable basis for continuing dialogue – we must remain within it as we determine our moral response to official state action in specific instances. We cannot consistently maintain our allegiance, treating practice as a proper basis for cooperation, while acknowledging certain, anomalous, requirements as valid, yet grievously unjust. Grievous injustice is excluded from the outset by the requirement of moral coherence: the law is interpreted as a unified scheme of justice, consistent with the fundamental rights of persons that our constitutional theory affirms. While general rules may sometimes threaten these rights when read in isolation, their application to particular cases is always sensitive to the moral principles that underpin our allegiance – the moral conditions on which our obligation to obey the law depends. Dworkin rightly emphasised the critical role of justice in our deliberations about the law's demands. But he erred in supposing that we might nevertheless invoke justice, once again, as a reason for disobedience. Our legal practice is moral all the way down. It is only from *outside* the practice that we can condemn a specific measure as valid yet too wicked to merit compliance – a sceptical stance that challenges the plausibility, under current conditions, of political obligation.[16]

When we acknowledge an obligation to obey the law, we envisage adherence to law as it is correctly interpreted – consistently with the moral principles that we invoke to justify the paradigms of legal practice. We accept the responsibility that accompanies membership of the interpretative community: law is a public, political endeavour, obliging us to conduct our dialogue over justice by reference to principles and precedents that our fellow citizens regard as salient. In the assertion of our "protestant" legal conclusions we are faithful to our moral consciences.[17] But our opinions express our best understanding of a common practice; we must offer them in the spirit of collaboration, recognising that we must seek to persuade those who must also struggle to harmonise their commitments to the practice with the principles that underpin, and condition, their allegiance. There is scope for sustained and vigorous moral disagreement within the practice, which can survive as long as there is agreement on the most important

[15] See also S.R. Perry, "Judicial Obligation, Precedent and the Common Law" (1987) 7 O.J.L.S. 215, especially 234–57.

[16] Dworkin argues that under the appropriate conditions of reciprocity people have associative obligations, deriving from membership of a genuine community: *Law's Empire*, pp. 195–202. Associative obligations cannot, however, consistently be overridden by considerations of justice as Dworkin mistakenly contends: see T.R.S. Allan, "Law, Justice and Integrity: The Paradox of Wicked Laws" (2009) 29 O.J.L.S. 705, at 716–19.

[17] Political obligation, according to Dworkin, is not just a matter of obeying the discrete political decisions of the community one by one: "It becomes a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme" (*Law's Empire*, p. 190).

instances – the precedents that serve as paradigms of legal rectitude, at least as regards their decisions on the facts if not always the entirety of the judicial reasoning. If we are bound by rules or rulings we deplore it is only because we have not yet persuaded others of their incompatibility with precedents and principles they readily affirm. They are guilty of injustice in the sense of inconsistency – moral confusion rather than wickedness. If we really thought that the laws authorised or commanded iniquity, we would abandon our interpretative responsibilities, repudiating political obligation.

When we characterise legal reasoning correctly, as moral reasoning appropriately sensitive to context, we can see that law is a reflection of justice, or at least as close an approximation as we can currently attain. We must envisage an integrated account in which each level of analysis, however narrow or technical, is supported by higher levels, explicating general principles.[18] Jeremy Waldron's portrayal of a special legal terrain located between moral argument, on one side, and confined "black-letter" reasoning, on the other, is not persuasive.[19] We cannot choose between law and justice, let alone veer inconsistently between them, because integrity fuses them into one. In pursuing integrity we are vindicating justice – the scheme of justice built on the moral foundations that our practice, when favourably interpreted, assumes.

Our conscientious resistance to official demands we reject is only adherence to law as, in our best judgment, we discern its requirements.[20] Purportedly wicked measures, adopted in breach of fundamental principle, are aberrations, calling for interpretative ingenuity and, if necessary, repudiation. But that repudiation is only an appeal to the requirements of practice, consistently followed. We are rejecting *misconstructions* of the law – departures from practice, correctly conceived – rather than genuine assertions of official authority. The state authority's depends on the legitimacy of its demands; those demands are *law* only insofar as they contribute to the larger scheme of justice that we try to construct in the spirit of integrity. Our legal obligations, then, are not the moral *consequences* of legal practice, viewed merely as social fact. They are what legal practice itself determines in its role as a forum for our deliberation over justice, mediating between past moral understanding, reflected in legal tradition, and fresh critical appraisal.

Mark Greenberg's "moral impact" theory of law is essentially a theory of *statute* law, marginalising the common law. While in one sense the law

[18] For a valuable attempt to reconnect traditional common law thought with contemporary theory, see M. D. Walters, "Legal Humanism and Law-as-Integrity" [2008] C.L.J. 352. See also Walters, "The Unwritten Constitution as a Legal Concept" in D. Dyzenhaus and M. Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford 2016), 33–52. Constitutional law must be understood as "ordinary" law in the sense that it is not derived from sources *external* to law (such as a rule of recognition): the basic norms of good governance are immanent within law itself.

[19] J. Waldron, "Judges as Moral Reasoners" (2009) 7 I. CON 2, at 11–13; see further below.

[20] Compare R. Dworkin, *Taking Rights Seriously* (London 1977), ch. 8.

consists (primarily) of legislative decisions that may command or authorise anything, even truly evil actions, in another sense it cannot contain evil norms because such norms cannot be part of the "moral profile".[21] There may be valid laws, identified by recourse to social facts alone, that should generate resistance rather than compliance.[22] Even though Greenberg stipulates that only moral obligations generated in "the legally proper way" are to be accounted legal obligations, the moral nature of law, if acknowledged at all, is sharply attenuated.[23] Legal obligations owe their moral force to conceptions of justice that owe little or nothing to the law itself, which is viewed largely as the product of a series of explicit political decisions.[24] Political obligation collapses, accordingly, into general morality; there is no intrinsic connection with legal or constitutional tradition, unique to the political community. In substance, the "moral impact" theory of law joins forces with legal positivism: if the *law* is conceived as morally binding, the *laws* that compose it are ascertainable independently of moral judgment.[25]

A deeper, more persuasive unity of law and political morality is available when an interpretative or hermeneutic approach is pursued with the necessary consistency and rigour. When we recognise that any rule or ruling is always a matter of moral construction – combining social fact and moral judgment by recourse to a theory of the law as a whole – we can see why political obligation is a matter of fidelity to the political community.[26] We are obligated to obey the law because it represents our current collective understanding of justice – the scheme of justice implicit in our practice, grounded in a fundamental commitment to the equal dignity of all. Our practice embraces and fosters moral argument about its own fundamental principles. Legal argument represents a debate over justice in the guise of competing interpretations, giving each interpreter, whether lawyer or layman, a special standing to confront injustice as inimical to the established legal order.

II. Legal Obligation as Moral Obligation

Legal reasoning, on this account, bears a close resemblance to Rawlsian reflective equilibrium. Rawls envisages an attempt to ascertain the

[21] Greenberg, "The Moral Impact Theory of Law", p. 1337. The "moral profile" includes "moral obligations, powers, privileges, and so on" (p. 1308).

[22] According to Greenberg there are evil laws, "where 'laws' is used in the sense of statutes or other authoritative legal texts" (ibid., at p. 1338).

[23] Ibid., at pp. 1321–23. Greenberg does accept that it is part of the nature of law that a legal system is supposed to improve our moral situation (even if in practice it may not).

[24] "Legal institutions take actions to change our moral obligations by changing the relevant facts and circumstances" (ibid., at p. 1294). The "moral impact" theory "takes the question of legal interpretation to be: what is *morally required* as a consequence of the lawmaking actions?" (ibid., at p. 1303, emphasis in original).

