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MORAL LIMITS OF DWORKIN'S THEORY OF LAW AND LEGAL INTERPRETATION

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At the foundation of *Justice for Hedgehogs* is a commitment to moral objectivity – the doctrine that there are right answers to moral questions.¹ This nicely complements Dworkin's legal theory, which holds that right answers to legal questions depend on right answers to moral questions.² Without the doctrine of moral objectivity, Dworkin could not reasonably maintain, as he does, that law provides determinate answers to legal questions.

I have no argument with moral objectivity. My concern is its implications for Dworkin's theory of law and legal interpretation, which holds that right answers to legal questions flow from moral principles that provide the best interpretation of past legally authoritative decisions.³ On the one hand, Dworkin holds that sound legal judgments have moral force.⁴ On the other hand, we know that legal systems sometimes support grave injustices.⁵

In previous work, Dworkin discusses briefly some cases involving morally indefensible laws.⁶ This paper considers the problems these laws pose for naturalism. I conclude that injustice under law narrows the scope of Dworkin's theory and frustrates its aspirations. Let us first consider the common law. To find the right answer to the legal question posed by a new common law case, naturalism requires identifying moral principles that justify the precedents (as far as that is possible) and then applying those principles to

* Professor of Law and Law Alumni Scholar, Boston University School of Law and Professor of Philosophy, Boston University. This is an expansion of remarks I presented at the Boston University School of Law Symposium, *Justice for Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book*, September 25-26, 2009. What these critical comments do not make clear is my conviction that we owe an enormous debt to Dworkin for his unparalleled contributions to legal theory and the theory of legal interpretation.

¹ See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010) (April 17, 2009 manuscript at 17, on file with the Boston University Law Review).

² RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 32-39 (1996).

³ I will call that theory *naturalism* – a term Dworkin suggested in the source of our two principal examples. Ronald Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982).

⁴ *Id.* at 166.

⁵ We have more reason to endorse the moral fallibility of law than to accept any theory of law. Accommodating the former is arguably a plausibility condition for the latter.

⁶ Dworkin, *supra* note 3, at 172, 186.

the facts of the new case.⁷ Precedents that are not justifiable by the principles that provide the best interpretation of past practice are to be set aside as “mistakes.”⁸

Naturalism would seem to imply that sustainable common law precedents are morally justifiable, which would explain how the legal judgments that are supported by those precedents can be thought to have moral force. But moral objectivity requires that we distinguish sound from unsound moral principles and justificatory arguments, and Dworkin’s examples indicate clearly that the best naturalistic interpretation of past practice can employ *unsound* moral principles and justificatory arguments.⁹ The legal judgments that are supported by such reasoning cannot be assumed to have moral force. Consider the following example:

Suppose . . . that the courts have consistently held, since the issue was first raised, that lawyers may not be sued in negligence. Our judge believes that this rule is wrong and unjust, and that it is inconsistent in principle with the general rule allowing actions in negligence against other professional people like doctors and accountants. Suppose he can nevertheless find some putative principle, [to] which others [subscribe] though he does not, which would justify the distinction the law has drawn. Like the principle, for example, that [because] lawyers owe obligations to the courts or to abstract justice, it would be unfair to impose on [them any] legal obligation of due care to their clients. He must ask whether the best interpretation of the past includes that principle in spite of the fact that he himself would reject it.

Neither answer to this question will seem wholly attractive to him. If he holds that the law does include this putative principle, then this argument would present the law, including the past decisions about suits against lawyers as coherent; but he would then expose what he would believe to be a flaw in the substantive law. He would be supposing that the law includes a principle he believes is wrong, and therefore has no place in a just and wise system. If he decides that the law does not include the putative principle, on the other hand, then he can properly regard this entire line of cases about actions against lawyers as mistakes, and ignore or overrule them; but he then exposes a flaw in the record of a different sort, namely that past judges have acted in an unprincipled way, and a demerit in his own decision, that it treats the lawyer who loses the present case differently from how judges have treated other lawyers in the past. He must ask which is, in the end, the greater of these flaws; which

⁷ *See id.* at 165.

⁸ *Id.* at 179.

