Integrity, Equality and Justice

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My aim is to raise questions about Dworkin's theory of law as integrity. I shall do this by proposing two views: first, that justice is a better model for law than integrity and second, that even if integrity is the better model, that will only be on the contingent ground that integrity happens best to fulfil justice's requirements in the real world. Another way of putting this second point is to say that integrity is only a theory about what is second best to justice, and this shows that integrity could only be, to borrow a term that Dworkin uses in relation to his theory of equality of resources, a theory of 'equity deficit repair'.

I make six assumptions in this paper. First, I assume that when we debate what is just that we think there is a right answer to the question even if we are uncertain what it is.[2] Second, I assume that because legal positivism cannot account for controversial argument about what the law is in a way that characterises it as distinctively or significantly *legal*, legal positivism has nothing to offer in what follows. Third, I assume that, at least at the highest appellate level, where argument concentrates on resolving difficult legal problems, it is problematic to say that a judge's private convictions about what is just can be clearly distinct from what the law requires. Fourth, I assume that no issue in legal, political and moral philosophy can be 'settled' by reference to the way people happen to speak; a starting point, yes, but not a matter of closure (and so the meaning of integrity – see later – is a matter of getting sense out of the idea, not looking to how the word is in fact used). Fifth, when I talk of legislative and judicial duties to be just, I do not mean that judging 'what is just' is merely a matter of ignoring or discarding other people's unjust decisions, actions, beliefs, and attitudes.

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1. I presented this paper during 2004 at Otago University, the University of New England, NSW, the School of Public Policy, UCL and the Oxford Jurisprudence Group. I am grateful for many helpful suggestions. I am particularly grateful to my two research students, George Letsas and Eva Pils.

2. I agree substantially with what Dworkin says in 'Objectivity and Truth: You'd Better Believe It', 1996 *Phil. & Pub Affairs* vol. 25 No. 2 p. 87.

This is because: i. justice distributes the power to decide what is just (through 'procedural' requirements of, say, democracy), and ii. being just to a person could require respecting people's mistaken views about what is just (e.g. respecting unjust legislation produced in good faith) and iii. justice respects personal responsibility (people's reasonable expectations should be met – the 'principle of certainty' – when they have been led, mistakenly perhaps, to a particular belief about what was likely to be decided). Sixth and finally, in one sense my thesis is negative: it claims that the concern for the justice of decision-making is foundational, certainly for the courts, and probably also for the legislature, in asserting that all unjust decisions are not justified in law. This negative way of putting it recognises that there will be decisions of the legislature which are contrary to justice. There will be many ways in which a community will express and organise itself, all of which could be equally just, and some and perhaps many of which will be matters of political compromise. I shall claim that the primary task of judges is to ensure that there is just redress, subject to the general balancing judgements required in the fundamental principle of treating people as equals.

The moot point in all that follows lies in considering the position of a judge who finds that according to his understanding the law requires him to come to a particular decision and he has no doubt that all things considered, the decision would be unjust. I am doubtful whether such situations are at all common. A good example, particularly so since Dworkin makes use of it himself, is found in the judicial approaches to the Fugitive Slave Acts in the nineteenth century in the United States. The Acts, the result of an early agreement from the slave-owning states to join the Union, denied freedom to slaves who escaped into the non-owning states, requiring them to be returned. This legislative provision compromised the non-owning states' stance on slavery, and put judges in these states in a difficult position. Since the wording and intention of the Acts seemed clear, it is reasonable to suppose that there was a conflict between the personal consciences of some anti-slavery judges and what they thought were the clear demands of the law. Robert Cover, in his study of the slavery cases that arose as a result of the Acts, concluded that there were four possibilities confronting the judge: i. he could apply the law, so acting contrary to his conscience, ii. he could act according to his conscience and ignore the law, iii. he could resign, and iv. he could lie (thus preserving his conscience in one sense) and say that the law did not require what he believed it to require.

But there is clearly a fifth possibility, which is to examine the law as a whole, outside the four corners of the Fugitive Slave Acts (and see the law in its 'full context' as people sometimes say) and read those Acts in terms

of the most fundamental values of the US Constitution stated in its Preamble: 'We, the people of the United States, in order ... to establish justice ... promote the general welfare, secure the blessings of liberty to ourselves ...' and conclude that the balance between the principles justifying the institution of the Union and those condemning the treatment of the fugitive slaves came down in favour of the slaves. Dworkin's position on this is fairly clear. While his view is that in controversial cases the controversy should be resolved in favour of the most fundamental moral principles explaining the Constitution, there could nevertheless be cases where a judge might find that his duty to his conscience overcame his duty to apply law:

> '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. The principle of integrity in adjudication, therefore, does not necessarily have the last word about how the coercive power of the state should be used. But it does have the first word, and normally there is nothing to add to what it says.'[3]

