Law, Justice and Integrity:
The Paradox of Wicked Laws

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Abstract—Ronald Dworkin’s theory of law forges a close connection between questions about the truth of propositions of law and the question of political obligation: law as integrity is a theory of legal practice that purports to explain, not only how the content of law is determined, but also why the law—in ordinary cases—imposes an obligation of obedience. The theory (as presented) is ultimately incoherent. If we accept Dworkin’s theory of the grounds of law we are obliged to reject his claims about its force; alternatively, if we accept his view of the force of law, we must reject his theory about its grounds: he cannot be correct about both force and grounds. Dworkin supposes that, in extraordinary cases, the force of law is cancelled or overridden; but the relevant considerations of justice are wholly internal to our identification of the content of law. Consistently elaborated, integrity denies the offending requirements legal status: lex injusta non est lex.

1. Introduction

By its insistence on a close interconnection between legal and political theory, Ronald Dworkin’s jurisprudence challenges a traditional division of labour. It denies that the question of political obligation—whether or not there is a moral obligation to obey the law—can be strictly severed from the question of how the law’s content can be determined. The true content of law is itself at least partly determined by moral considerations also pertinent to the existence of an obligation of obedience. According to Dworkin, a theory of law should offer an account of how state coercion can, in principle, be morally justified: it must explain when and why the law’s demands are legitimate, giving rise to a general duty of obedience. The questions of legitimacy and obligation are very closely related: ‘A state is legitimate if its constitutional structure and practice are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them.’ A ‘full political theory of law’ must

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address both the grounds of law—the basis for determining the truth of propositions of law—and the force of law—the ‘relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance’.

Since different legal theories will offer varying accounts of why law justifies coercion, at least in principle, many lawyers will think that the law’s force may on some occasions be overridden by competing considerations of political morality: people usually ‘recognize a difference between the question what the law is and the question whether judges or any other official or citizen should enforce or obey the law’. Consistently elaborated, however, Dworkin’s theory of integrity promises to undermine that distinction. The distinction between the grounds and force of law, while a natural counterpart of conventionalism, is likely to seem more problematic to anyone persuaded that law reflects, instead, a consensus of independent conviction. Such a consensus reflects agreement, not merely on the content of law, but on its capacity (thus understood) to create genuine obligations.

Dworkin supposes that his own theory of law as integrity, like conventionalism, accounts only for a prima facie obligation of obedience, which may in exceptional cases be overridden. On the one hand, law is in part a reflection of political morality: the grounds of law are given by an interpretation of legal practice informed and guided (inter alia) by considerations of justice. An interpretation of legal practice aims to make it the best practice it can be, from the perspective of political morality, while keeping faith with the dimension of fit. On the other hand, however, the law may be deeply unjust, obliging a morally conscientious person (whether citizen or official) to disobey its commands. The Fugitive Slave Acts may have been part of United States law before the Civil War even if many people denied that they imposed any moral obligation of compliance. Justice may sometimes override integrity, as a matter of moral, if not legal, judgment.

However, there are good reasons for supposing that when legal theory is deeply and resolutely interpretative, in the manner of law as integrity, a qualification to the moral force of law appropriate to conventionalism may be quite inappropriate and, indeed, misleading. The possibility of conflict between legal and moral obligation exists whenever there are moral reasons for

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2 Ibid 110.
3 Ibid 109.
4 Ibid 135–9. ‘Conventionalism’ is Dworkin’s reconstruction of legal positivism as an interpretative theory of legal practice: see ibid 94. The merits of Dworkin’s version of conventionalism are irrelevant to my present purpose, which is to explore the internal coherence of integrity as a theory of law and adjudication. So I follow his account of the contrast between conventionalism and integrity.
5 See e.g. ibid 225: ‘According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.’
6 Ibid 226–7: ‘Law as integrity is . . . both the product of and the inspiration for comprehensive interpretation of legal practice . . . It offers itself as continuous with . . . the more detailed interpretations it recommends.’
disobedience which are independent of the moral considerations applicable to the determination of the law’s content. Under Dworkin’s theory of law, however, all the considerations of political morality (including justice) relevant to the question of obligation or obedience are also granted a role in the interpretative process by which the content of law is ascertained or constructed. It follows (I shall argue) that Dworkin’s theory cannot consistently acknowledge the existence of wicked laws, which ought to be resisted on grounds of justice. Such statutes or decisions are either not truly laws at all, from the perspective of integrity, or their legal status, if affirmed, amounts to the complete repudiation of political obligation: the claims of integrity are inapplicable to the regime in question. When law is properly sensitive to the various dimensions of political morality that law as integrity prescribes, it is conclusively binding, in the sense that there cannot be countervailing reasons of justice in favour of disobedience. Wicked statutes, apparently authorizing iniquity, are at best purported laws, incapable of grounding either legal or moral obligations.

The reader may initially be inclined to reject the argument on the ground that, even if considerations of justice are relevant to the true content of law, there is no guarantee that the law will turn out to be even moderately just: the pertinent social facts may prove inimical to such an outcome. That view would, however, be mistaken. Law as integrity adopts the internal viewpoint of the participant in legal practice: it is only through his or her eyes that the content of law, and its capacity to create obligations, can be ascertained. And from that internal viewpoint there is neither valid law (in the appropriate interpretative sense) nor binding legal obligation unless the various demands of integrity are satisfied. But those demands cannot be satisfied unless legal practice as a whole can be plausibly understood as a broadly (not perfectly) just scheme of rights and duties, capable of eliciting the interpreter’s allegiance. Any gross violation of that general scheme (I shall argue) will challenge that allegiance.

If, then, we believe that a theory of law should remain agnostic on whether, in specific instances, the law ought morally to be obeyed or resisted, Dworkin’s theory is misguided. It is either mistaken about the grounds of law or mistaken about their force. The reader may conclude that it is Dworkin’s claims about the grounds of law that ought to be rejected: the law’s dependence on contestable moral judgment may be thought implausible. But since integrity is offered as an account of the doctrinal concept of law, attuned (primarily) to Anglophone, common law legal systems, we might well conclude that Dworkin’s mistake concerns, instead, the force of law.7 In that context, by contrast with a broader sociological account,8 agnosticism may be out of place. A holistic interpretative process of the kind envisaged will ensure that any

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7 Dworkin’s theory of law is stated to be ‘an interpretation of our own political culture’: ibid 216.
8 For the distinction between doctrinal and (inter alia) sociological concepts of law, see Dworkin, Justice in Robes (Harvard UP, Cambridge, Mass 2006) ch 8.
genuine legal requirement, as the upshot of integrity, is one that ought morally to be obeyed.