⁹ *Id.* at 186.

way of reading the record shows it, in the last analysis, in the better and which in the worse light.¹⁰

In brief, it is a well-established principle of law that professionals are accountable to their clients for negligence. As Dworkin suggests and I shall assume, we have no reason to regard this as morally mistaken. But in Dworkin's hypothetical scenario, judicial practice exempts lawyers from that obligation. Some defend the exemption by citing one or another special obligation that is incumbent on lawyers, and Dworkin suggests that such reasoning is unsound.¹¹ I see no reason to deny that lawyers have special obligations. The problem is that those obligations are compatible with an obligation of due care to clients.

Dworkin notes that a naturalist judge might reject such an unsound justificatory argument and regard the precedents establishing an exemption for lawyers as mistakes.¹² Alternatively, she might decide that sustaining those precedents and maintaining the exemption is required by the best overall interpretation of past practice.¹³ The latter option is of interest to us here. It exemplifies Dworkin's point that naturalism takes due account of the actual history of a jurisdiction so that past practice makes a difference, which helps to differentiate Dworkin's theory from "natural law" theories as they are often understood.

What Dworkin seems to say, but does not adequately explain, is that considerations that are extrinsic to the precedents themselves help to determine the best interpretation of past practice, so that the best interpretation can sometimes sustain precedents and legal doctrines that themselves lack moral merit.¹⁴

What needs to be considered now, is how naturalism can endorse such precedents and ascribe to them moral force. The notion of moral force is ambiguous. We need to distinguish between the justifiability of a legal doctrine on its own merits and the justifiability of its enforcement on grounds that are extrinsic to it.

This distinction is familiar to legal and political philosophers, as it is used routinely in theories of political obligation.¹⁵ The main moral point of that notion is the idea that one can have a moral obligation to comply with a law that is morally indefensible by virtue of, say, the moral merits of the system as a whole.

¹⁰ *Id.* at 172-73.

¹¹ *Id.* at 172.

¹² *Id.*

¹³ *Id.* at 172-73.

¹⁴ Naturalism also seems to imply that some precedents classified as mistaken were in fact correctly decided and represent sound moral judgments.

¹⁵ See, e.g., THOMAS HOBBS, *LEVIATHAN* 185 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

To see how Dworkin's legal theory might accommodate such cases of morally indefensible laws, we need yet another distinction, one that Dworkin employs.¹⁶ We can distinguish (what I will call) *plausible* principles from putative principles that are not even plausible because they endorse grounds for drawing moral distinctions that are patently arbitrary.¹⁷ Within the set of plausible principles, however, some are sound while others are unsound.

Consider two competing negligence law regimes. Suppose that drivers *A* and *B* were involved in an automobile accident to which both parties' negligence contributed by enhancing either the likelihood or the severity of the accident. A contributory negligence regime holds that any degree of negligence on *A*'s part nullifies any claim that *A* might have to compensation for the loss *A* suffered, even if *B*'s negligence was much greater than *A*'s and *A*'s loss was much greater than *B*'s. A comparative negligence regime holds that *A*'s claim for compensation should be discounted by the degree to which *A*'s negligence contributed to the accident or its severity. Courts have thought it reasonable to regard a party's negligence as adversely affecting her valid claims for compensation, which suggests that *both* a comparative negligence principle and a contributory negligence principle are plausible representations of the moral facts. For present purposes, let us suppose that one but only one of those two principles is sound. The prevailing view is that the comparative negligence principle is morally superior to the contributory negligence principle. Suppose that is correct: we then have an example of two plausible principles, one sound and the other unsound. We can contrast those two principles with the notion that one's racial classification can enhance or adversely affect one's claim to compensation. I believe Dworkin would say that such a putative principle is implausible because it draws a moral distinction along a morally arbitrary line.¹⁸

Now let us return to the lawyers' liability example; and let us agree that lawyers have a special obligation to the courts as well as to abstract justice. As we are assuming that those obligations are compatible with lawyers' obligation of due care to clients, the moral argument for an exemption, which cites either or both of the corresponding principles, is unsound.

I take the following to be true: One cannot soundly support a moral judgment, such as the judgment that lawyers are properly exempt from liability for malpractice, by invoking an unsound moral principle or by employing sound principles in an unsound justificatory argument. As we have no other

¹⁶ RONALD DWORIN, *LAW'S EMPIRE* 240-50 (1986).