Integrity as real world virtue

Integrity for Dworkin is a virtue to which both law-makers and judges should subscribe. It is not a word in general use amongst legislators or judges, but it certainly corresponds to ways that both legislators and judges act and speak. In ordinary speech, we substitute for 'integrity' the more familiar ideas of 'consistency of law', 'certainty of law', the 'justice of the law', and claims that the law must be understood as 'rational'. These ideas come together in the idea of integrity. The idea is most intuitively grasped through the metaphor that Dworkin uses. A person who has integrity acts in a particular way. We do not have to say that a person who so acts does the right thing in some senses, just that he acts in a way that shows that he acts according to his own convictions. So while we may disapprove of what a person does, say, by giving a certain piece of advice about abortion, or of his harsh treatment of animals, we can still say that such a person acts 'with integrity' because his acts (and beliefs) represent his genuine conviction (about abortions, animals, etc).

3 *Law's Empire* (Harvard, 1986), p. 219.

Dworkin's metaphorical extension of the idea of integrity to law is a reasonable one. We can say that laws are unjust but we can at the same time say that they were the result of the genuine conviction of the community, and it is here where the personification does the bulk of its work. The difference between the individual person, in whom we understand most readily the idea of integrity, and the community is that the community is viewed, not just as a collection of individuals, but as in some sense both united and distinct from the individuals who are members of the community. It is this body that should 'act with integrity'. That means that decisions made by the community as a whole in which the coercive power of the community is used must for Dworkin be justified in accordance with the requirements of integrity. So the law has this particular moral advantage: it exhibits an important moral virtue just like an individual, in acting on the basis that a particular legal or legislative decision represents the genuine and considered conviction of the community, read as a whole, even though the decision, as in the case of the individual, might be wrong in some other way. In this sense, integrity in law resembles honesty in a person.

We can see the limitations of integrity, of course, in the case of the individual. There are people who act with integrity whom, while we think they hold genuine moral convictions and are to be admired for forming them and acting upon them, we also think to be capable of doing bad. We can 'admire the integrity' of those with whom we are in fundamental disagreement and who do things that are therefore to our mind quite wrong. We can give extra force to this if we are robust in accepting the force of our own moral judgements. We do not have much difficulty in seeing that a person can 'act with integrity' and do something morally vile. To someone who believes that a woman's procreative life is her own to develop when her decision affects no-one's rights or interests, a decision made by 'men with integrity' to force her to have a child against her wishes, is an immoral act because of its disrespect for her autonomy. We can multiply these examples to see that integrity and, at least, moral outcomes, can come far apart in individuals. The extension of integrity, by way of community personification, brings in the element of how a combination of views about what is right can sensibly be said to form a 'genuine conviction'. We can say that of the individual at least more sensibly than of the community and there is a difficulty in saying that by a combination of procedures for ensuring all views are taken into account in some appropriate way, the ideal of integrity promotes the 'genuine conviction', even if wrong, of the community.

However, Dworkin proposes integrity as a matter of 'consistency'

towards all, including not just those who are living but those who have been treated in a particular way in the past. True, it is a matter of 'consistency' as 'a matter of principle' and not mere 'elegance', as he says. But the assertion that consistency of behaviour should be principled suggests that inconsistencies of behaviour are permissible if they conform to some principle other than consistency (genuine equality of concern, say), and that suggests that consistency is not the driving idea.

Even if we ignore any sense of circularity, another problem remains. Integrity requires honesty. No-one could complain of another's lack of integrity if that person, aware now that he has acted wrongly, changes his behaviour. Consistency has no part to play here, thus making it clear that the primary principle underlying the idea of integrity is something other than 'speaking with one voice' to all. To be fair, the idea of a community 'integrity' makes a good intuitive appeal to our idea of what we demand of our public institutions. We want them to act honestly, and, of course, consistently (as people with 'genuine convictions' are likely to express those convictions with consistency) and, further, consistency will not be quite enough, since those decisions that are 'genuinely' thought to be wrong must be modified, or discarded.

Perhaps the more potent argument in Dworkin connects integrity with justice and fairness. Briefly, as he says, 'integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation'.[4] The idea of relationship is brought out by his 'Neptune' argument in which, like the planet Neptune, integrity is 'discovered' by the gravitational forces of the surrounding known planets, fairness and justice. Dworkin argues that in an ideal world, the proper model for law would be justice. This is presumably because justice alone provides the best justification for the use of the community's coercive powers. But in the real world, there are disagreements about what justice requires, and so we need to develop some means of resolving such disagreement. Here, Dworkin employs another facet of morality, that of fairness. In the real world we can devise fair procedures according to which decisions about what is just is distributed in the right way. Fairness requires – but also allows – us to take account of wrong views of justice because there is no means, in the real world, of satisfying everyone whether one view of justice is right.