[25] Compare Hershovitz, "The End of Jurisprudence", p. 1194 (see further below).

[26] Compare G.J. Postema, "Integrity: Justice in Workclothes" (1997) 82 Iowa L.Rev. 821, at 844–51.

principles that account for the particular moral judgments about which we are most confident.[27] If, then, we confine the category of moral judgments to the legal judgments widely treated as reliable precedents, we can regard legal principles as the relevant explanatory moral principles. The judicial decision-maker may be thought an exemplar of the "competent moral judge" who possesses the intellectual traits and virtues necessary to reach reliable conclusions about particular cases.[28] His integrity is protected by the requisite conditions of independence and impartiality. And the agreement of such competent and independent judges, at least over substantial parts of the settled law, gives some assurance of the reliability of the precedents concerned. The explanatory principles of law will be a subset of the "explication", envisaged by Rawls, applicable to "the total range of the considered judgments of competent moral judges as they are made from day to day in ordinary life, and as they are found embodied in the many dictates of commonsense morality, in various aspects of legal procedure, and so on".[29]

The explanatory principles must, of course, be capable of promoting acceptance on the ground of their inherent reasonableness; and one test of that reasonableness is a principle's power to hold its own against certain particular judgments, regarded on further reflection in the light of the principle as being incorrect.[30] A constructive interpretation of law will inevitably require certain precedents to be rejected as "mistakes".[31] The search for a comprehensive theory, embracing the various requirements of statute and precedent across the wide range of state regulation, must be an enduring quest. Each modest reform or revision, whether through legislation or common law development, may have wider implications that will, in due course, need to be explored. As Rawls contends, ethics "must, like any other discipline, work its way piece by piece"; or in Mansfield's image, applicable to the common law, the law slowly "works itself pure" as it evolves, piecemeal, in response to fresh insights and challenges.[32]

Many legal theorists are sceptical of analogies with reflective equilibrium. They suppose that authoritative legal sources, such as statutes and precedents, impose binding constraints of a kind that resist comparison

[27] J. Rawls, "Outline of a Decision Procedure for Ethics", (1951) 60 Phil.Rev. 177.
[28] Ibid., at pp. 178–81.
[29] Ibid., at p. 184. Appropriate instances for ethical analysis are to "be found in those decisions which seem to represent a well-established result of discussion on the part of moralists, jurists, and other persons who have given thought to the question at issue" (p. 194); Rawls's example is freedom of speech and thought.
[30] Ibid., at p. 188. In later accounts of reflective equilibrium Rawls emphasises the interaction between different levels of generality, denying that either the level of abstract principles or that of particular judgments should be viewed as foundational: see J. Rawls, *A Theory of Justice* (Oxford 1972), 20–21, 46–51; J. Rawls, *Political Liberalism* (New York 1993), 8, n. 8.
[31] Dworkin, *Taking Rights Seriously*, pp. 118–23.
[32] Rawls, "Outline of a Decision Procedure", p. 189; *Omychund v Barker* (1744) 1 Atk. 21, 33, (Solicitor-General Murray, later Lord Mansfield).

with the considered moral judgments that we are free to modify, or reject, in the light of general principle.[33] It is doubtful, however, whether such theorists give sufficient weight to the critical role of moral judgment in translating the relevant institutional facts into normative propositions of law.[34] In his efforts to distinguish legal from "pure" moral reasoning, for example, Jeremy Waldron objects that in law we are not free "either to drop inconvenient lines of precedent or modify propositions embodied in authoritative texts".[35] If we are not always free to review and revise legal propositions in the context of the particular case, however, we often exercise such freedom in reflecting, more broadly, on matters of doctrinal coherence. When the institutional record of decisions must be interpreted, as far as possible, as a coherent body of law – allowing like cases to be decided alike, according to defensible criteria of similarity – moral judgment will be central to legal judgment. Every question of law is, in the last analysis, a matter of interpretation of the larger scheme of justice that best represents the current product of our legal and political practice.

If legal principles were merely the best generalisation available of a set of rules or rulings, which might in practice have any content whatever, such principles could scarcely be invoked to justify the assertion of state power. Even if these principles were the best available, in the sense of the least morally obnoxious, they would not justify official encroachments on life, liberty or property. When, therefore, Dworkin denied that legal principles need be genuine moral principles he weakened his account of integrity. From a moral realist stance, his dilemma was acute. Either the connection he sought to establish between law and morality was false, because the legal principles applied by courts may be morally offensive, or else the validity of law depended on conformity with an independent moral truth – a robust natural law stance that Dworkin eschewed.[36]

On a thoroughgoing interpretative approach, however, we can see that legal practice itself provides an avenue to moral understanding. Legal principles are genuine moral principles just insofar as they support those elements of practice that exemplify arrangements we honour and respect. And our honour and respect are earned by the beneficial consequences of these arrangements. We have forged our conceptions of the rule of law and democratic governance in response to past misdeeds and iniquities. Our moral judgment is inextricably bound up with our experience, political morality being the product of our reactions to the ills of bad government –

[33] See e.g. L. Alexander and K. Kress, "Against Legal Principles" (1997) 82 Iowa L.Rev. 739, at 766–67.
[34] Compare M. Greenberg, "How Facts Make Law" in S. Hershovitz (ed.), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford 2006), 225–64.
[35] Waldron, "Judges as Moral Reasoners", p. 13.
[36] While rejecting "the absurd view that the law is always morally sound", Dworkin suggested that legal principles were nevertheless moral principles in form, by contrast for example with prudential judgments or historical generalisations: *Taking Rights Seriously*, pp. 341–43.

sins of omission as much as those of commission – over many generations. Just as law is a response to the demands of justice as they have arisen in particular contexts, so justice is, at least in large part, our theory of law, correctly conceived. Our principles of justice portray legal practice in its best light by articulating the grounds on which we distinguish between its authentic and inauthentic elements – preserving those features of practice that experience has taught us to value as necessary to sound governance or the public good. We determine what justice requires chiefly by extrapolating from the examples of injustice that our practice identifies, general principle affirmed by reference to concrete example.[37]

Mark Greenberg suggests that legal obligations are simply the moral obligations that arise in *consequence* of legal practice – our moral response to the social facts that comprise our legal practices.[38] And he is sceptical about the plausibility of an interpretative or hermeneutic approach: "On the face of it, one might expect that the principles that best fit and justify the actual, often severely morally flawed, practices would be principles that one should not follow, even given the existence of the legal practices."[39] But that view gives no credit to legal practice and tradition as itself a source of moral guidance – a repository of wisdom built on the continuing efforts of conscientious citizens and officials to mould their practice, by incremental steps, into something worthy of their allegiance. It dissolves political obligation into general morality, any duty to obey the laws of one's own jurisdiction being wholly contingent on appraisal of all the circumstances.[40] While it may be true, as Greenberg maintains,[41] that "there is no general moral obligation to obey directives from legal authorities", regardless of content, the corpus of legal principle within which such directives obtain their true meaning and proper application normally deserves respectful compliance.

Greenberg contends that his "moral impact" theory explains why we treat the law not merely as one relevant consideration among many, but as a central concern, excluding other considerations. By contrast, he claims, "it is much less easy to understand why we would be interested in identifying the principles that best justify the legal practices (or that make them the best they can be)".[42] Even if such principles were relevant to the issue of

[37] Compare F.A. Hayek, *Law, Legislation and Liberty* (London 1982), especially vol. 1, ch. 5, defending legal judgment as a form of "immanent criticism" by which "rules of conduct" are developed to produce an "efficient order of actions". Even if a judicial decision cannot be logically deduced from recognised rules, it must be consistent with them "in the sense that it serves the same order of actions" (pp. 115–16).