Dworkin locates the source of political obligation in a conception of community. In a ‘genuine’ political community, which shows all its members equal concern and respect, the law may be a source of binding obligations. It can be interpreted as a coherent body of legal principle, extending to everyone the rights or benefits secured for some: ‘A community of principle, faithful to that promise, can claim the authority of a genuine associative community and can therefore claim moral legitimacy…in the name of fraternity.’ 9 Admittedly, Dworkin adds immediately that such claims may be defeated by those of justice; but this is very doubtful. If everyone is treated fairly in accordance with a broadly just scheme of legal principle, there is little scope for the operation of iniquitous laws. The abusive treatment of individuals or minorities, flouting the standards more generally applied, would be unlawful (from the perspective of integrity) as a violation of the basic requirement of equal concern.

While conventionalism, which views law largely as a matter of social fact, is plainly inconsistent with any idea of conclusive political obligation, integrity can be interpreted quite differently. Legal practice is understood by reference to the moral and political ideal that integrity identifies; and that ideal regulates and qualifies the significance of the relevant social facts. The relationship between Dworkin’s twin criteria of fit and justification is properly nuanced and subtle: the true contours of legal practice (and hence the limits to the constitutional powers of the state) can only be finally determined in the light of the best interpretation overall. Anyone’s interpretation of law, accordingly, will reflect the principles of justice and fairness that also determine his ability to acknowledge the legitimacy of the legal order. So long as an interpreter retains his loyalty to the legal order, as a tolerably just system of governance, worthy of his allegiance, he will insist that its benefits be fairly extended to everyone, as integrity commands. Iniquitous statutes, flouting equality of respect and concern, necessarily violate integrity: they create no genuine obligations because, properly understood, they do not qualify as laws at all.

If Dworkin is right to think that law is capable of giving rise to a general obligation of obedience, so that a requirement’s legal status is itself a source of obligation (quite apart from its specific merits), the obligation arises in virtue of the law’s compliance with the various standards of political morality that integrity imposes. Any serious violation of that morality challenges the whole legal and constitutional edifice. The persistence of unjust rules or requirements, sufficiently grave to provoke civil disobedience or conscientious dissent, would threaten the integrity, and hence the legitimacy, of the legal order as a whole. It would do so, at least, in the eyes of any citizen or official whose moral convictions were thus affronted. It would confront him or her, as a competent

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9 Dworkin (n 1) 214.
legal interpreter, with the choice between principled opposition, based on appeal to integrity itself, or (wholesale) scepticism.

The position of the integrity-sceptic, who denies the justice and hence the legitimacy of law within his jurisdiction, is exemplified by Judge Siegfried: he despises the system in which he works.10 If Siegfried decides that legal practice in that jurisdiction can offer no justification for state coercion, he ‘should simply ignore legislation and precedent altogether, if he can get away with it, or otherwise do the best he can to limit injustice through whatever means are available to him’.11 In limited circumstances, Siegfried might think that certain rules could properly be enforced on the ground that they have induced reliance; but ‘weak’ rights could be acknowledged only if such rules, regarded discreetly, met minimum standards of justice.12 In ‘hard’ cases, dependent on application of an attractive interpretation of the legal record overall, there is no genuine law to be applied from his perspective. Such cases can be resolved, according to law, only by someone who ‘is in general sympathy with the system, who counts it as a flourishing example of law’.13 But a system that permits gross violations of justice, provoking conscientious disobedience, cannot (I shall argue) count as a flourishing example of law. There is, moreover, no significant distinction between hard and easy cases: the method of integrity, as Dworkin affirms, is equally at work in both.14 A case that turns on the application of unjust rules is, it follows, always a hard one.

In the following section I develop the argument by further study of the concepts of law, justice and integrity. Section 3 considers Dworkin’s account of political obligation, confirming the conclusions drawn in Section 2. In Section 4, I respond to what may initially be thought an important objection: my analysis of integrity misconceives its conception of legal authority, overlooking the distinction between ‘pure’ and ‘inclusive’ integrity. The distinction turns out to be a difference only of degree: the constraints imposed by the legal record, though genuine, are in the last analysis those that a morally responsible, non-sceptical interpreter can in good conscience accept.

2. Law, Justice and Integrity

Dworkin’s theory of law adopts the internal viewpoint, from which the truth of propositions of law depends on the nature of legal practice as the participants understand it: ‘it tries to grasp the argumentative character of our legal practice

11 Ibid 105.
12 Ibid 105–6. Insofar as Siegfried acknowledges a genuine conflict between legal and moral rights, he does so only because, in these circumstances, a conventionalist account of legal rights (based on protecting expectations) is substituted for integrity (cf. Dworkin, ‘Reply’ in Marshall Cohen (ed.), Ronald Dworkin and Contemporary Jurisprudence (Duckworth, London 1984) 258–9).
13 Dworkin (n 1) 107.
by joining that practice and struggling with the issues of soundness and truth participants face.\textsuperscript{15} From this perspective, rival theories of law are competing interpretations of a general concept of law that reflects our general assumptions about legitimacy and obligation. For law to make a legitimate claim to the allegiance of its subjects, it must satisfy the principle of the rule of law, abstractly conceived: ‘Law insists that force should not be used or withheld...except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.’\textsuperscript{16}

Theories of law offer different explanations of that abstract constraint on the assertion of state power.

While positivism, in the interpretative guise of conventionalism, reflects the value of protecting legitimate expectations, law as integrity, which requires the law to be interpreted as a consistent and coherent scheme of principle, points to a species of associative obligation deriving from membership of a genuine (rather than ‘bare’) community: legal practice must exhibit a pervasive concern for the equal welfare of all, underlying the discrete obligations that exist in particular instances. The adjudicative principle of integrity reflects a deeper principle of political integrity, which has implications for all branches of government: integrity ‘requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some.’\textsuperscript{17}

Conventionalism seeks to insulate legal reasoning, as far as possible, from moral controversy by ‘making the occasions of coercion depend on plain facts available to all rather than on fresh judgments of political morality, which different judges might make differently.’\textsuperscript{18} Integrity, by contrast, denies that legal reasoning is, or should be, insulated from moral controversy in that way. Whereas conventionalism makes the truth (or soundness) of a proposition of law depend on settled convention, integrity makes its truth a matter of moral judgment: the interpreter cannot, accordingly, escape his own responsibility for independent evaluation of the moral questions relevant to the content of law. There are genuine rights and duties to be determined in hard cases, when lawyers disagree, because we assume that there are correct answers to the moral questions that explain the disagreement; and each interpreter must determine such answers to the best of his ability.