4. *Law's Empire*, p. 219. And see p.166 where Dworkin says: 'Integrity becomes a political ideal when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles..'

The way fairness works as a model of law, according to Dworkin, makes quite clear how fairness is distinct from and may appear to conflict with justice. How does fairness, which seems to be a dimension of morality workable in the real world, work as a model of law? Take the legislative majority in a democracy, in which legislation is produced in accordance with fair procedures. It is fair to each member of the legislature to take into account what view each has as to what the justice of proposed legislation is. And so a model of law based on fairness, Dworkin argues, would require a distribution of the views of what justice requires in the legislation in proportion to those voting. Say two-thirds of the legislature voted in favour of limited abortion rights and one-third voted against. Fairness, Dworkin says, would require a law of the sort that allowed only two of three women wanting abortions who satisfied the limited conditions to be able to get one. Why? It is fair to the two-thirds majority that justice, as they see justice, be implemented, but only to the extent that their voting numbers in fairness permit. And it is fair to the one-third who voted against it, holding a different view of what justice requires (justice to the foetus), that their view of justice be implemented, too, to an appropriate extent. The resulting legislation looks botched, a compromise between opposing views of justice, which throws out, as American constitutional lawyers say, a 'checkerboard' pattern where just outcomes are produced for some but not for others. Yet this model seems workable in a way that justice as a model does not, because so far as justice goes, we only need to register the fact of different views among the legislators.

Fairness alone would not yet provide us with the technique of majority decisions, which of course we actually use in this context. So Dworkin says that there must be a third dimension of morality in play, one that serves as the correct model for law, and which he calls integrity. The model of integrity, to employ the metaphor of individual personification once more, 'speaks with one voice' to all members of the community, and so, in the case of abortion, requires the majority view to stand. All women who want abortions (and fulfil the conditions) are entitled to them. Conversely, had a majority in the legislature favoured prohibiting abortions entirely, integrity would require that the law 'speak with one voice' prohibiting all women from having abortions. From realising that justice as a model of law is unattainable, and that fairness as a model of law produces an unacceptable compromise, Dworkin concludes that there is this third force, that of integrity, at play. It, too, represents a compromise, since those voting in the minority will not get what they consider to be the just outcome, but it is, Dworkin says, an acceptable compromise, one that is 'internal' to the legal

institution. And presumably it is acceptable because when the community 'speaks with one voice' it is expressing its shared conviction (this is the link with individual integrity) that the community acts 'according to principle'.

Integrity is therefore a virtue of particular importance to law, workable in the real world unlike justice, allowing us to see that at least when the community makes a declaration of what it believes to be the just decision it consistently applies that to the whole community. The duty imposed upon individual legislators is therefore to vote genuinely on what they believe to be just (which can mean whatever they think is right and is not unjust), accept that there will be disagreement, and allow the legislature to express a one-result-for-all, non-checkerboard solution. Dworkin's personification of the community is therefore a crucial part of his argument.

It is a short step from integrity at this legislative level to judicial integrity. Integrity for the judge requires the judge to suppose that legislative enactments were non-checkerboard. In Dworkin's terms, the judge must 'make sense' of these enactments in terms of their 'speaking with one voice' and so the judge interprets the statute on the assumption that the legislature was acting on principle (acting with integrity). In understanding previous court decisions the judge will consider himself bound by previous decisions in the sense that these, together with the decision he contemplates, will form again a 'speaking with one voice' to all, in other words, will produce a principled decision. At first sight, this will mean that the judge needs to 'fit' his decision with the previous law but, of course, in more controversial cases where two outcomes both appear to 'fit' the previous law, the judge will have to appeal to some reason of 'substance' such that the matter is resolved in favour of the understanding of the law that best furthers more fundamental principles. In *McLoughlin* v. *O'Brian* where a person claimed damages for nervous shock when the damage was caused to her away from the scene of the accident, both a decision for her and against her was arguable as far as 'fit' was concerned because no previous case had decided this specific point.[5] But as a matter of 'substance' – the argument that it would have been morally arbitrary and so morally wrong to deny her damages, given that she was in the 'aftermath' of the accident and she was the mother and husband of various of those injured in the accident – the more fundamental principle that she was entitled to be treated as an equal of all others in the previous cases rightly prevailed.[6]

5. [1983] 1 AC 410.