[38] Greenberg, "The Moral Impact Theory of Law". Institutional action may in practice generate moral obligations to remedy or mitigate its consequences; these obligations are not "legal obligations" because they do not arise in the "legally proper way" (pp. 1322–23).

[39] Ibid., at p. 1302.

[40] Compare J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford 1994), ch. 14.

[41] Greenberg, "The Moral Impact Theory of Law", p. 1314.

principled consistency, they would, he supposes, be merely one consideration in reaching practical judgments. But if, on the contrary, legal practice is itself a reflection of justice – an embodiment of the community's systematic struggle to attain it – principled consistency is fundamental. It is critical to deliberation and dialogue, making the law a common asset for moral reflection and judgment. Our dominant concern with the law's demands reflects our conviction that, under favourable conditions – when the fundamental equality of persons, characteristic of integrity, is generally affirmed – the law is normally our best guide to decision and action. And this is so not because legal practice has moral *effects*, which we cannot properly ignore, but because such practice is itself the principal forum for working out what justice requires in the context of current social conditions.[43]

Scott Hershovitz, who contends that legal obligations are a species of moral obligation that may sometimes conflict with other moral obligations, also adopts a detached, external stance – a position from which we could endorse a version of the positivist slogan that the existence of law is one thing, its moral merit or demerit quite another.[44] If people disagree about what the law requires, according to Hershovitz, it is because they disagree about the moral significance of our legal practices; but the content of *laws*, as opposed to the requirements of *law*, is a matter of social fact.[45] Although Hershovitz denies that legal practice generates its own distinctive domain of normativity – there are no distinctively legal (in the sense of non-moral) rights, obligations, privileges and powers – he is unwilling to concede law, as a social practice, any intrinsic moral virtue. Any particular law or legal system might therefore be "wholly devoid of moral merit, or worse than that, morally repugnant".[46]

From an internal perspective, however, closer to that of conscientious citizen or official, we would strive to avoid the conclusion that a genuine rule or ruling was "devoid of moral merit". We would seek an interpretation that made moral sense of such a rule or ruling by treating it as a response to exceptional circumstances – a limited qualification or adjustment to the scheme of justice we are trying to construct through moral dialogue with our fellow citizens. As with a common law rule, the meaning of a statutory rule is closely dependent on the context of application.[47] And if a foreign legal system appears to be morally abhorrent, it is chiefly because it

[42] Ibid., at p. 1305.
[43] In rejecting "positivistic" notions of the "moral neutrality of law", Lon Fuller observes: "To regard as morally indifferent the existence or non-existence of law is to assume that moral precepts retain the same meaning regardless of the social context into which they are projected." See L.L. Fuller, *The Morality of Law*, 2nd ed. (New Haven 1969), 206–207.
[44] S. Hershovitz, "The End of Jurisprudence", p. 1194.
[45] Ibid., at p. 1194, n. 57.
[46] Ibid., at p. 1194.
[47] See below for further argument.

deviates so fundamentally from the principles of justice that our own practice, correctly interpreted, exemplifies. It is a parody of law, mimicking its structures while mocking its requirements.

Greenberg and Hershovitz overlook the inherently moral nature of law, ignoring its internal aspiration to justice, intrinsic to the activities of those who collaborate with their fellow citizens in aid of the public or common good. Like Waldron, they suppose that the social facts of legal practice impinge – often regrettably – on what morality or justice would otherwise require. They thereby join the legal positivist, who, insisting on the autonomy of law, views the moral implications of legal practice from the outside, fastidious observer of a practice to which he has no special allegiance.[48] That external stance purchases moral and intellectual independence at the price of exclusion from the critical dialogue: it disables the theorist from making any contribution to the questions of meaning, interpretation and consequence that concern participants. An inquiry about the moral *effects* of legal practice is more appropriate to the sceptic, who denies any claims of political obligation.[49] The practice-participant, by contrast, identifies the practice, in relevant detail, by reference to its point or value. The moral consequences of practice are found within the practice itself: we are obligated to sustain the practice, whether as citizen or official, by adhering to the requirements that its best interpretation identifies.

III. Legal and Moral Reasoning

In his reflections on the relationship between legal and (pure) moral reasoning, Jeremy Waldron acknowledges that adjudication forges a close alliance between them. The judge engages in "the elaborate construction of a moral argument for, and in the name of, a very large group – his whole society".[50] In the spirit of Dworkinian integrity, the judge "tries to reconcile what he is disposed to do about the problem that comes before him with what others have done in society's name with problems more or less analogous". His attention to the precedents constitutes no "affront to the autonomy of morality or justice" precisely because he seeks to act in the name of society at large: he attempts to decide the case in a way that keeps faith with the treatment of other people in similar circumstances.

Waldron insists, nevertheless, that legal and moral reasoning are in practice quite distinct. On the one hand, he rejects the "simple dual-task theory" of adjudication, inspired by legal positivism, which supposes that moral reasoning is merely supplementary, and subsequent, to the judge's primary

[48] Hershovitz is content to accept conflict between legal and other moral obligations because he thinks the former are a consequence of discrete, explicit sources (analogous with explicit promises); his position is in that way aligned with legal positivism: see "The End of Jurisprudence", pp. 1188–89.
[49] For Dworkin's discussion of (internal and external) scepticism, see *Law's Empire*, pp. 78–85, 266–71.
[50] Waldron, "Judges as Moral Reasoners", p. 18.

duty to determine and apply the law as he finds it.[51] On the other hand, however, he contends that in place of mere "black-letter legal reasoning" we find not "pure moral reasoning", but rather a "mélange of reasoning".[52] While basic premises will sometimes be set by reference to fundamental values, they are at other times dependent on texts. Judgment is informed, on this view, by "a hybrid of moral and legal sensibility, quite unfamiliar to moral philosophers".[53] Rawls's method of reflective equilibrium is not an appropriate analogy, Waldron contends, because by contrast with the freedom of thought of the pure moral reasoner, in law we are constrained by statute and precedent.

As Waldron appears to concede, however, insofar as moral argument in law is marked by deference to text and precedent, it is a necessary consequence of context. There are, of course, moral reasons for such deference – reasons of a kind that would show a legal judgment that failed to grapple with the relevant legal materials to be morally (as much as legally) deficient. These include "reasons of concern for established expectations, reasons of deference to democratic institutions, and reasons associated with integrity and the moral value of treating like cases alike".[54] Waldron considers, nevertheless, that such complicated moral reasons create "a normative world of their own", threatening comparison with our ordinary ideals of moral reasoning. Judges, on his account, go back and forth between fundamental values, on one side, and authoritative texts, on the other, as if inducing a kind of intellectual or moral schizophrenia.