In law as integrity, the truth of a legal proposition depends on the strength of its foothold within an overarching theory of the content of law—one that seeks a high level of coherence and consistency of principle across all areas or ‘departments’ of law. If we assume that such a theory can generate correct answers in hard cases, even if they are controversial, legal practice is poorly

\textsuperscript{15} Ibid 14.
\textsuperscript{16} Ibid 93.
\textsuperscript{17} Ibid 165.
\textsuperscript{18} Ibid 117.
represented as a debate over how the law should be made or developed in the gaps left around the perimeter of established conventions. Judicial decisions are better understood as being more fully constrained by existing law: a court must determine the parties’ existing rights and duties, even if that involves an elaborate and painstaking exploration of the foundations of legal doctrine. It is in that sense that jurisprudence is the ‘general part of adjudication, silent prologue to any decision at law’.19

Although integrity is a virtue distinct from justice, it represents the community’s collective attempt to define and enforce as law ‘a single and comprehensive vision of justice’.20 Adherence to such a vision, even when people disagree about what justice requires, safeguards equality: everyone is equally entitled to whatever rights or benefits the general scheme provides. The nerve of integrity, then, is that everyone must be treated with equal concern and respect; but the requirements of concern and respect (it seems fair to assume) will impose strong constraints on the permissible content of law. Equality of treatment cannot be an entirely free-standing political value: the merits of treating like cases alike must depend, at least in part, on the relevant substantive standards (and hence the criteria for determining likeness). If, then, integrity is an important value, capable of accounting for an obligation of obedience to law, it must be one closely associated with justice: everyone is entitled to the benefits of that scheme of justice that the legal record reflects or embodies, on its most favourable construction.

Equal concern is satisfied by something less than true justice; but it must betoken at least an approximation to justice.21 The correct conception of the abstract concept of equal concern would presumably be that given by the correct theory of justice; but any plausible,22 albeit incorrect, conception of equal concern can, in principle, generate associative obligations. Plausibility cannot, however, be identified with mere sincerity, which is course compatible with very great injustice.23 Occupying a ‘moral middle ground’ between mere consistency, on the one hand, and true justice, on the other,24 equal concern must amount to a scheme of rights and duties that portrays an existing legal tradition, correctly interpreted, as being (all things considered) worthy of allegiance. Its deficiencies must be offset by the necessity to keep faith with

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19 Ibid 90.
20 Ibid 134.
22 Cf. Dworkin (n 1) 201.
a common history, which can generate loyalties to a less-than-perfect political community.

If there is an obligation to obey the law, correctly interpreted, it must embrace requirements that justice would condemn: if it routinely surrendered to a competing moral duty to resist injustice it would have little or no substance. It does not follow that such an obligation could encompass laws responsible for very grave injustice. A genuine, but mere *prima facie*, obligation could of course be *overridden* by a duty to resist iniquity; but no such obligation arises. Fundamental conflicts between law and justice are already ruled out by integrity itself: they are excluded by the basic requirement of equal concern. Rules that discriminate unfairly against vulnerable minorities will plainly deny those concerned equality of respect and concern. Admittedly, integrity permits the consistent application to *everyone* of standards that justice condemns; but only up to a point. A system of governance that departed too far from the ideals and expectations of its (conscientious) subjects would cease to be a candidate for the interpretative approach integrity commends. Failing to embody a plausible conception of equal concern, it would invite only scepticism as regards its claims to legitimacy and allegiance. Political obligation is therefore *all or nothing*; and *radical* departures from justice must be accounted suspect, dubious official claims that law as integrity denies. It follows that any very grave departures from justice—sufficiently serious to threaten either the victim’s loyalty to the legal order, on the one hand, or his self-respect, on the other—would be condemned by any *defensible* interpretation of legal practice. Falling outside the boundaries of legitimate governmental action, the offending rules or decisions (or purported rules or decisions) would not qualify as *law*.

It is true that the injustice of someone’s treatment might be very *controversial*: integrity comes into its own as a political ideal precisely when people disagree about what justice requires. It might be argued, therefore, that even a grave injustice, as judged by someone’s standards of ‘abstract’ justice, might nevertheless be a legitimate requirement of integrity.25 Dworkin observes that even genuine communities, giving rise to associative obligations, may be unjust: they may reflect a defective conception of equal concern.26 Within the overall demands of integrity, the demands of justice must accommodate those of fairness. When people hold different views about what justice requires, political fairness demands that ‘each person or group in the community should have a roughly equal share of control over the decisions made by Parliament or Congress or the state legislature’.27

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25 Legal interpretation must take account of the potentially competing values of justice, fairness and due process, in addition to integrity itself: ‘Integrity becomes a political ideal . . . when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are’: Dworkin (n 1) 166.
27 Ibid 178.
Jeremy Waldron warns that it is misleading to talk of a conflict between justice and fairness, or between justice and integrity, if we focus on the need for collective decision-making. Fairness concerns the procedures for resolving conflicting views about what justice actually requires: it responds to what he calls the ‘circumstances of fairness’. In the same way, integrity is a response to the ‘circumstances of integrity’: divergent moral opinion and a history of political competition will have led to a patchwork of standards that will not reflect anyone’s own favoured conception of justice. Integrity is not, accordingly, a value that competes with justice: it comes into play ‘when the place properly assigned to justice in the life of a community... turns out to have been filled by disparate and competing conceptions of justice itself.’ The value of integrity is nonetheless dependent on justice, at least at the margins; for there is no law—nothing for integrity to safeguard—in the absence of an interpreter able and willing to embrace its demands. Each interpreter will impose his own moral limits on what the political majority can authorize; for him the conflict between integrity and justice is all too real. As Waldron recognizes, a person’s moral feelings about some injustice may be so intense as to outweigh any continued commitment to a political system that could produce it.

If, then, an interpreter believes that everyone enjoys certain basic rights, as necessary conditions of the respect for human dignity required of any legitimate government, he will not countenance any suggestion that integrity might permit their infringement. It is true that departures from justice will often be warranted by conflicting considerations of fairness and due process, insofar as integrity permits and requires; but very grave injustice to any particular group of citizens would undermine the idea of the true community of principle. For those citizens would then be denied any plausible version of equal concern and respect; their associative obligations would be counterfeit, even if their treatment was politically expedient and very popular. At least, that would be the judgment of any legal interpreter who thought—as almost any conscientious lawyer in our political culture is likely to think—that individuals have fundamental rights that even elected officials or institutions cannot legitimately override. It is no objection here that the content of basic rights may be controversial, jeopardizing any prospect of finding common ground. For integrity displaces justice, as Waldron observes, only when certain conditions are satisfied. Just as integrity would be redundant in an utopia, in which a single theory of justice attained unanimous support, so it would be impracticable in a dystopia where ideological opinion was too deeply divided.