A summing up. Note the following about the above argument for what comes later: i. the distinction between 'the judicial conscience' and 'what the law says according to integrity' is maintained, and this is true both according to the model of law as fairness and law as integrity. If a judge genuinely abhors abortion, he will recognise that under both models the law can nevertheless allow abortions. ii. Justice, fairness and integrity seem to have common roots in some conception of equality for Dworkin, and I discuss this in the next section. iii. What is just, what is fair, and what is in accordance with integrity are each controversial matters, but presumably for Dworkin it is less difficult to establish what being fair to a person is than it is to establish what constitutes a just outcome (Dworkin distinguishes between justice as an outcome, and being fair as a process), because fairness is practiced on a model of procedures guaranteeing outcomes conforming to specified requirements. This is not difficult to accept; we have little problem in the idea that, where we disagree in substance, we might at least agree to draw straws, or adopt some other fair procedure. The difficulty with integrity is that it seems more controversial than fairness, if not as controversial as justice.[7] iv. The theory of integrity is a theory of the 'second best', that is to say it is a theory of how to cope with the demands of the real world we live in, given that people will disagree on what is just: we do so by 'internally compromising' the demands of fairness and justice. It is therefore 'second best' to the model of law as justice ('Integrity would not be needed as a distinct political virtue in a utopian state').[8] It is natural to borrow Dworkin's term in his 'The Place of Liberty'[9] and call his theory of integrity one which is designed to reduce 'equity deficits'. This point is important because in the final chapter of *Law's Empire* Dworkin gives an

6. I wonder at the analogy Dworkin draws with the interpretation of art, although it clearly has its attractions. I can see lines of 'fit' in the case of objects or works of art which are not quite analogous to the lines of 'fit' in legal practices. In legal practice, whether there is a line of 'fit' seems to me to be much more a matter of evaluative judgement. In *McLoughlin* v. *O'Brian*, for example, was it a question of 'fit' that Mrs McLoughlin's case exhibited with the previous law, or was it a matter of 'substance'? Her case 'fits' with the rest if you make moral judgements such that her name is irrelevant (hers was the first case with a plaintiff called 'McLoughlin', say); so, if it was morally irrelevant that she was not precisely at the scene of the accident, it seems her case 'fitted' the law. As I argue later, Dworkin also allows that lines of 'fit' can be discounted by an argument of 'internal scepticism' which just seems to be a judgement that the precedents don't make moral sense.
7. This speculation is sociological, it should be added. I discuss in a later section whether, if Dworkin's rejection of justice as the model for law is that there is disagreement about what is just, there is just as much an argument for rejecting integrity as the model for law.
8. *Law's Empire*, p. 176.
9. See 'What is Equality? Part 3: The Place of Liberty', (1987) 73 *Iowa Law Review* 1, and chapter 3 in *Sovereign Virtue* (Harvard, 2000).

account of the meaning of the phrase used by American lawyers of 'working the law pure'. Integrity achieved, 'pure' law as I understand it, would be law as the model of justice:

> 'It consists in the principles of justice that offer the best justification of the present law seen from the perspective of no institution in particular ... Present law gropes toward pure law when modes of decision appear that seem to satisfy fairness and process and bring law closer to its own ambition; lawyers declare optimism about this process when they say that the law works itself pure.'[10]

If, as seems likely, the theory of integrity is a theory for reducing equity deficit ('integrity will bring us closer to justice than any other theory') then the question arises, why choose that theory over the model of justice? Or does Dworkin mean by integrity something more than one of several strategies, some of which could be 'external' compromises such as judicial policy-making (in Dworkin's sense) or the adoption of 'checkerboard' statutes, or even the adoption of legal positivism as a way, in some communities, of putting a distance between individual conscience and the demands of the state?[11] v. There is a question whether, at least in the case of the judge who has to construct his decision 'interpretively' by considering questions of both 'fit' and 'substance', such a method would be appropriate in the case of the model of law as justice (and, possibly, law as fairness). In the 'ideal' world justice model for law, since 'existing practices' can always be compared against the ideal world and found wanting, it is not particularly interesting or relevant that 'existing practices' depart from justice. The significant consideration is 'what is just?'

Two kinds of equality

It is important to appreciate an important distinction between two ideas of equality as a moral principle, which are used by Dworkin throughout his political philosophy. In his terms, we distinguish the ideas of 'treating people equally' in the sense of giving them equal amounts (of whatever) and the idea of 'treating people as equals'. It is the latter idea that does the fundamental work in moral judgements about morality, he says. If there are two children, one blind and the other with perfect health, a father treating them equally would give them the same amount of financial assistance.

10. *Law's Empire*, p. 407.
11. See Hart *The Concept of Law* (2nd edition, Oxford, 1994) ch. 9.