It is more plausible, however, to suppose that principles are affirmed and clarified by reference to precedent, and that precedent, in turn, is understood in the light of principle. When, for example, we identify a prisoner's right to legal advice as an aspect of his wider, more fundamental right of access to the court, we can point to an authoritative judicial ruling on the correct interpretation of a statute granting powers of control over prisoners' communications.[55] In turn, our confidence in the soundness of the ruling rests on our commitment to the principle of unobstructed access to the courts as a central aspect of our constitutional ideals of the rule of law and separation of powers. An application of legal principle in the particular case reveals limitations implicit in an otherwise open-ended grant of executive power. The statute's meaning is developed or elaborated in the context of application, demonstrating the susceptibility of an authoritative text to interpretative nuance and qualification. In a rigorous interpretative analysis, then, text and value inform each other in a manner that bridges the supposed division. Statutes and precedents cannot be interpreted – accorded

[51] Ibid., at pp. 9–11.
[52] Ibid., at p. 12.
[53] Ibid., at p. 13.
[54] Ibid., at p. 14.
[55] *R. v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198.

sufficient content to determine the outcome of particular cases – independently of the pertinent political values.[56]

Implicit in Waldron's view is the assumption that the moral reasons for deference to statute and precedent compete with the moral reasons that would otherwise dictate correct answers to questions of justice. While considerations of justice might commend one view of a matter of basic rights, for example, a good judge would have to give due weight to countervailing considerations of due process or legal tradition – matters of legitimate expectation or democratic authority or fairness in the sense of equality of treatment. Even when the inherently moral nature of adjudication is conceded, therefore, it is supposed that substantive moral reasoning is qualified – and hence compromised – by the potentially conflicting demands of the institutional character of the decision-making process. There is, on this approach, a correct answer to the question of rights as a matter of pure justice, uncontaminated by law, and a different answer when the various contingencies dependent on legal history and process are added in.

It is doubtful, however, whether we can make much sense of that approach from within the internal, interpretative viewpoint of judge or lawyer. What criteria could apply to guide the choice between the demands of justice, on the one hand, and the countervailing considerations of legality, on the other? The dilemma reawakens a complaint legitimately raised against Dworkin's initial elaboration of his theory of law and adjudication. If Hercules has to balance independent considerations of fit and appeal – fit between theory and practice, on the one hand, and moral justification, on the other – it is hard to see what considerations might establish an objectively correct solution in the particular case.[57] It is more plausible to suppose that the interpreter should treat adherence to legality as itself the correct route to justice. In keeping faith with our practice, in all its internal moral complexity, we act justly towards fellow members of the political community.

Although Dworkin initially suggested that the criterion of moral appeal should be employed only to break ties between competing interpretations of legal practice that fitted equally well, his subsequent qualifications confirm that fit and appeal are much more closely interdependent.[58] Only a morally plausible reading should be regarded as an eligible candidate if we aim to show practice in its best light. And fit is merely a marker for a

[56] See further T.R.S. Allan, "The Moral Unity of Public Law" (2017) 67 U.T.L.J. 1, pp. 14–19.

[57] Compare J. Finnis, "Reason and Authority in *Law's Empire*" in J. Finnis, *Philosophy of Law: Collected Essays*, vol. IV (Oxford 2011), 290–95. Hercules is Dworkin's ideal judge, who follows law-as-integrity (see *Law's Empire*, pp. 238–40).

[58] See R. Dworkin, *Justice in Robes* (Cambridge, MA 2006), 171. Compare *Law's Empire*, p. 257, affirming that the constraint fit imposes on substance is "the constraint of one type of political conviction on another in the overall judgment which interpretation makes a political record the best it can be overall, everything taken into account".

range of moral considerations that must be brought to bear against an interpretative choice made solely on grounds of substantive moral correctness. Such considerations as legal certainty, avoiding novel interpretations that would upset reasonable reliance on previous understandings, and political fairness, bowing to the reasonable authority of elected legislators and other properly appointed officials, provide moral reasons to be weighed against any single-minded pursuit of pure integrity.[59] The content of the law is the product of an interpretative analysis that takes account of all the moral reasons that any competent lawyer, attuned to the moral complexities of practice, would recognise as pertinent.

If we are seeking to balance considerations of democratic authority with the countervailing demands of legal principle or precedent, we can try to give all relevant factors their due according to the specific context. We can interpret the statute so as to further the legislative purpose (such as maintaining order and discipline within the prisons) consistently with common law principle. By contrast, a conflict between moral truth and legal truth – justice, on the one hand, and institutional commitments, on the other – seems merely to present an impasse. While a bold judge might prefer justice, a more cautious one would seek the comparative safety of literal statutory command or inflexible precedent. We seem to be forced to choose, impossibly, between respect for justice and adherence to law. And it is no answer to say that we should follow the law until it becomes indeterminate, allowing us to revert to justice. That would merely reintroduce the "simple dual-task" theory of adjudication, inspired by legal positivism, that Waldron has already rejected.

We are, then, confronted by a stark choice about how to understand the moral dimension of law and adjudication. It is either marginal – peripheral to the principal matter of determining the dictates of statute and precedent – or it is central in a way that denies the divorce between legal and moral reasoning on which Waldron insists. And having rejected the positivist model of rules, identified largely by pedigree or social source, we cannot simply retreat to a crude version of integrity, allowing the requirements of justice to be offset, or even overridden, by exaggerated demands of institutional autonomy or custom. Admittedly, Dworkin envisages a tussle between conflicting ideals of justice, fairness and integrity, claiming that "fairness or justice must sometimes be sacrificed to integrity".[60] But that view is mistaken for reasons that Waldron has himself explained.[61] Principles of political fairness apply to resolve disagreement about questions of justice. And integrity *displaces* justice in the "circumstances of integrity", when disagreement about justice, though prevalent, is not so profound or divisive

[59] See below for Dworkin's distinction between "pure" and "inclusive" integrity.
[60] Dworkin, *Law's Empire*, p. 178.
[61] See J. Waldron, *Law and Disagreement* (Oxford 1999), 191–95.

as to frustrate the striving for coherence that integrity requires. In joining the interpretative debate, we are seeking to resolve our differences over justice within the legal process – substituting for more detached philosophical ruminations a commitment to determine the legitimacy of purported state action as participants within a common enterprise.

If like cases should be decided alike, it is ultimately because that is a requirement of justice; and the relevant considerations of similarity or dissimilarity – the criteria for legal judgment – are given by the principles of justice that provide the best account of our legal practice, viewed as whole. The "checkerboard" statute is an explicit assault on equality, obliging us to invoke principles to justify some provisions that we must then repudiate to make any sense of others.[62] Its violation of integrity is, accordingly, a denial of *justice*: if taken at face value, it precludes an interpretation that treats law as the product of a coherent theory of justice, compatible with the basic equality of persons. It is only when justice is regarded, implausibly, as a wholly independent ideal – a standard for the critique of our practice but having no central role within it – that the values of justice and integrity appear to diverge.

While justice may appear to conflict with institutional practice from the observer's perspective, which may focus on specific decisions or arrangements alone, from an internal, interpretative viewpoint propriety or correctness is always a matter of concordance with an attractive vision of the whole. It is also, moreover, a subject of dialogue between interpreters, each of whom seeks to defend a unified account of practice in which basic principles of justice operate to identify, and marginalise, inconsistent rules and rulings – mistakes in the sense of departures from law, correctly construed. Vibrant moral disagreement takes place within a shared tradition, in which appeals to specific values or principles need not (as they otherwise might) fall on deaf ears. As long as there are unifying elements of that tradition – principles and presumptions specified, in part, by the concrete consequences exhibited in leading precedents, widely affirmed – we can be confident that the debate is genuine. Disagreement is productive dispute between people who have enough in common to speak the same language – a discourse in which precedent and principle are inextricably intertwined.[63]

In that way, justice is itself a function of history or practice. Our legal tradition is not merely the context in which we have in the past sought to resolve disputes about justice, but also a source of enlightenment from which we can seek moral guidance. If there are any parts of that tradition that we are anxious to affirm – legal paradigms that we are reluctant to

[62] A chequerboard statute embodies an arbitrary compromise that reflects divided opinion about matters of justice: Dworkin, *Law's Empire*, pp. 178–84.