29 Ibid 198. Cf. Postema (n 21) 835: ‘Integrity is justice in political workclothes, with its sleeves rolled up.’
30 Waldron (n 28) 207–8.
31 A lawyer’s decision in a hard case will reflect ‘not only his opinions about justice and fairness but his higher-order convictions about how these ideals should be compromised when they compete’: Dworkin (n 1) 256.
32 Waldron (n 28) 192–4. Waldron observes that a situation in which the circumstances of integrity no longer obtained ‘seems to be true of the postbellum United States and slavery’ (ibid 207).
From the perspective of the legal interpreter—the only perspective from which there is *law*, in the sense of integrity—a conflict arises whenever his own convictions about justice, which are always engaged, clash with enacted rules or judicial precedents that appear to reflect a contrary viewpoint. Unless that conflict can be resolved by an interpretation that gives due weight to justice, fairness and integrity, as the interpreter perceives these demands, he must succumb to scepticism. He cannot both treat the law as a genuine source of moral obligation, even *prima facie*, and condemn it as responsible for unacceptable injustice. Confronted by a gross violation of human rights, or the repudiation of moral standards he regards as basic to decent government, respectful of the governed, the Dworkinian interpreter must denounce the state’s actions as neither lawful nor legitimate. He would deny the possibility of an interpretation of law that both fitted and justified the established legal order.

These conclusions are plainly at odds with Dworkin’s suggestion that the law of the United States, before the civil war, may have included the Fugitive Slave Act even though many lawyers despised its purposes:

If a judge’s own sense of justice condemned that Act as deeply immoral because it required citizens to help send escaped slaves back to their masters, he would have to consider whether he should actually enforce it on the demand of a slave owner, or whether he should lie and say that this was not the law after all, or whether he should resign.  

This sounds like the dilemma faced by a conventionalist judge, who recognizes a clear distinction between law, as determined by settled practice, and political morality, which may condemn it. But law as integrity denies that clear-cut distinction, making the justice or injustice of a measure directly relevant to the question of what, if anything, it actually permits or requires.

Admittedly, Dworkin purports to distinguish between the grounds and force of law in order to accommodate the conventional view that the content and moral bindingness of law are separate questions; and it follows (on that view) that the law’s normal justification for coercion can be defeated in exceptional circumstances. We may disagree about how judges should have treated the Fugitive Slave Law even if ‘we share a general, unspecific opinion about the force of law when such special considerations of justice are not present, when people disagree about the justice or wisdom of legislation, for example, but no one really thinks the law wicked or its authors tyrants’. When someone really does think a statute wicked, however, he may also doubt its legal status. A lawyer who condemned the Fugitive Slave Acts as perpetrating grave injustice would not have thought that they were saved by considerations of fairness, even if his deliberations followed the course integrity commends. They were *not* law because they were inconsistent with a constructive account of law

33 Dworkin (n 1) 219.
34 Ibid 111.
as a whole, capable of vindicating its claim on its subjects’ allegiance; or they were ‘law’ in the purely ‘pre-interpretative’ sense of the exercise of force, without moral justification.

From the internal, participant-perspective, an interpretation of legal practice must sustain its moral capacity to justify coercion; and an interpretation that permitted iniquitous rules to generate grave injustice in particular cases would forfeit that capacity: it would call into doubt the legitimacy of the legal order. It follows from Dworkin’s ‘protestant’ view of legal interpretation, which makes each lawyer the final judge of legality, responsible to his own convictions about political morality, that the status of wicked rules will be controversial. It is precisely the interpreter’s ability to challenge unjust rules and decisions, as inconsistent with the tenor of the law as a whole, when favourably interpreted, which enables him to preserve the ideal of integrity in the face of serious threats of official injustice. He will tolerate departures from coherence and consistency only to the extent that his deepest convictions about justice and fairness permit: he gives way to contrary legal opinion only insofar as his loyalty to the legal order, as a (broadly) just scheme of governance, can survive unscathed. If he cannot endorse an account of the law compatible with fundamental justice, as he understands it, he has become a sceptic.

For the non-sceptic, who treats his own jurisdiction as a ‘flourishing example of law’, the content of law is determined by the process of constructive interpretation that integrity requires. There must be an appropriate balance between fit and justification, one which enables at least the majority of existing judgments and statutory provisions to be interpreted as a coherent and morally appealing system of legal principle. But the relationship between these criteria is subtle and complex. Beyond a certain minimum threshold, a highly attractive set of principles can accommodate remaining defects of fit because a judge can set off ‘the community’s infrequent lapses in respecting these principles against its virtue in generally observing them’. Such occasional lapses, moreover, will mark the existence of rules or decisions which are vulnerable (in due course) to reappraisal; and the greater the divergence from general principles the more doubtful their legal status will be. For once identified, these general principles will exert great force throughout the law. It seems reasonable to suppose that they must exclude certain legal outcomes altogether, if these are radically at odds with legal principle. Such supposed rules (or interpretations of rules) or precedents must then be rejected or revised: both law and justice, correctly understood, condemn them.

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35 See ibid 190: ‘Political obligation is then 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.’
36 Ibid 257.
3. Associative Obligations and the Conditions of Genuine Community

Dworkin’s discussion of associative obligations generally supports these conclusions; or does so once certain ambiguities are resolved. Such obligations arise only when a community satisfies certain conditions: the members must regard their mutual responsibilities as special to those within the group; these responsibilities must be understood as personal, rather than owed merely to the group as a whole; they must reflect a more general responsibility of concern for the well-being of other members; and the group’s practices must be understood to show an equal concern for all. If these conditions are met, Dworkin argues, ‘people in the bare community have the obligations of a true community whether or not they want them’.37 This conclusion needs to be qualified, however. Since these are interpretative, rather than psychological, conditions, they apply only when the context makes it appropriate: the satisfaction of what are essentially formal criteria must be accompanied by more substantive judgments of political morality.