But if the father treated them each 'as an equal', this would mean spending more money on the sick child because its need would be greater. It seems too simple to say that our moral duties to others, when understood as a duty of equality, should end at ensuring that the amount of assistance provided should ignore differences between people to this extent. Rather, the appeal of saying that people 'are equal' arises because we see others in some important sense as ourselves,[12] and so the blind child suffers in a way that places it in a less equal position to its sibling, and this is something that the father should take into account. We treat a person as an equal when we see that person as a person, equal to ourselves and to others. Nevertheless, this is not to say that we should not ever treat people equally because often the best way to treat people as equals, that is, in accordance with the fundamental principle, will be to distribute equally. This will be when there are no relevant differences to be taken into account, say if one person is blind or in a similarly disadvantaged position. In those cases where there are no relevant differences between people it would be normal to suppose that people should be treated equally (for example, 'one person, one vote', equal shares, equal consideration, etc).

It seems right that, for Dworkin, the fundamental principle of moral equality should connect justice, fairness and integrity. On this model, equality connects to justice as an ideal, since his political philosophy is about the right way to treat people with equality of respect and, in fact, his theory of justice rejects distribution according to an equality of outcomes. It is less obvious where fairness is a model of law but, if we take the 'one person, one vote' principle, then clearly equality of respect is at play, even though there is, too, an equality of outcome in the distribution of voting rights. In the case of fairness as the model of law, each individual legislator is accorded equal respect in the equal distribution of voting rights. It is not so clear that equality of respect requires in this case a checkerboard distribution of outcomes. Being fair to the individual legislator will require also being fair to whomever is affected by that individual legislator's vote. The legislator has the right to vote, but the member of the community also a right to be treated fairly and this right would be violated where the legislator voted genuinely but wrongly (that is, contrary to justice and contrary to the fundamental right people have to be treated with equality of respect). It would also be violated by the checkerboard solution, which would at least be unfair to part of the community.[13] Of course, the legislative institution

12. See my 'Equality in Legal Argument' [2004] *Acta Juridica* 18.

13. A checkerboard statute might be unfair to all (e.g. a pointless tax) but particularly unfair to

has a right that its decisions command a certain weight and so individual rights will often be outweighed in a way that is consistent with fairness overall and there will be an unfair outcome. Dworkin says:

> 'Most political philosophers – and I think most people – take the intermediate view that fairness and justice are to some degree independent of one another, so that fair institutions sometimes produce unjust decisions and unfair institutions just ones'.[14]

Perhaps it does not particularly matter if the root in equality of respect is the same. Dworkin's methodology is one of making sense of practices, not of analysing linguistic usage. 'Justice' might therefore be useful for distinguishing questions about what the ideal state would be, the state in which no person was denied equality of respect, from the question whether in any particular case a person was treated with equality of respect (cases where the complaint was that 'you are not being fair to me'). It is natural to think that this (slightly) different dimension of equality would focus on procedures, rather than ideal outcomes.

It is more difficult to reconcile equality of respect with integrity because integrity can produce outcomes completely contrary to that principle. If the law 'must speak with one voice' where a minority of legislators correctly (in terms of equality of respect) voted against that law, a wrong decision is imposed on all people rather than, as for the fairness model of law, just on some. There is an appearance of equality but it is only an equality of outcomes disconnected from the fundamental principle that all people should be treated as equals. This does not appear to matter for Dworkin. In the case of law as fairness, the compromise between the opposing legislators is 'external', he says, and so unacceptable, but in the case of integrity, the compromise is 'internal'. Presumably what he means here is that the actual law produced has the outward appearance of being fair or just to all and so is consistent with the 'right to be treated with equality of respect.' The 'virtue' of integrity is that the community is seen to 'act on principle' even though it will on occasions get its decisions wrong.

It is not obvious to me that integrity is distinct from justice and fairness. The problem with the fairness model is that it is not clear why it commends a checkerboard solution. For fairness itself commends that all people should

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some (e.g. where taxation is regressive). Is there any argument to say whether such a law is not a 'checkerboard' statute? In the context of the famous checkerboard solution – the compromise over slaves in the US Constitution – this seems odd, but the right objection to that clause is fundamentally that it was unfair in not (as we might say) correctly distributing the right to be treated with equality of respect.

14. *Law's Empire*, p. 177.

be subject to laws produced in a fair way. If we pose the problem of the checkerboard statute, and then argue that fairness commends that model, it seems sensible for us to embrace integrity. But if we persist with the fairness model, then leaving integrity altogether allows us to embrace directly the idea that is at the root of fairness and connects it with justice, which is the idea of equality of respect. It may be that Dworkin would accept this point. He might say that there are two ways law as fairness could commend a result, and that 'integrity' helped to identify the fairer and non-checkerboard result.