¹⁷ *See, e.g., id.* at 240-42.

¹⁸ *See* DWORIN, *supra* note 1 (manuscript at 70) ("Convictions whose inconsistency is hidden in compartmentalization are also ineffective filters . . . because inconsistency across departments of moral personality shows inattention rather than genuine respect and concern for others and permits what further examination shows to be arbitrary difference rather than principled evenhandedness.").

grounds for exempting lawyers from a professional obligation of due care, the exemption is morally indefensible.

How, then, can a naturalist judge who agrees with those last points sustain the exemption as part of the best interpretation of past practice? She must suppose that the exemption can justifiably be enforced despite its moral flaws. The moral force of the legal judgment endorsing the exemption is exhausted by its justifiable enforcement.

So far, I think, so good. But we must then ask what makes the exemption justifiably enforceable. In his brief reply to a short version of these comments at the Conference, Dworkin alluded to both the fairness of treating like cases alike and to the reliance interest.¹⁹ And he added that, in the absence of these two principles, the exemption would not count as law.²⁰ Let us consider these claims.

I am less sanguine than Dworkin about the moral credentials of treating like cases alike.²¹ That precept has moral limits. First, its bare terms tell us too little (alike in what respects?) or too much (alike in *all* respects?). For determinate guidance, we need to know what limited aspect of past practice we are supposed to maintain. Second, if the aspect of past practice that we are told to follow is not morally permissible, the prescription may reasonably be challenged. Not only may there be objections to doing so, but there may be no moral merit at all in going on as before. It is an open question whether the lawyers' exemption from malpractice liability is unjust enough to deprive past practice of any claim to our respect.

As for the reliance interest, relying on past judicial practice, a lawyer might have declined the opportunity to purchase malpractice insurance that had been available and may be surprised by a change in the law. It is unclear, however, whether the surprise would be unfair. Suppose the lawyer was well aware that opposition to the exemption had been building within bench and bar. He might nonetheless have been lulled into carelessness because he was so accustomed to the exemption protecting him. In such a case, it is not clear that the reliance interest has any moral weight at all.

We should recall that Dworkin would deny that the exemption is law if such arguments do not soundly support its continued enforcement, even if the courts continue to maintain it.²² This suggests that naturalism fails to recognize some elements of existing law. Before moving on, we should also note that

¹⁹ Ronald Dworkin, Response to Panel II: Interpretation at *Justice for Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book* (Sept. 25-26, 2009) (transcript on file with the Boston University Law Review).

²⁰ *Id.*

²¹ See David Lyons, *On Formal Justice*, 58 CORNELL L. REV. 833, 854 (1973).

²² Dworkin, *supra* note 3, at 172 (explaining that a judge may look at a long line of precedent dealing with negligence suits against lawyers, disagree with the decisions' "putative principle," and "properly regard this entire line of cases about actions against lawyers as mistakes, and ignore or overrule them").

naturalism is supposed to provide not only sound criteria for determining the answers to legal questions, but also the basis for interpreting past decisions. We should understand past decisions in terms of the principles that justify them. In cases such as we are considering, however, past decisions are sustained although no principles truly justify them. In these situations, naturalism appears unable, on its own terms, to guide the interpretation of existing law.

We turn now to Dworkin's second example, which concerns statutory law:

Suppose that the most sophisticated interpretation of our Constitution, at the time of the Fugitive Slave Acts, contained no principle in virtue of which slaves had a right to be free, so that even a naturalist judge would have had to recognize those unfortunate statutes as perfectly constitutional. . . .

. . . Does the slaveholder whose slaves have escaped have any right, however weak, that the constitutional system be enforced on his behalf, as it is on behalf of the slaveowner who has managed to keep his slaves imprisoned at home? If you were a naturalist judge, you might think that he does. In that case you would have to decide the Fugitive Slave Cases for the slaveowners even though you despise them and deplore that constitution, and even though you privately work for a constitutional amendment or even for civil war. But you might also come to the opposite conclusion. You might think that no one can have any right, even a weak right, to the equal benefit of wicked laws. In that case you would decide against the slaveowners if you could, because the underlying reason for your concern with the past, which is people's abstract rights to institutional consistency, would have exhausted its power.²³

Once again, to make sense of this example, we must distinguish between legal decisions that are morally justifiable on their merits and decisions that cannot be justified. Dworkin assumes, in effect, that the Fugitive Slave Acts are morally indefensible.