Dworkin notes that since these obligations are subject to interpretation, ‘justice will play its normal interpretive role in deciding for any person what his associative responsibilities, properly understood, really are’.38 When the ‘bare facts of social practice’ are indecisive, the interpreter’s moral convictions will help to determine his view of its true character. Even when an unjust feature is ‘settled and unquestioned’, moreover, it may still be rejected: ‘the interpretive attitude may isolate it as a mistake because it is condemned by principles necessary to justify’ everything else.39 There is no guarantee, however, that a genuine interpretation will justify ‘reading some apparently unjust feature of an associative institution out of it’. If the injustice lies at the heart of the practice, scepticism may be the best response: ‘no competent account of the institution can fail to show it as thoroughly and pervasively unjust’, and it should therefore be abandoned.40 Purported obligations are not necessarily genuine, therefore, even if most members of the group do in fact recognize and honour them as if they were. It is not enough that the conduct of such members can be understood as exhibiting a pervasive practice of equal concern; their conception of equal concern may be deeply flawed, or violate other requirements of justice. It must be shown that the practice can be understood as an effort to comply with appropriate standards of equal concern, capable of eliciting our approval and endorsement—or the endorsement of whoever is the ultimate judge of whether the pertinent obligations exist.

37 Ibid 201.
38 Ibid 203.
39 Ibid.
40 Ibid.
The analogy between personal and political integrity is instructive here. We would normally hesitate to attribute personal integrity to someone whose conduct or convictions, though consistent and coherent, departed too sharply from our own standards of personal morality. Integrity requires, in addition to coherence, ‘that one act in accord with a defensible moral view’.\(^{41}\) Insofar as a person falls short of the moral standards we accept, the shortfall must be attributable to a reasonable difference of opinion—one that does not call into question his grasp of the most important attributes of honesty, or decency, or good citizenship. Political integrity must equally be conditional on conformity to acceptable standards of justice, according to the interpreter’s view of what these are. And only he can decide, as a matter of moral and political responsibility, how far justice and integrity may legitimately diverge. His scepticism starts where his conscience revolts at the idea that some rule or decision provides a source of obligation or merits respect: it could be acknowledged as a genuine legal rule or decision only at the price of rendering illegitimate the entire system to which it belongs.

In the case of a democratic polity, associative obligations cannot arise from the decisions of elected officials that exceed the limits of the legitimate powers of the state; the requirement of equal concern assumes an explicitly liberal hue. The conditions of ‘moral membership’ of a genuine political community—one that embodies a constitutional, rather than merely majoritarian, conception of democracy—secure for everyone a private sphere of judgment and action in matters of ethics where these are critical to moral personality or agency: ‘A political community cannot count anyone as a moral member unless it gives that person a part in any collective decision, a stake in it, and independence from it.’\(^{42}\) In the context of our own political culture, therefore, these conditions are necessary elements of integrity: no genuine legal obligations can arise from political decisions that flout these constitutional constraints; and that must be so whether or not such constraints are entrenched in a written constitution, enforced by a supreme court. If a citizen retains a responsibility for the central values of his ethical life that he cannot yield to the political community, even when he has an equal vote in its deliberations, he cannot acknowledge obligations that deny that responsibility. An enactment or judicial decision that purported to impose such obligations would be repudiated, or reinterpreted, by integrity.

Admittedly, Dworkin’s discussion of associative obligation is not quite consistent. He imagines an instance of persistent conflict between justice and integrity where, though justice triumphs, integrity seems to play a residual (non-sceptical) role. A daughter who marries against her father’s wishes, when paternalism is the only unjust feature of family life, retains her other family

\(^{41}\) Scott Hershovitz, ‘Integrity and Stare Decisis’ in Hershovitz (ed.) (n 24) 114.

responsibilities: only the specific duty to defer to parental choice is overridden by other moral considerations. But this account is surely confused. The daughter cannot plausibly ‘strive to continue her standing as a member of the community’ she has a duty to honour while violating what she concedes to be genuine, if inconvenient, obligations of obedience. If she owes ‘an accounting, and perhaps an apology’, it must be because her principled stance has caused offence that she naturally regrets. She is free to marry against her father’s wishes, however, only because she insists that, properly interpreted, her family responsibilities permit her to do so; or else because, if that view is quite untenable, such responsibilities are sham—imposed by an oppressive tradition that she now rejects. Her interpretative responsibilities are finally and necessarily a matter of personal conscience and conviction that she cannot remit to anyone else.

Are there, then, no circumstances in which we can acknowledge a genuine legal obligation yet conclude that other moral considerations, of greater weight, override it? We need to distinguish between political morality, pertinent to legal interpretation, and personal morality or ethics, beyond the domain of politics; for the law is already tied by integrity to basic standards of justice. If, for example, we think that the circumstances call for an exception to, or qualification of, a general rule, on urgent grounds of justice, it will already be part of the law, when fully elaborated —unless, of course, there are persuasive reasons (perhaps of political fairness) for concluding otherwise. It is only when we offer no challenge to the law, as a reasonably (not perfectly) just and coherent corpus of rules and principles, yet feel entitled nonetheless to disobey it, that a genuine conflict between legal and (other) moral obligation arises. Perhaps I should set my loyalty to a close friend above my duty to testify against him in court, even if I would not want to grant the same privilege to others as a matter of legal right. Or perhaps it would be right to help a close friend, in great pain from a terminal illness, to die, even if I think, on balance, that the law should prohibit such conduct in all cases, as a better safeguard against involuntary euthanasia—or at least that the legislature could properly make that judgment.

The Fugitive Slave Acts, therefore, presented judges with a moral dilemma that was also a genuine legal dilemma. While the possibilities of lying or resignation might be appropriate for a sceptic, by analogy with Judge Siegfried
in Nazi Germany, they are quite out of place in the context of integrity.\(^{48}\) Although a sceptic, sickened by the pervasive injustice of the legal order, would clearly contemplate such solutions, a judge who accepted integrity and thought an Act did grave injustice would challenge its validity, or deny that it really required what it (superficially) appeared to require: a correct construction would be one that made the statute consistent with fundamental principles of justice, even if the result might surprise (even dismay) the draftsman or many members of the legislature. As Dworkin had previously observed, there were principles of justice much more central to the law than the ‘particular and transitory policies of the slavery compromise’ that the courts in the Northern states reluctantly enforced:

The general structure of the American Constitution presupposed a conception of individual freedom antagonistic to slavery, a conception of procedural justice that condemned the procedures established by the Fugitive Slave Acts, and a conception of federalism inconsistent with the idea that the State of Massachusetts had no power to supervise the capture of men and women within its territory.\(^{49}\)

Admittedly, Dworkin observes that a judge may sometimes think it right to co-operate with a radically unjust regime, as the lesser of evils; and so even a Dworkinian judge might have held, as Joseph Story did, that a Fugitive Slave Law could be enforced as a necessary means of preserving the Union.\(^{50}\) But such a decision would not be the dictate of integrity: it would be a case where the slaveholders’ rights would ‘survive rather than depend on our interpretative judgments of the system as a whole’.\(^{51}\) If not a mere concession to conventionalism, it would represent a moral judgment, undisciplined by any genuine law, that such ‘rights’ (or expectations) could in all the circumstances legitimately override the moral rights of fugitive slaves. The critical point is that the legal and moral dilemmas are (for a Dworkinian judge) identical—whether or not to recognize a hideous law to save the Union.\(^{52}\)

4. Legal Authority and Interpretative Autonomy

I have argued that there can be no fundamental conflict between law and justice, from the perspective of integrity; and it follows that any eligible interpretation of law—one its author could conscientiously defend—will exclude the possibility

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\(^{48}\) Dworkin has perhaps taken insufficient heed of his own warning against recourse to tyrannical regimes as a test for a theory about the connection between moral and legal rights: see Dworkin, ‘Reply’ in Cohen (n 12) 260.