[63] Compare L.L. Fuller, *Anatomy of the Law* (London 1971), 136, describing common law precedents as a "common language", preserving "those systematic elements of law without which communication between generations of lawyers … would be impossible".

jettison – they instantiate features of justice on which we can build in puzzling over more doubtful and contentious cases. Paradigms signal not merely consensus over aspects of practice that must be taken, for better or worse, as unassailable criteria of fit; they do not mark off boundaries to deliberation, separating law from morality. Rather, they indicate points of convergence on matters of justice, sufficient to enable deliberation and dialogue to proceed with civility and at least the promise of greater integrity – a more unified and coherent response to connected questions of justice as they arise in practice.[64]

The principles of natural justice, in public law, are aptly named; they are the requirements of fair procedure that we take to be an integral part of justice according to law. If no one can be a judge in his own cause, as a matter of English law, we suppose that the same principle must apply universally: it is a necessary feature of any legal order that we would acknowledge as legitimate. We honour the other components of a fair hearing, such as notice of complaint and opportunity to respond, in the same way, invoking familiar precedents by way of illustration. While there may be much disagreement about what natural justice requires in all the circumstances of a particular case, having regard to the divergence of executive public agencies from the familiar model of court or tribunal, we invoke our paradigm cases as moral exemplars: the precedents help to frame the debate, placing a burden of justification on departures from what is understood to be the norm. We do not suppose that our moral deliberations are distracted by a legal tradition we must tame or temper; we invoke our tradition as an instructive guide to the moral rights that deserve to be judicially enforced.

The principles of natural justice may serve as an illustration of the way in which legal practice informs our deliberations over justice. Moreover, procedural fairness is closely tied to the broader ideal of due process, which makes the impartiality and independence of courts and tribunals a basic part of the constitutional scheme of separation of powers. It is not sufficient that whatever matters are allocated to courts should be fairly resolved; it is equally important that certain questions should be identified, on substantive grounds, as particularly appropriate for impartial judicial decision. The infliction of punishment for criminal conduct is a function that cannot fairly be left to elected politicians or their officials, for example: punishment should be imposed according to uniform principles, insulating the administration of criminal justice from political interference or public clamour. Procedural fairness must be supplemented by principles of equality – requirements of reasonableness that identify permissible criteria for discrimination between persons – if the rule of law to be firmly in place as a constraint on the

[64] The moral consensus must, of course, be a consensus of conviction rather than convention: "Paradigms anchor interpretations, but no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake" (Dworkin, *Law's Empire*, p. 72).

exercise of governmental power. Due process and equality are interdependent precepts of a coherent account of democratic constitutionalism.[65]

IV. Law, Justice and Integrity

The conflicts that Dworkin identifies between justice, fairness and integrity, as he defines those ideals, are the consequence of their abstract definition, removed from ordinary experience. When we invoke the value of justice in debate with our fellow citizens – when political philosophy enters the public realm of action and decision – we cannot escape appeal to the common ground of practice and tradition. While a theory of law (or English law) must be authentically the theorist's own, conforming to moral truth as she perceives it, it must be offered simultaneously as a proposal for collective action, eligible for adoption by others as an expression of their own commitments as these are inscribed in settled practice.[66] Waldron comes close to acknowledging the point when he ponders the appropriate way to proceed in political philosophy, emphasising the contrast between individual thinker and society at large – the tension arising between the "I" and the "we", who "in the end constitute the only possible agent of social change".[67]

The place of integrity at the heart of justice is acknowledged by Dworkin in his suggestion that it falls to philosophers "to work out law's ambitions for itself, the purer form of law within and beyond the law we have".[68] Competing political philosophies should "show how law can develop in the direction of justice while preserving integrity stage by stage", each step building on the existing structure.[69] But then justice is only a deeper version of integrity; and legal argument occurs, as Dworkin suggests, on a continuum with moral and political debate. And the idea of "law beyond law", though an appealing image, is only a metaphor, marking a largely invisible transition between the abstract and the concrete, principle and practice.[70] While the law that a judge is obliged to declare and enforce – the law as fixed by "inclusive integrity" – may differ from the purer form to which it aspires, it can only be a difference of degree. The force of the various constraints on a judge's pursuit of "pure integrity" is always a matter of moral judgment, dictating the requisite level of deference to rules or rulings he might prefer to override.[71]

[65] See further T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford 2001), ch. 5. See also T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford 2013), ch. 3.

[66] Compare Postema, "Integrity", arguing that justice is a public good attainable only through coordinated, collective action.

[67] Waldron, *Law and Disagreement*, p. 201.

[68] Dworkin, *Law's Empire*, p. 407.

[69] Ibid., at p. 409.

[70] Compare Solicitor-General Murray (later Lord Mansfield) in *Omychund* (1744) 1 Atk. 21, 33: the common law "works itself pure by rules drawn from the fountain of justice".

[71] Pure integrity "consists in the principles of justice that offer the best justification of the present law seen from the perspective of no institution in particular and thus abstracting from all the constraints of fairness and process that inclusive integrity requires": *Law's Empire*, p. 407. "Inclusive integrity" provides

If pure integrity is our lodestar – the principles of justice that offer the best justification of the present law – we must acknowledge a disparity between law and justice insofar as "inclusive" integrity falls short of its own aspiration. But law diverges from justice only in the sense in which any approximation to an ideal must fall short by its own standards. The constraints of precedent do not impose arbitrary impediments to truth: they regulate the deliberative process necessary to further its attainment. Adherence to precedent, within the relatively flexible standards normally applied, ensures that like cases are decided alike. Progression towards a deeper or larger truth, based on greater coherence across the law as a whole, must be cautious and incremental, maintaining equilibrium between present consistency and future ambition. It is only the higher courts that can survey the larger field in the light of their more extensive range of experience; and deference to that expertise permits adjustments to previous doctrine to percolate downwards throughout the legal system. The requirements of *stare decisis* need not obstruct the pursuit of justice; they rather provide an institutional structure to coordinate it.

Legislative supremacy, moreover, enables elected representatives to join the moral dialogue; the incorporation of statute, correctly construed, within the general scheme of legal principle assists in the quest for pure integrity. The application of legislation to any particular case, in all the complexity of the circumstances arising, depends on the correct theory of the statute – the best account of its point or purpose in the light of what was thought to be wrong with the previous law it amends. That theory will enable a judge to differentiate between appropriate and inappropriate applications, clarifying the content of the statutory language. The statute's true meaning unfolds from case to case in a manner akin to the development of common law precedent, incorporating the act within the broader tapestry of legal regulation. In Dworkin's language, "Hercules interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment".[72]

While law may differ from justice when we contemplate dubious rules or precedents, inconsistent with the principles we think correctly instantiated in our leading paradigms, the law as a whole *embodies* justice when we focus on the scheme of principle we try to construct in the spirit of integrity. It follows that the law's content is always a moral judgment informed and inspired by our own tradition, combining respect for the past with appraisal of its strengths and weaknesses. No single statutory provision or common law rule has any independent content, detached from the larger theory in which it finds its proper meaning. And that general theory precludes all

our "actual concrete law", according to Dworkin; it is "law for the judge, the law he is obliged to declare and enforce" (ibid., at p. 406).

[72] Ibid., at p. 348.

discrimination between persons inconsistent with the political ideals that sustain and justify our continuing allegiance – the ideals of human dignity and equality that the committed interpreter looks to legal practice to illuminate and clarify. From that perspective, any putative rules that would be gravely unjust are understood to *contradict* the practice: their application would destroy integrity, undermining political obligation. Any grievously unjust demand that threatens legitimacy is by hypothesis *not* law: it is ultra vires, excluded by constitutional principles that the rule of law, in the guise of integrity, affirms.

