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The Connection Between Law and Morality: Comments on Dworkin

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[Ronald Dworkin, Professor of Jurisprudence, The University of Oxford, and Professor of Law, New York University, spoke at the AALS Workshop on Jurisprudence and Legal Philosophy held at Philadelphia, Pennsylvania, on March 20-22, 1986. His oral remarks at the Workshop were a summary of his book, *Law's Empire* (Cambridge, Massachusetts: 1986), which has since been published. The reader is referred to the book for a statement of his views.

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Our discussions yesterday seemed haunted by a contrast—never quite formulated—between Natural Law and Legal Positivism. The standard interpretation turns on the idea of a "necessary connection" between law and morality. Positivism has often been understood to hold, and Natural Law to deny, that there can be unjust laws.

It is clear who wins that argument. But Positivism seems to win too easily. And our official representative from the Natural Law tradition agreed that there can be unjust laws.

Recent work in legal theory—especially work by Ronald Dworkin—has given subtler shape to the idea of a "necessary connection" between law and morals. Dworkin, among others, has suggested the following view (though this may diverge from his most recent suggestions). The rule of law requires fairness—fairness in the sense of, say, treating like cases alike, evenhandedness, or going on as before. But this calls for interpretation. Courts need to

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interpret what has gone on before—the law we have—so that they can carry it forward.

But interpretation is not normatively neutral. It is called for in the service of justified decisions, so it seeks an interpretation that justifies what law we have. Indeed, it seeks to understand what we have in the best light possible.

Dworkin suggests another idea: that what law is can best be understood by way of interpretation itself—by determining how judges should decide cases.

If we put these two ideas together we get the notion of a "necessary connection" between law and morality. What law is can best be understood by way of the interpretation of existing law, and sound interpretation—interpretation that is faithful to the rule of law—looks at the law we have in the best light possible, and specifically in terms of its best justification.

This gives us two questions. First, is it in fact correct to suppose that past official decisions (including judicial, legislative and constitutional decisions) should be interpreted in terms of the best justification that can be given them, or in the best light possible? Second, is it true that law is best understood as fundamentally a matter of the decisions that judges (and perhaps other officials) should on that basis make?

I shall offer two comments. First, it does seem plausible to hold that judicial and other official decisions should be based on the best interpretation of what law we have. If we want decisions to be justified and indeed as good as possible—while at the same time faithful to the rule of law—then we want officials to look at the law on which they base their decisions in the best light possible.

But, secondly, the best justification for the law of a particular jurisdiction may be very poor indeed. It may not even be possible to justify what has gone on before. The law of the land as a whole may be morally bankrupt. This is not a mere abstract possibility. We can find examples of such law in living memory, and quite likely at the present time.

Nor are these issues merely theoretical; they are profoundly practical, for they concern what constitutes fidelity to law and how judges should decide cases. The practical importance of jurisprudential theory is one of the lessons that I believe Dworkin has tried to teach us.

The upshot is that law can be so bad that fairness cannot plausibly be understood to require going on as before. That may be required in some circumstances, but it cannot be supported, to the slightest degree, in all.

Officials may routinely be faced with a moral predicament. They can have a choice which amounts to a significant conflict of duties. Whatever force there is to the duty of fidelity to law can conflict with the duty not to become the instrument of injustice.

Sometimes, however, the system within which officials work does not merely contain significant injustice but is, as I have suggested, morally bankrupt. Then any duty of fidelity to law must disappear entirely. The rule of law can claim then no value at all.

So, in response to the question whether law is best understood in terms of the decisions that officials are required by law to make, we can say: If it is, it will be so only in a sense that is compatible with the points I have just made.

This means that we must take the subtle new version of a "necessary

connection" between law and morality with a grain of salt. Looking at law in the best light possible, we may see something that is, after all, unjustifiable. The "necessary connection" between law and morality is at best a matter of aspiration or promise—or, perhaps, pretense—rather than guaranteed achievement. So the ideas about interpretation and their bearing on what law is that have been advanced by Dworkin and others should not lead us to assume that law always merits even the smallest measure of respect.