\(^{51}\) Dworkin (n 1) 106.

\(^{52}\) Dworkin’s expressed adherence to the distinction between grounds and force of law appears to lie at the root of the puzzles and ambiguities explored by Levinson (n 50). It seems to promise a distinctively legal solution to problems that, in this context, integrity cannot provide: the ‘circumstances of integrity’ are absent.
of very grave injustice in particular cases. The lawyer’s ability to interpret
the legal record as a coherent set of rules and principles, capable of generating
moral obligations of compliance, depends on its compatibility with the
standards of justice and fairness he affirms as basic conditions of legitimacy.
These standards will govern both legal interpretation and constitutional validity.
A rule capable, on one construction, of giving rise to grave injustice would be
understood as containing implicit exceptions or qualifications necessary to
safeguard fundamental rights. A judicial decision that infringed such rights,
on its most favourable reading, would have to be rejected as mistaken, made
in ignorance of the first principles of the legal order.

Are such conclusions really consistent with the nature of legal authority? May
it not be the case that even grossly unjust rules, violating basic principles
integrity otherwise affirms, are nonetheless firmly embedded by authoritative
precedent or statute? Dworkin has distinguished between ‘embedded’ and
corrige mistake: legislative supremacy may ensure that a statute retains its
specific authority even if it lacks any broader ‘gravitational force’.53 A legal
record otherwise amenable to a constructive interpretation of the sort integrity
demands may nevertheless be marred by isolated, but undeniable, moral flaws,
resistant to the beneficial force of broader constitutional principle. Would an
interpreter not then have to qualify his generally favourable view of the legal
system (sufficient to ensure its legitimacy) by admitting its grave deficiencies
in a limited range of unfortunate cases?

Dworkin’s distinction between ‘pure’ integrity and its more prosaic counter-
part, applicable to ordinary legal reasoning, may initially be thought to suggest
an affirmative answer. 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’.54 A judge, however, is bound by
inclusive integrity: ‘he must give effect to statutes that pull against substantive
coherence and to precedents and local priorities that stand in the way of
consistency over different departments of law’.55 Yet the distinction between
these conceptions of integrity can only be a matter of degree: the law ‘works
itself pure’ as impediments to coherence and consistency are challenged and
(ultimately) repudiated. Doctrines of precedent and legislative supremacy must,
accordingly, be sensitive in application to the urgency of the demands of justice
they qualify; their resistance to the demands of pure integrity will be a function
of context and circumstance.

The nature and limits of legal authority must be integral features of an overall
interpretation of legal practice, consistent with our ordinary assumptions about
legitimacy and obligation. The close dependence of legal rules on the moral

53 Dworkin (n 47) 121–3.
54 Dworkin (n 1) 407.
55 Ibid 405.
values that inform their interpretation, revision and application suggests that the principles determining legal authority are themselves highly elastic, sensitive to context. Principles of legislative supremacy and *stare decisis* dictate obedience to statutes or common law rules as they are correctly interpreted, in accordance with justice (in the guise of integrity). Admittedly, doctrines of legal authority will be interpreted more strictly in some periods than others, as Dworkin observes; the constraints of fit will then appear more onerous. But even when legal practice generally frowns on departures from precedent or the literal meanings of statutes, emphasizing the values of certainty and predictability, there must always be some leeway in exceptional cases. Such leeway is a crucial safety-valve; for the hard case may test the interpreter’s allegiance to the legal order, forcing a choice between interpretative flexibility, on the one hand, or wholesale scepticism, on the other.

It is a feature of Dworkin’s ‘protestant’ theory that an interpreter is entitled to press his own analysis of law against competing accounts even when the latter are popular or influential. Even the decision of a Supreme or Constitutional Court may be challenged as a denial of integrity, correctly determined. The stance of Jehovah’s Witnesses, who refused to accept the Supreme Court’s decision that a state law requiring students to salute the American flag was valid, was vindicated when the Court’s decision was reversed in *Barnette*.56 Dworkin has defended the Witnesses’ right to disobey the first decision: they were entitled to resist a doubtful view of the law on grounds of conscience. Civil disobedience provides a dramatic demonstration of dissent, without violation of integrity: ‘A citizen’s allegiance is to the law, not to any particular person’s view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires’.57

Dworkin stresses, of course, that an individual may not disregard what the courts have said; but could submission be demanded, as a matter of political integrity, when the consequences for justice or conscience were especially grave? The citizen does not act unfairly in following her own judgment, Dworkin argues, when the law is uncertain, ‘in the sense that a plausible case can be made on both sides’.58 But the law remains, in the pertinent sense, uncertain whenever the citizen denies the legitimacy of a supposed requirement, or the propriety of a constitutional interpretation that affirms its validity. Whether or not there is a ‘plausible case to be made on both sides’ is a question that the interpreter must, in the final analysis, decide for herself; for every citizen is guardian of the constitution she honours, accepting the

57 Dworkin (n 47) 214.
58 Ibid 215.
responsibility (if she is not a sceptic) that the demand of integrity imposes. The Jehovah’s Witness may be understood as having struggled to reconcile her civil and religious obligations, invoking the freedom of conscience that she took the constitution she affirmed to honour: acknowledging the flag as ‘a symbol of fairness and justice’, she nonetheless declined to join a ceremony condemned by her religion.

There is some truth, then, in Leslie Green’s observation that Dworkin’s protestantism ‘turns principled civil disobedience into obedience to true law, since the disobedient are merely trying to keep faith with their own intentions in maintaining the practice of law.’ Dworkin replies that this confuses protestant interpretation with the erroneous view that there is no single right answer to a question of law, but the reply is not entirely persuasive. When the right answer is controversial, the competing views reflect contrasting judgments of political morality; and those (or similar) judgments will also determine the boundaries of legitimacy. However much an interpreter attempts to distinguish her legal from her other moral obligations, she cannot conclude that the law flouts the most important moral principles without ipso facto impugning its authority. She cannot divorce her interpretation of law from the conditions that preserve her own allegiance to it; or at least she cannot do so without succumbing to scepticism: the connection between legal and political obligation is itself a feature of integrity that she must honour. In extreme cases, then, a protestant view may leave little, if any, space between the content of law and independent moral conviction; for in determining the true requirements of law she must at the same time try to keep faith with her own commitment to sustaining its practice.