Legislative supremacy could constitute a serious threat to integrity only if statutes were treated as sets of discrete instructions, detached from the wider body of the law within which they must operate. When interpreted in the light of Parliament's responsibilities to further the public good within the constraints of justice – to enhance and reform the current scheme of public justice – no statute can be applied in a manner that violates integrity. The scope and content of any statutory rule are always the products of judicial construction: the enactment is treated as a contribution to justice, precluding the possibility of injury to basic rights or legitimate interests out of all proportion to any discernible public benefit. When Dworkin observes that a judge must enforce as law a statute that "admits of only one interpretation", even if he thinks it "inconsistent in principle with the law more broadly seen", he forgets his own observation that ambiguity is as much the product of a text's reception as its composition.[73] The uncertainty is caused by the threat to justice posed, in the circumstances arising, by literal or apparent meaning. A statute "admits of only one interpretation" only after our doubts have been resolved by adoption of a suitably nuanced construction, sensitive to all the relevant political values. We read in the exceptions and qualifications needed to enable the enactment to function as a useful addition to the larger scheme of public justice.

The presumptions of statutory intent that common law courts invoke to ascertain "legislative intent" are principles of justice that promote the integration of legislative change, preserving the moral unity of law. While in principle subject to contrary legislative instruction, whether express or implied, their weight or force will depend on all the circumstances. The more urgently adherence to common law principle is required to maintain legitimacy – the continuing concordance of law and justice – the more reluctant a competent interpreter will be to acknowledge its effective qualification. The presumption against the retrospective application of criminal penalties – *nulla poena sine lege* – is, for example, a central feature of the rule of law. It is part of the same conception of law that denies the validity of a bill of attainder, distinguishing genuine law from arbitrary power.

[73] Ibid., at p. 401; compare Dworkin's account of statutory interpretation at pp. 350–53.

Principles of natural justice and due process operate to ensure that legal rules are fairly and impartially applied to particular cases. Recourse to the courts for the remedy of violations of these basic principles, or for the correction of other breaches of legality, is a presupposition of the constitutional fabric. Statutes that threaten these principles, by purporting to narrow their range or scope, must be construed in a manner that averts the threat. We must strive to reconcile an appropriate deference to legislative ambitions, as these are conveyed by the statutory scheme, with our commitment to the principles of justice that constitute the larger corpus of law. Legislative supremacy operates in harness with the rule of law.[74]

Provisions purporting to exclude judicial review of administrative action must be given a qualified reading, preserving the power to quash ultra vires acts or decisions.[75] The purported revocation of the right of anyone accused of criminal conduct to know what is alleged against him, in relevant detail, must be read as preserving at least the essentials of a fair hearing.[76] A provision apparently giving a government minister the power to override a judicial decision, as regards the requirements of law in a particular instance, must be given a narrow construction – as narrow as necessary to maintain the integrity of the rule of law.[77] The relevant judicial powers are intrinsic to the idea of law as a coherent scheme of justice, faithful to implicit demands of human dignity. They are the institutional expression of each individual's responsibility to interpret governmental action, in all its manifestations, as a seamless moral whole, uniting law and justice.

Insofar as an interpretation of law is offered to others as a contribution to their own practical reasoning, its success depends on its persuasiveness as a theory of a shared tradition. It must build on widely recognised paradigms, seeking to elicit assent to the principles that such paradigms exemplify. A failure to attain that assent, however, is no more confirmation of error than the inability of a dissenting judge to alter her colleagues' opinions. An interpreter is not merely entitled to insist on the truth of her own considered account, but obligated to do so – just as the dissenting judge must adhere to her own conclusions about the rights and duties of the litigants. Each must have the courage of her own convictions. The dissentient who refuses to obey a purported rule or ruling on grounds of conscience must be understood to be appealing to legal and constitutional principle – to the law itself, correctly interpreted. There is no genuine conflict between law and justice as long as the internal, interpretative viewpoint is maintained: individual

[74] See further Allan, *The Sovereignty of Law*, especially chs. 4, 5.
[75] The classic example is *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 A.C. 147.
[76] See especially *Secretary of State for the Home Deparment v AF (no 3)* [2009] UKHL 28, [2010] 2 A.C. 269; *Canada (Citizenship and Immigration) v Harkat* 2014 S.C.C. 37, [2014] 2 S.C.R. 33; Allan, "The Moral Unity of Public Law", pp. 12–14.
[77] *Evans v Attorney General* [2015] UKSC 21, [2015] A.C. 1787; see T.R.S. Allan, "Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*" [2016] C.L.J. 38.

conscience marches in step with adherence to legality.[78] It is only from an external perspective, born of radical scepticism, that justice and integrity diverge. When faith in the practice is destroyed by instances of oppression or injustice that others refuse to characterise in that way – when prevailing notions of dignity or equality are perverse and implausible – scepticism is the only refuge. Integrity must be repudiated because legal practice can no longer be portrayed as legitimate. But from that perspective there is law only in the limited "sociological" sense: the state enforces its illegitimate demands against people who owe no genuine duty to comply.[79]

There is no coherent halfway house between legitimacy and illegitimacy, as Dworkin seems to suppose, and hence no conflict between integrity and justice.[80] A flagrantly wicked statute, if taken at face value, can be identified as law only by the detached observer. For the interpreter, whose allegiance to law survives, the statute's practical application is limited to whatever reasonable deference to democratic authority permits within the constraints of justice – justice in the guise of integrity. At the extreme, a statute's extension may be very limited indeed. Even when there is no recognised doctrine of judicial review, the question of whether or not a statutory provision has any application to the particular case is always open. A bill of attainder, singling out particular persons for punishment, provides a clear example. In removing any scope for exceptions or qualifications, by virtue of its offensive particularity, it undercuts its pretensions to legal status: it proclaims itself a vindictive attack, masquerading as law. It contradicts on its face its implicit claim to legal and moral authority.[81]

We should not say, with Dworkin, that the Fugitive Slave Act, commanding the return of escaped slaves to captivity in the southern states, was law that judges should have overridden as a matter of "moral emergency".[82] Nor should we accept the idea that a judge was forced to choose between enforcing the statute, resigning his office or lying about the law.[83] These accounts strip the judge of his interpretative role, undermining his fidelity to law. If the plain words of the act should not have been taken to authorise what they seemed on their face to require, it is because they were subject in application to broader principles of individual liberty, due process and federalism, as Dworkin himself had formerly observed.[84]

[78] Integrity in law depends on interpretative integrity, forging close links between the rule of law and individual conscience: see Allan, "Interpretation, Injustice, and Integrity", pp. 74–80.

[79] Dworkin distinguishes between the "doctrinal" and "sociological" concepts of law: *Justice in Robes*, ch. 8. It is very doubtful, however, whether either concept should be treated as lacking an internal moral dimension: see N. Simmonds, *Law as a Moral Idea* (Oxford 2007), 25–31.

[80] See Dworkin, *Law's Empire*, pp. 108–13 (distinguishing between the "grounds" and "force" of law) and pp. 202–206 (conflict between law and justice). When political obligation is genuine, it imposes the duties that the correct interpretation of law identifies; and these cannot be consistently overridden on grounds of justice: see Allan, "Interpretation, Injustice, and Integrity", pp. 63–68.

[81] See Allan, *The Sovereignty of Law*, pp. 93–94.

[82] Dworkin, *Justice for Hedgehogs*, p. 411.

[83] Dworkin, *Law's Empire*, p. 219.