Interpretation and the ideal world

Whatever the precise relationships between the ideas of justice, fairness and integrity, the dominating principle that people should be treated with equality of respect is present in all. It will follow that in a system of laws in which that dominating principle is absent, as in a cruel dictatorship, we would have to say that this was not properly law. In Dworkin's terms it will at least lack what he calls 'the force of law', that is, the moral reasons in equality for justifying it. It looks like law and for many purposes can be called 'law' but it does not match up to the model of law that Dworkin proposes. His conception of law as integrity requires a moral underpinning and so, where that is lacking, there is a deviation from his central morally justified model. If this account of Dworkin is correct, one way of looking at his theory of integrity would be to see it as an ideal model against which the 'real world' can be compared. There is a strong sense in Dworkin that he has an answer to the perennial question of whether evil legal systems are really law, or whether unjust laws are law. It is that, where equality of respect at a fundamental level is missing, there is no legal system and no law. He rejects this conclusion, but this is probably because he does not want to be read as suggesting that the important question of moral justification within a legal system was to be settled by reference to a dispute about the meanings of words.[15]

Law ideally requires only that law must never deny equality of respect. This, while extremely abstract, also seems reasonable as an understanding of integrity. And so legal practices, wherever they occur, whether in broadly just communities or dictatorships, can be tested against the ideal and where they fail they do not count as law. It is useful to draw an analogy with the

15. See *Law's Empire* at p. 108.

economic free market. The 'perfect' economic market can take a number of forms but it is clear that whatever form it takes, there is no difficulty in supposing that there are a. existing 'economic practices' and b. these 'economic practices' are 'imperfect' by reference to the perfect market. There is no conceptual difficulty in saying that all markets are imperfect, since that would only mean that the ideal is not instantiated whenever, say, there are natural monopolies and cartels that could not be practically eliminated. But although in some sense the perfect market does not 'exist in the real world,' in another sense it plays a very great part in it, since the conception of what should be the case is present in the description of a real world market as an 'imperfect market'.[16] So understanding the 'real' world means that the real world of the market must be seen through the eyes of the ideal market.

There are two ways that we can view the world. First, we can appraise or criticise the world by reference to an ideal, or a set of normative principles. Our moral view of the world is like this. A's intentional and successful act of killing B can, depending on the circumstances, either be morally justified or not. We can separate in some reasonably clear sense a describable act that is neutral as to its moral justification. A distinction between a neutral 'real' world and its moral appraisal explains our ability to examine 'the facts' before making some judgement as to moral culpability. Second, we can adopt the Dworkinian interpretive method which construes the world of human practices through an examination of the 'point' of such practices. Here the distinction between 'the world' and 'what justifies' merge. But interpreters, too, must have 'something there' to interpret and that suggests that the distinction between 'real' and 'ideal' world lies in the background. For law, at least, it is not clear that when interpreters are 'making sense' of the law, they are not identifying a legal practice and then, independently of the practice, saying whether it is good practice or not.[17]

Does the interpretive approach differ from identifying – or describing – a practice and assessing that practice independently? Dworkin's idea is that we see what the law is only through making the interpretive judge-

16. There is an ideal lurking in the background to Hobbes's remark that the natural world was 'brutish', although that statement is often thought to be a statement of the 'true reality' from which politics springs; but to say 'if' such a state is 'brutish' is to say 'this is not in the ideal how things should be'.

17. To say this is not to affirm anything a positivist says about the 'factual' identification of law. Quite the contrary, since 'the identification of law' in the proposal I have advanced is that law might best be thought of on the model of justice rather than integrity. For 'legal practice' is likely to be too unclear when 'factually' determined just because a large part of our legal practices are controversial.

ment. So there has to be a difference. In *Riggs* v. *Palmer*, for example, it is not that there was a rule in New York State that permitted murderers to benefit from their victim's estates, by virtue of the law of succession, and that judges made a moral judgement about that rule, found it wanting in justice, and then 'exercised discretion' to bring about a just result, creating an exception to this rule.[18] Rather, it is that the judge 'reads' the law of succession by employing a moral principle that coheres with the wider body of the law that shows that 'the proper reading' is that the law of succession does not so allow murderers to inherit. The first way of looking at the case contrasts what the law of succession 'actually says' with what is morally ideal, the second way allows for reading the law of succession in a way directed by a reasonable principle. But how much turns on this idea for Dworkin? What is gained by his approach over the first? There are at least two advantages. One is that judges are constrained by their place in a just institution to consider only what the law is (they are not elected, for example) and so should not make new law when it seems to them that the law is unjust. The second is that judges will perform their role better by concentrating on what the statutes say and what past cases have decided. If they think that the law can be set aside for something called 'justice', they will eventually lose sight of what special merits there are in making the existing body of law morally coherent.