It is surely a consequence of Dworkin’s theory of the grounds of law, when properly elaborated, that no general principle of legislative supremacy could be absolute, even if there were no written constitution or settled tradition of judicial (constitutional) review. The constraints of justice that any interpreter brought to his own interpretative reconstruction of legal standards would exclude certain outcomes: these are the price of his own continued membership of the interpretative legal community. The notion, for example, that, in the absence of formally entrenched rights, absolute legislative supremacy must be accepted as a necessary feature of British legal practice belongs to conventionalism rather than integrity: it depends on the terms of a rule of recognition constituted (for one reason or another) by the mere facts of official practice.

59 Cf. John Rawls, *A Theory of Justice* (OUP, Oxford 1972) 390: ‘There can be no legal or socially approved rendering of these principles that we are always morally bound to accept, not even when it is given by a supreme court or legislature.’


61 Green (n 46) 276.

62 Dworkin’s ‘Reply’ in Burley (n 46) 378–9.

63 Cf. Perry (n 24) 204.
Whereas conventionalism insists that judges should respect established legal conventions ‘except in rare circumstances’, when law can be overridden or displaced by appeals to justice or policy, integrity makes every legal doctrine sensitive in application to considerations of political morality.

A defender of unqualified parliamentary sovereignty must therefore reject integrity. It may be a better alternative, however, to embrace Dworkin’s theory of the grounds of law, repudiating absolute sovereignty. For we should not suppose that a lawyer who denies the validity of an iniquitous statute, in the absence of an explicit power of judicial review, must be guilty of ‘invention’. His acceptance of legislative authority in ordinary cases is enough to satisfy the ‘rough theshold requirement’ imposed (at a minimum) by the constraints of fit. These constraints merely require a lawyer to distinguish between his views about ‘abstract’ justice, fit for utopia, and his bona fide determinations of integrity:

Any plausible working theory would disqualify an interpretation of our own law that denied legislative competence or supremacy outright or that claimed a general principle of private law requiring the rich to share their wealth with the poor. That threshold will eliminate interpretations that some judges would otherwise prefer, so the brute facts of legal history will in this way limit the role any judge’s personal convictions of justice can play in his decisions.

A lawyer who challenges the validity of a wicked statute, or who insists on a non-literal (more benevolent) interpretation, does not deny legislative competence or supremacy outright; he repudiates only an absolute doctrine of supremacy as inconsistent with the complex adjustment of competing principles that law as integrity entails.

If all aspects of practice were subject to moral scrutiny, as an intrinsic element of legal reasoning, there could be few, if any, ‘brute facts of legal history’ that would exclude particular interpretations automatically. In particular, a challenge to legislative competence, which denied its capacity to authorize very serious infringements of fundamental liberties in the absence of compelling justification, could not be rejected on merely historical or conventionalist grounds. Its appeal to principles of justice reflected in other parts of the law, including the general common law, would demand consideration on its merits. If persuasive, as an interpretation of law that affirmed its moral authority—showed legal practice in its best light—it would have to be accepted as correct. Statutory curtailments of basic freedoms, lacking persuasive justification, would be invalid, accordingly, even if many lawyers, clinging to formerly unquestioned dogma, thought the opposite.

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64 Dworkin (n 1) 116.
65 Ibid 255.
66 Allan (n 60) chs 7 and 8.
The possibility of controversy over fundamental principles, characteristic of complex cases in superior courts, no doubt depends on the stability achieved by shared understandings across the broader spectrum of legal practice. There must be a sufficient overlap of opinion or conviction ‘to allow debate over fundamental practices like legislation and precedent’ to proceed in the interpretative spirit, ‘contesting discrete paradigms one by one, like the reconstruction of Neurath’s boat one plank at a time at sea.’67 Gerald Postema has emphasized the essentially collective and interactive nature of interpretation of a common practice.68 Integrity, then, requires a delicate balance between individual conscience and collective understanding; but only the individual interpreter can decide where the limits of justified co-operation fall. Each lawyer’s interpretation of law, moreover, will be offered as an account of what justice (and fairness) demands, in the context of a specific question of law: it defends a moral stance which may or may not elicit widespread assent.69 No lawyer’s account of the law will be identical with that of any other lawyer: the law is essentially a framework for argument about the respective demands of justice, fairness and integrity. Statutes and precedents provide a crucial focus for such debate; but the rules they are taken to establish have only tentative and temporary authority, subject always to reappraisal in the light of continuing reflection and dialogue.70

Insofar as Hercules71 must bow to doctrines that inhibit his pursuit of justice, in the sense of pure integrity, it is only because he is part, rather than sole, author of the law’s content in any particular case. Even pure integrity is a fundamentally political, as well as moral, virtue: it is another name for justice, as the right ordering of the community, having regard to the historical precedents and collective deliberation central to legal practice. Legislative supremacy acknowledges the efforts of the majority to determine the true requirements of justice, seeking to repair errors and omissions in the current public record of those requirements. Deference to precedent, where appropriate, recognizes the guidance afforded by settled tradition. The discovery of a purer law within the existing law is really a metaphor for unanimity: law’s ultimate ambition is the identification of principles of justice that all can accept and celebrate as uniquely correct for the circumstances of their own historical community.

Under inclusive integrity, ‘fit’ stands as a marker for all the various considerations that militate, in any particular instance, against direct enforcement of the principles of justice vindicated by history and tradition. The demands of due process limit the scope for internal, systematic ‘reform’ of what have developed as discrete ‘departments of law’: it may be unfair to uproot established rules

67 Dworkin (n 1) 139.
69 Dworkin (n 1) 255–7.
71 Hercules exemplifies the judicial role according to law as integrity: Dworkin (n 1) 239.
or precedents without prior warning. It may also be unfair to adopt an interpretation of statute that, though superior from the perspective of justice, would defeat legitimate expectations based on the supposition of a contrary meaning; or to revise a construction which, though dubious in the light of evolving legal principle, has been widely relied on by citizens or officials. Doctrines of precedent and legislative supremacy impose further constraints of fit: the correct theory of a given statute, for example, may not match the best theory of the law as a whole.