There is no space between conscience and allegiance, and hence none between justice and law. The judge satisfies the demands of conscience in steadfast pursuit of integrity, which by insisting on adherence to principle precludes state action that affronts the equality and dignity of persons.[85] An unqualified requirement to return escaped slaves to captivity was either *not* law, as a matter of integrity, or it was law only in the "preinterpretive" (or sociological) sense – law from the sceptic's viewpoint only, repudiating the interpretative quest as hopeless.[86]

V. Democracy and Constitutionalism

Greenberg claims it as a merit of his own theory that it explains how legal systems can generate morally binding obligations despite the fact that "there is no general moral obligation to obey directives from legal authorities".[87] While democratic considerations can reinforce other factors that point to the existence of relevant moral obligations, he concedes, there is no general moral obligation to comply with directives of popularly elected representatives. But while there could be no general obligation to obey the literal instructions of an elected assembly, whatever their content, it is more plausible to recognise a duty to obey the statutes as these are correctly interpreted – given the meaning and scope that principles of political fairness indicate, subject to the countervailing principles of justice affirmed by integrity. A statute that when taken at face value would be productive of grave injustice – flouting constitutional rights affirmed by a competent theory of practice as a whole – is in practice inapplicable whenever it threatens such rights in particular cases. It may be interpreted in such a way as to avert oppression or iniquity, just as a common law rule, productive of injustice, can be modified or distinguished in subsequent cases.

Greenberg's critique of Dworkin's work is pertinent: "At least in general, a straightforward appeal to which interpretation yields a morally better standard does not seem permissible in legal interpretation."[88] If, however, the moral considerations adduced reflect the public scheme of justice, lending coherence to related aspects of legal regulation, the objection loses its force. The substantive merits of contrasting interpretations are plainly relevant because the one selected as optimal must operate smoothly in the wider context of the legal order – a legal order constructed, by interpretative dialogue, on the basis of moral principle.

[84] Dworkin, "The Law of the Slave-Catchers".
[85] Hershovitz is obliged to argue that, while we do not want officials to think that they can decide whether a statute should be enforced, we must also hope that they will sometimes decline to enforce a statute nonetheless: "The End of Jurisprudence", p. 1192. Such infelicity is the result of separating the sources of law, treated purely as social fact, from the legal/moral obligations that arise in consequence.
[86] See further Allan, "Law, Justice and Integrity".
[87] Greenberg, "The Moral Impact Theory of Law", p. 1314.
[88] Ibid., at p. 1293.

In *Smith v United States*,[89] the Supreme Court was divided over the question of whether Smith was properly sentenced under a statute providing for increased penalties when the defendant "uses … a firearm" in a drug-trafficking or violent crime. By contrast with the strict semantic content of the phrase, which covered Smith's conduct in offering to trade a gun for cocaine, its communicative content – what the legislators presumably meant – required the firearm to be used *as a weapon*. Greenberg supposes that Dworkin must choose between these two eligible meanings whichever rule would be, *ex ante*, the better one to have.[90] It is a mistake, however, to suppose that the choice between meanings, even if made on grounds of justice, would be detached from the constitutional context – an illegitimate imposition of personal judgment extrinsic to ordinary legal reasoning. The better rule to have, *ex ante*, is the one better suited to the general scheme of legal principle in which it must operate.

Rather than adopt a moral stance external to the recognised sources of law, the lawyer attempts, instead, to make the wider scheme the best it can be in the sense of a harmonious and mutually reinforcing set of standards. A Dworkinian interpreter, accordingly, would recognise the same range of moral considerations that Greenberg identifies as relevant to the issue of construction. If reasons of political fairness operate to dictate obedience to statute to begin with, they must also apply to help resolve uncertainties about what has actually been enacted. Whether communicative content is a better guide than pure semantic content, for example, depends on the best conception of democracy, as Greenberg suggests. But insofar as Greenberg makes such general considerations of principle pertinent to correct construction, his theory begins to converge with a common law, interpretative approach. It is a seamless moral inquiry that starts from the text and ends with context, giving all relevant considerations their due. When we abandon the notion of a "threshold" test of fit, as it appears in *Law's Empire*, we can see that interpretation is a moral exercise all the way down. There is no juncture at which the institutional record runs out or proves indeterminate: a judge's moral convictions are "directly engaged" throughout.[91] And a complex legal history can always offer further insight if its interpreter has the ability and patience to probe it more deeply.[92]

The treatment of legal practice merely as something that moral judgment must take into account, as affecting otherwise independent judgments of justice or good governance, has most plausibility in regard to statute.

[89] *Smith v United States* 508 U.S. 223 (1993).
[90] Greenberg, "The Moral Impact Theory of Law", p. 1292.
[91] See Dworkin, *Law's Empire*, pp. 255–56, suggesting that such convictions operate only beyond the threshold of fit.
[92] Law is not only "ordinary" but also pervasive, "understood to stretch across the entire field of social and political life leaving no gaps where the exercise of power is arbitrary": Walters, "The Unwritten Constitution", p. 49.

Enacted rules have an apparent specificity and evident democratic pedigree that foster the notion that they might operate independently, dictating whatever content their authors choose to write on a clean slate. But an understanding that, within common law theory, a statute must be accommodated within the general corpus of law, obtaining its full meaning from an interpretation of that wider canvas, puts the matter in a wholly different light. The larger scheme of law is itself a domain of political morality, constituted by the collaborative efforts of interpreters to make moral sense of a shared legal practice and history. From an internal, interpretative viewpoint, the moral consequences of practice are those that the practice itself identifies when correctly understood. Those consequences may be contested and controversial; but the debate is a dialogue between participants, not an argument between detached observers having no direct investment in the practice.

In treating precedent as an inferior source of lawmaking, subservient to legislation, Greenberg overlooks the value of the interaction between precedent and principle, which provides a moral structure for the reception and support of legislative change. He acknowledges that "considerations of fairness support treating like cases alike", and that, accordingly, "the resolution of cases will generate standards that affect the proper resolution of future cases".[93] But this is scarcely a minor consideration, as Greenberg implies, marginal to the quest for justice. Those standards are fundamental to the principle of equality before the law; their consistent application is not something incidental to the democratic process, or even in conflict with it, but instead critical to the preservation of a unified legal and constitutional order. Statute and common law must operate in harmony, democracy bolstered by the demands of legality.[94]

As Greenberg observes, relevant similarity between cases is a moral question, not merely a matter of what a previous court has stated. A common law rule, encapsulated in precedent, is nevertheless closely dependent on the reasons that sustain it. The rule may be regarded as a summary distillation of the relevant balance of principles as they apply to the context in point. And while the rule may be qualified in subsequent cases, when an altered context provokes a reappraisal of principle, its provisional content cannot be wholly detached from the reasons originally given to justify it. Those judicial reasons explain the content of the rule, purporting to show how it applies the relevant principles to the material facts of the case – the material facts as the court identified them on the basis of its grasp of

[93] Greenberg, "The Moral Impact Theory of Law", p. 1316.

[94] In response to Cass Sunstein's contention that "the development of large-scale theories of the right and the good is a democratic task, not a judicial one", Dworkin observes: "It is only through interpretation of more concrete enactments that we can identify the principles which we have together embraced." See Dworkin, *Justice in Robes*, pp. 70–71; C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York 1996), 53.

legal doctrine. Moral judgments of similarity between cases, then, are heavily dependent on an adequate grasp of legal doctrine. And it is ultimately respect for doctrinal reasoning that lends moral argument the coherence and discipline intrinsic to integrity. The precedents, in which rule and reasons are closely aligned, serve to structure a discourse that consists of critical reflection on experience. If, as Greenberg says,[95] "democratic values having to do with public deliberation give weight to a court's public offering of reasons in support of a standard", it is also true that the constitutional value of legality gives weight to the reasoned application of a standard to particular cases.