There is a disadvantage, too. This is that where the law departs from morality, the judicial role does not make much sense. If equality of respect is not the fundamental principle guiding the judges' interpretation of the law, the judge will not have the means to 'make sense' of the law and so not be able to come up with any interpretation of it at all. We can use an example similar to Dworkin's example of a rule of courtesy to show this. In a simple 'pre-interpretive' society there is, say, a rule that requires hat-doffing by men to women and this rule is just accepted without question. At a later stage, an 'interpretive attitude' to the rule is adopted so that people will argue amongst themselves what the rule 'means'. Some will say it is a simple matter of courtesy to women, acknowledging their gentle nature and ability to bear children. Others might argue that it was an aggressive gesture, showing contempt for women's physical weakness. And there will be other arguments. At some stage, a 'post-interpretive' point will be reached where there is a consensus, say, that the hat-doffing rule is best explained as a rule of courtesy, marking respect for women. At this stage, some

18. See 1889 115 NY 507.

alteration in the rule might occur. It might be accepted, say, that hat-doffing should be extended to certain men, perhaps those who had distinguished themselves in some way and deserve respect. Further, the rule might just be extended this way, but also restricted in other ways. Given the rationale of respect, the rule might no longer obtain in the case of women who had committed crimes. But there is a further point that can be reached, according to Dworkin, since it will be possible to produce an 'internal' and 'sceptical' argument that undermines the rationale that hat-doffing endorses a principle of respect. Someone might start to argue that courtesy can only 'mean' anything if it means treating another with equality of respect. Equal respect in turn is inconsistent with any form of courtesy that is based on deference, and so bowing to others, or curtseying, and hat-doffing and the like, cannot be based on any reasonable understanding of what respect requires. This means that there is no justification for sticking to the rule. We can see this sort of argument going on in the English case of *R.* v. *R.* In this case, the rule that said that when husbands raped their wives, it was not rape in the sense of English criminal law (serious assault, yes, but not rape), was held to be 'no longer relevant in the contemporary world.'[19] The two justifications offered for the rule were i. that women were chattels, not people, which was an ancient justification that no-one had accepted for centuries and ii. that women had, by marriage, implicitly consented to sex with their husbands at any time and in any manner he chose, while the marriage lasted. This second argument was held to be inconsistent with contemporary thinking about the position of women. One way of explaining the decision is to say that, legally, these arguments, even if they ever were good, are now no longer so. To express scepticism about the rule is to express scepticism about whether formerly accepted reasons for the rule (explanations of the rule's 'point') any longer obtain. Argument i. is easily dealt with. No-one doubts that the law now treats women as people. Argument ii. can be established, too, by referring to the legislation that has in the past eighty years attempted to place women on a more equal footing with men and it is now fictional and so irrational to assume that women consent to sex in every situation with their husband.

There is another way to argue the case, however, which is to appeal to justice, not integrity, directly. It denies equality of respect to a woman to say that she consented to sex when she has been assaulted sexually. It is also irrational both to say that she consented and that it is a fiction. If this is right it is unnecessarily complicated to engage in an exercise of arguing

19. [1991] 1 WLR 767.

'internally' to a 'sceptical' conclusion. Instead, the lawyer argues the direct case of justice.

The question arises whether there is any real distinction between arguing the direct case of justice and arguing the case in integrity. If the argument for 'fit' carries no weight when the argument of 'substance' is sufficiently strong, that suggests that 'fit' and 'substance' are just part of one continuum of moral argument because it is difficult to see how there could be any point at which 'fit' could check 'substance'. The distinction between 'fit' and 'substance' in Dworkin seems designed to achieve two objects. The first is that 'fit', which loosely corresponds to how he first used the idea of a rule in *Taking Rights Seriously,* refers to consistency with legal practice such that if some normative proposition 'fits' the law it would be consistent with either a statute or previous decision of a judge. So 'fit' provides law as integrity with the power to characterise actually existing practices within actually existing legal systems. For his attack against positivism, much of the work is done by the idea of substance since that gives good sense to our understanding of law as a practice that involves contestable argument. The second object of 'fit' is that it is part of Dworkin's application of constructive interpretation to law: interpretation must be interpretation 'of' something, and the thing that is interpreted is *actually existing* legal practices.

All forms of interpretation seem to require something outside the interpretive activity itself, something which stands in relation to the interpreter in a relatively fixed way. One way of fixing the 'thing to be interpreted' would be to assume the truth of some account of it.[20] So a detective might ask himself, 'Assuming the suspect did commit the murder, how would he have disposed of the body?' Thinking like this sensibly drives the imagination and intellect towards conclusions which only *might* later turn out to be true. Assuming that *The Merchant of Venice* is a genuine play as opposed to an anti-Semitic political tract, to give another example, we can get on with discussing whether it is a good play or a bad play. Just as in the case of the detective, this is not to say that the assumed proposition is unarguable or uncontroversial. Rather, it is accepted for the time being, as sufficiently true for considering its merits *as a play*.[21]