In every case, however, the relevant constraint of fit is one imposed by political morality: it is a product of interpretation, rather than an independent condition of the interpretative enterprise. When the requirements of justice are sufficiently pressing, the constraints of fairness or due process will give way to the need for a morally acceptable outcome, everything taken into account. This is surely implicit in Dworkin’s admission that the different dimensions of interpretation are finally responsive, in their mode of interaction, to Hercules’s political judgment: ‘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.’72 It follows that a wicked statute—unjust to a degree that challenges the interpreter’s adherence to the legal order—could not consistently be acknowledged as law. Flouting minimal requirements of justice, it could not be sustained by considerations of fairness: there is no duty to defer to the wishes of the majority, or its elected representatives, to sustain (what the interpreter conceives to be) iniquity.

It was part of Dworkin’s case for the judges’ right to resist legislation they despised, in the context of the Fugitive Slave Acts, that the slavery cases were hard ones: the law was not clearly settled in favour of the slave-catchers. But the crucial point is different: the law cannot be clearly settled if, as officially interpreted, it may be thought to contradict the fundamental principles of justice—those that, in the last analysis, confer on the legal order the legitimacy it enjoys in the eyes of those who acknowledge its authority. The limits of interpretative flexibility are always partly subservient to context. The requirement of fit is ultimately one applicable to the body of law as a whole, in the sense that an interpretation can survive a poor fit with the text of a specific statute, or the doctrine of legislative supremacy, if that is necessary to preserve integrity overall. While, in ordinary circumstances, an interpreter’s ‘formal’ convictions about statutory interpretation cannot properly adjust automatically to favour his more substantive convictions,73 the extreme case by contrast threatens

72 Ibid 257.
73 Ibid 236–7.
Dworkin’s distinction between interpretation and ‘invention’: it presents a challenge to the possibility of a morally acceptable reading.\textsuperscript{74}

If a consensus over sources of law were grounded in conviction, rather than convention, there could be few features of legal practice immune from the critical, internal inquiry that a general interpretation requires. No legal doctrine would enjoy a standing wholly independent of the context in which it was asserted or applied. Legislative supremacy and \textit{stare decisis} would have the character that the law, regarded as a coherent scheme of justice, accorded them on correct analysis. If such doctrines were understood to serve valuable ends, within the broader scheme of principle integrity commands, their nature and limits would be sensitive to those ends. If legislative supremacy were honoured chiefly as a requirement of democracy, it would not sanction the enforcement of statutes that plainly \textit{undermined} democracy; and if democracy were valued as an appropriate means to the ultimate end of \textit{justice}, it would repudiate measures that flouted such essentials of justice as the principle of fair trial for those accused of criminal offences.\textsuperscript{75} There are limits to the legitimate authority of a popular majority or its elected representatives. No competent legal interpreter, who recognized the law’s moral claim to obedience, could accept a constitutional theory that permitted the infliction of very grave injustice, incompatible with principles acknowledged as fundamental in other parts of the law.

\textbf{5. Conclusion}

I have argued that Dworkin’s theory of law is marred by an important confusion. It makes the justice of the law critical to both its authoritative status and its specific content, but concedes that its moral claims may yet be outweighed by the demands of justice; and these positions are ultimately inconsistent. We cannot accept both Dworkin’s theory of the grounds of law and his view about its force. The moral value of integrity stems from the basic requirement of equal concern, which demands that everyone is fairly treated in accordance with standards of justice which, though imperfect, retain the respectful allegiance of the committed interpreter. Departures from those standards would threaten the very principles of law that underpin its legitimacy. When the content of law reflects the demands of integrity, it makes a moral claim on the citizen’s conscience that cannot consistently be overridden on grounds of justice: the various competing requirements of political morality.

\textsuperscript{74} Cf. David Dyzenhaus, ‘The Rule of Law as the Rule of Liberal Principle’ in Ripstein (n 50) 69: ‘The distinction between institutional rights and background rights disintegrates when the judge finds the moral content of the law obnoxious.’

have already been fully taken into account. Legal obligations, correctly determined, can only be rejected wholesale—by the sceptic, who challenges the legitimacy of the legal order itself.

That interdependence of legality and legitimacy may explain why, even when judges acknowledge doctrines of absolute legislative supremacy and binding precedent, they usually reserve the right (if rarely exercised) to resist iniquitous measures that would flout the basic ethos of the legal order. Common law judges often enter caveats of that kind. Like local priority, doctrines of legislative supremacy and precedent serve to discipline legal reasoning, promoting convergence of views on acceptable answers to questions of justice; but they cannot coherently undermine the *fundamentals* of justice—those elements sustaining and informing the overall scheme at a thousand points and underpinning the very disposition (in those who have it) to treat law as a scheme of justice.

It follows that there are only two logically defensible responses to official demands that threaten basic principles of justice. Either such demands have no validity, deriving no legal authority from the constitutional order, correctly interpreted; or their (formal) validity, if acknowledged, strips the legal order of any claim to legitimacy, sufficient to warrant the allegiance of anyone respectful of those requirements of political morality that integrity makes pertinent to the content of law. There is no third alternative. Dworkin’s attempt to accommodate the conventional view that law imposes only a *prima facie* moral duty of obedience, defeated in cases of grave injustice, is misconceived. The truth of propositions of law is a function of the demands of that scheme of justice sanctioned by legal practice and tradition, when correctly interpreted. While the tradition retains its moral authority, preserving the interpreter’s allegiance to law, it excludes any incompatible legal proposition. Such a proposition, whatever its source, official or otherwise, misstates the true content of legal obligations.

Law is an interpretative concept which reflects or embodies the values that inform the political ideal of the rule of law. The truth of legal propositions therefore depends on the criteria identified by a persuasive account of that ideal. If, as Dworkin contends, the value of legality (or the rule of law) is best explained by reference to an ideal of political integrity—that the state should apply a coherent set of principles to all citizens—that is because the underlying idea of equality is a principal requirement of justice itself. The rule of law, as a political ideal, makes law dependent on justice in the sense that everyone is equally a member of the ‘moral community’ constituted by the just state.

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76 Dworkin distinguishes ‘interpretive’ from ‘criterial’ and ‘natural kind’ concepts. Interpretative concepts figure in the explanation and justification of shared practices, including law: see Dworkin (n 8) 9–12.
But we should not suppose, with Dworkin, that there remain even ‘very rare cases’ in which ‘judges may have a moral obligation to ignore the law when it is very unjust’, even if that is the popular or conventional view.\textsuperscript{77} Although law and justice are independent, if closely related, interpretative concepts, they lead to the same conclusions about the truth of propositions of law when united in the manner dictated by the rule of law.

\textsuperscript{77} Ibid 18–19.