As before, we are faced with the question of whether it is possible to justify the enforcement of statutes that we, and the naturalist judge, assume are morally indefensible. This time, however, the question arises within a morally distinguishable context. Dworkin tells us that his naturalist judge despises slaveowners, deplores the Constitution that authorizes the Fugitive Slave Acts,²⁴ and agonizes over the enforcement of these laws. As I will explain, that combination of attitudes is puzzling.

²³ *Id.* at 186-87.

²⁴ Dworkin's constitutional objections to the Fugitive Slave Act of 1850, which denied due process to escaped slaves, are beside the present point. See Ronald Dworkin, *The Law of the Slave-Catchers*, *TIMES LITERARY SUPPLEMENT*, Dec. 5, 1975, at 1437, 1437 (reviewing ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975)). The crucial point is the Constitution's support for slavery.

Let us suppose we are considering a case that arises between 1851 and 1860. Lawyers and legal theorists, then and now, with few exceptions, take for granted that the Constitution is the supreme law of the land and supports chattel slavery, not least by authorizing the Fugitive Slave Acts. It is unclear how Dworkin's judge can reconcile this with his naturalism. If the naturalist judge regards the Constitution as the supreme law of the land, then naturalism requires that he regard the constitutional order as morally justifiable. What sound moral principles could he imagine that might justify its support for chattel slavery?

It seems likely that elements of the U.S. constitutional order of the 1850s were morally justifiable. But that is not sufficient for present purposes. Dworkin's judge is deliberating whether the moral merits of the system as a whole provide sound moral justification for enforcing the Fugitive Slave Acts.

I assume that if the constitutional order can be justified, it can, in principle, be justified to those who live under it. But I do not see how a constitutional order that supports U.S. chattel slavery could have been justified to all of those living under it (including, of course, those who were enslaved).

If we took a Hobbesian view of the matter, the problem would be solved, for that view regards any centralized system of coercive social controls, however oppressive, as better than no system at all.²⁵ But I see no reason to make such an assumption or to ascribe it to Dworkin.

From a democratic perspective, the argument is deeply problematic. No plausible set of democratic principles is capable of justifying the system that prevailed in the 1850s, when, for example, most adults – including, of course, all women and slaves – were excluded from the political process.

What about Dworkin's reference to abstract rights of institutional consistency?²⁶ Would they not apply? I have already commented on the moral limits of treating like cases alike. But Dworkin seems to have in mind applying principles that provide the best interpretation of past practice – an idea that has problematic application to institutional arrangements, such as ante bellum chattel slavery, which are morally indefensible.²⁷

Furthermore, a commonplace characteristic of systems that are dedicated to racial, ethnic, religious, or class subordination is procedural unfairness against those who are targeted for discrimination. If we consider past practice more fully, including official malfeasance and nonfeasance, going on as before lacks the heart of institutional consistency.

²⁵ HOBBS, *supra* note 15, at 144-45 (explaining that under a sovereign government with unlimited power "men may fancy many evill consequences, yet the consequences of the want of it, which is perpetuall warre of every man against his neighbour, are much worse").

²⁶ Dworkin, *supra* note 3, at 187.

²⁷ I assume (as Dworkin allows might be the case) that the considerations which are capable of justifying property rights in general are incapable of including among them property in human beings.

The larger point is this: we have been given no reason to suppose that legal systems *generally* merit the requisite respect. Naturalism is supposed by Dworkin to apply to legal systems generally, not just to nice, humane, and reasonably just systems. And most actual systems within the scope of legal history would seem to have little prospect of meriting the necessary respect. In all of those cases, systemic considerations will not be available to justify enforcement of legal judgments and decisions that cannot be justified on their own merits. Thus, in those cases, naturalism cannot be relied upon as a sound basis for either identifying law or interpreting it.