We cannot stand wholly outside the legal process, as it appears to those who wrestle with the complexities of legal doctrine, free to make independent moral judgments about the relevance or similarity of cases. If the similarity between cases is a moral question, which it plainly is, it is also a legal question in the sense that the doctrinal assumptions and arguments at play are integral to a proper characterisation of the pertinent moral issue. There must, then, be full participation in the practice itself, considerations of justice and law being indissolubly combined. To ask about the "moral impact" of a rule or ruling when the question is detached from the issue of interpretation – the correct *understanding* of that rule of ruling – is to turn one's back on the whole enterprise as participants would understand it. It is to take an Archimedean stance outside the practice from which there are no correct legal answers – only different attitudes to decisions arising as discrete events in political history.[96]

If, as Greenberg suggests,[97] lawyers' skills in reading statutes and cases "may be generally reliable ways of working out the impact of statutes and judicial decisions on the moral profile", is this not because the "moral profile" is constituted, in part, by settled interpretations of practice? It is not the case that there is no need to consider moral principles explicitly, as Greenberg suggests; it is rather that there is no need to consider them *independently* – as if they stood above and beyond the legal tradition in which they are reflected and sustained. Lawyers are expert in "working out the impact of the legal institutions on the moral profile" because that profile chiefly consists, in its political dimension, of the principles confirmed by the *milieu* in which institutional actions are performed and understood.

VI. Conclusion

I have defended an interpretative account of law, exemplified by common law thought, against two contrasting approaches. The law is neither a

[95] Greenberg, "The Moral Impact Theory of Law", p. 1317.
[96] There is at least an analogy here with Dworkin's critique of Hart's jurisprudence as "Archimedean", detached from the commitments and perspective of participants: see Dworkin, *Justice in Robes*, ch. 6.
[97] Greenberg, "The Moral Impact Theory of Law", p. 1336.

product of its official sources, regardless of moral merit, nor anyone's view of the moral consequences of specific elements of legal practice. It is, as Dworkin suggests, a constructive interpretation of practice informed by moral values of liberty, equality and fraternity. But those values obtain their specific content only through engagement with practice: their realisation depends on an integration unique to the polity that claims our allegiance. Justice is represented by integrity – the moral unity attained by that reconciliation of political values. The content of the law, accordingly, is itself the product of integrity, grounded in the ideals of human dignity and equality that inform and underpin our quest for justice. It is in the interaction between practice and principle that we discover the concrete implications of those abstract ideals. Purportedly wicked measures, infringing the legal principles that structure any competent interpretation of law as a whole, must be seen as aberrant readings – misconstructions – of statutes intended to contribute to the reform or revision of the public scheme of justice. No rule or ruling can threaten political obligation itself by evoking radical conflict between law and justice.

An internal, interpretative approach does not require us to endorse a special normative domain, distinct from both morality and prudence.[98] Law is a fully moral domain – the pertinent normative judgments are moral judgments – but it treats past practice as itself an instructive guide to (a helpful orientation towards) moral truth. Insofar as we value our own tradition, we have reason to harness its lessons for future judgment and action. Moreover, we build on that tradition in seeking to forge agreement, invoking familiar paradigms as a basis for arguments about justice likely to resonate with our fellow citizens. If moral judgment is itself a joint endeavour – we seek to explicate the shared values that make ultimate sense of our more specific agreements and disagreements – legal judgment is an important aspect or dimension of it. For legal purposes, the moral paradigms are legal ones: they are the principles and precedents that must find a place in any convincing account of judicially enforceable rights and duties.

While we retain our faith in moral dialogue with our fellow citizens as a means of attaining justice through law and politics – the "circumstances of integrity" obtain – our practice is the best guide to decision and action. When we acknowledge the salience of practice – we invoke its guidance in orienting our efforts to address new questions – arguments within the practice have the requisite moral hue. They aim to show, simultaneously, what is *required* by the practice, as a matter of principled consistency, and what would *improve* the practice – bring it closer, in current circumstances, to the ideals that animate it. Interpretation aims to reveal the

[98] See Hershovitz, "The End of Jurisprudence". Hershovitz's repudiation of such a special normative domain leads him, unnecessarily, to reject an interpretative, Dworkinian approach.

merits of the practice, affirming its claim on our allegiance, by deepening our grasp of the values it embodies as we extend it to novel circumstances or resolve perceived tensions and conflicts. A "protestant" attitude is demanded, accordingly, in the sense that there is a moral responsibility on each participant, imposed by the practice, to help make it the best it can be – to make it a coherent expression of the values that motivate our continuing allegiance. But it is a protestantism born of strong collegiality: it challenges other citizens and officials to live up to their own commitments as these are reflected in shared traditions and common ideals.

While charting an instructive course between legal positivist and traditional natural law theories, Dworkin's account veers somewhat inconsistently between competing conceptions of interpretative legal reasoning. If, in *Law's Empire*, Dworkin defends a view too close to "conventionalism", which contemplates conflict between morality and law, his later work appears not to recognise that, while law is clearly a department of morality, morality is also, in a sense, a department of law.[99] There is an interaction between moral argument and legal practice and paradigm, only briefly glimpsed in Dworkin's earlier work. There Dworkin had fused legal and moral judgment, uniting lawyer and citizen. Not merely would anyone's theory of law "include almost the full set of political and moral principles to which he subscribes", but it would be "hard to think of a single principle of social or political morality that has currency in his community and that he personally accepts, except those excluded by constitutional considerations, that would not find some place and have some weight in the elaborate scheme of justification" of the corpus of law.[100] The legal judgment is at once Hercules's own moral judgment and a reflection of "the community's moral traditions", at least as "these are captured in the whole institutional record that it is his office to interpret".[101]

Principle, practice and precedent are all intrinsic to the moral deliberation demanded by common law reasoning. It is only when our conclusions of law satisfy the theory we construct by reflection on the paradigms of legal practice – the judgments about examples that are currently a matter of broad, if only provisional, agreement – that we can be confident that they are sound. We are obliged, in that sense, to articulate an "artificial reason", built on learning and tradition.[102] But such artificial reason is our only

[99] Conventionalism is legal positivism in interpretative dress: see Dworkin, *Law's Empire*, ch. 4.
[100] Dworkin, *Taking Rights Seriously*, p. 68.
[101] Ibid., at p. 126.
[102] Against Hobbes's rejection of Coke's notion of artificial reason, Matthew Hale replies that "it appears that men are not born common lawyers, neither can the bare exercise of the faculty of reason give man a sufficient knowledge of it, but it must be gained by the habituating and accustoming and exercising of that faculty by reading, study and observation, to give a man a competent knowledge thereof": Hale's 'Reflections' on Hobbes's 'Dialogue between a Philosopher and a Student of the Common Laws of England' in G.J. Postema (ed.), *On the Law of Nature, Reason, and Common Law: Selected Jurisprudential Writings of Sir Matthew Hale* (Oxford 2017), 193.

sure guide to natural reason, which we can approach only through our reflection on experience. A proposition is legally correct only when it is morally correct; but moral correctness is itself dependent, for all practical purposes, on the coherence we can establish within our legal and constitutional practice.[103]

[103] My account of law has much in common with the view presented in C. Misak, "A Pragmatist Account of Legitimacy and Authority" in D. Rondel and S. Dieleman (eds.), *Pragmatism and Justice* (Oxford 2017), exploring the work of Oliver Wendell Holmes. Compare H. Nye, "Staying Busy While Doing Nothing? Dworkin's Complicated Relationship with Pragmatism" (2016) 29 C.J.L.J. 71.