Law is different, for in law 'the thing to be interpreted' is less clear than in literary interpretation. Say you are faced with Hart's famous statutory provision in which vehicles are prohibited in the park. The interpreter's

20. In *Law's Empire* Dworkin discusses the example of *The Merchant of Venice* at p. 55 f.

21. 'Sufficiently', since it could be argued that *The Merchant of Venice* is not such a good play

relationship with the words of the statute is what we would most readily come up with to make the relationship between the interpreter and something 'there' intelligible. We would visualise the interpreter (a person) and the 'words' (the actual black letters on the page). But the words on the page mean nothing significant as 'the law to be interpreted' until they are already invested with the quality of being 'a statute'. They have to have the status of law in order to become the subject of interpretation. Interpretation goes further down.[22] The black letters have significance because they issued from the legislature. But the words these letters constitute are the subject of interpretation only because they are the words of the *legislature*. And I have supposed that the right way to understand these words as legislative, if the legislature is properly democratic. So my understanding of what is required in this case about vehicles, expressed as a normative proposition about what people should do, derives from a general moral position I hold about the moral force of democracy and that, ultimately, I have derived from justice. But if I am right, it seems there is no empirical reason, no reason 'out there', which morally justifies democracy, for only I can do that (perhaps unsuccessfully). Ultimately, I am driven to an account of a moral ideal of democracy.

It is difficult to base interpretive judgments about what justice and democracy require on an empirical ground. In some senses, 'what people in fact accept' can be empirically determined. One problem with the idea of empirically identifying people's acceptance of an idea is that it is unclear which interpretation of that idea they accept. Amongst any group of people there will be different ideas of what democracy means. For some it will be just rule by majority and for others it will have a more elaborate meaning about the importance of equality or freedom. When you try to find out what people 'accept' you find that you are tempted to engage in arguments with them; 'no, that does not count, you might want to say, or 'you have made a wrong move there', or 'you have not thought about it

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because it teeters on the political tract end of the spectrum by caricaturing Jews, and so is a play, but a 'political tract sort of play'.

22. This point is not just about the status in the material world of a 'type'. The black letters of this particular provision are repeated at least as many times as official copies of the statute exist. It extends plausibly to all copies and, even, mental states contemplating the meaning of the words, and it is wrong to suppose that a different law with identical content exists – as silly as thinking that when someone says 'that is *the* Ferrari Dino' he means there is only one in existence. The different point is that it is a matter of interpretation, of making sense, by virtue of which we understand that judgment that a particular set of words expresses the proposition that people taking vehicles through the park are either prohibited by law from doing so or they are permitted.

enough'. It must be possible to formulate meaningful propositions about the coincidence of beliefs of large numbers of people. It would otherwise be wrong – and this seems unlikely – that we can say confidently, as we can, that 'people in the United Kingdom, on the whole, believe in democracy'. But this account of democracy would not be useful for it is natural to want to keep asking what it is that people accept when they accept democracy, and what is it that counts as people's acceptance. Each conviction can, in other words, be examined and ignored if they are unjustified (for example, the view that 'democracy is government in which officials steadfastly ignore my views'). If no-one held any views that the government was about representation, then we have good reason to think that there is no democracy in this community and, therefore, according to my argument, no legal system. Conversely, the ideal legal system will be the one in which all of the officials (at least) have the right convictions.

So the interpretive process for democracy, and therefore for law, seems no more than a psychological description of how people make moral judgments ('the human mind is capable of holding more than one proposition at a time'). 'Interpreting democracy' can readily convince us that interpretation is a mental – or committed – activity contained 'within' ourselves. We make sense of the external world (black marks on white paper) but then the external world appears just to be the result of another mental act – an interpretation – and our interpretation is really an interpretation of an interpretation. The subjectivity of this is odd because it does not quite correspond to the initial picture of the interpreter interpreting a thing 'there'. The picture is rather one of a person conducting a conversation with herself. 'Given this proposition,' she says 'this other proposition would be true ... although let me check another proposition. Yes, it is true, and let me check the one below (or above)' and so on. Interpretation cannot account for the distance between the interpreter and the thing interpreted merely by the device of holding interpretations in check. Otherwise, it seems that interpretations go down and down (or up and up) and we get lost. We feel the pull that the thing interpreted is something existing in the real – material – world. But to our puzzlement, as we pursue interpretation down, things become, not more concrete, but more abstract. We can draw a line. Things cannot go down and down. And so there must be something in the outside world in which interpretations anchor.

Since we cannot draw a line for justice, we must conclude that justice (and, therefore, democracy) is not an interpretive idea. For there is no *practice* of justice as there is no practice of morality. Justice is an ideal. And so, if law is a form of justice, law is not an interpretive practice, at least in the

'artistic' or 'constructive' sense where there is a sense of 'real world' existence in the raw material of the artist's intentional endeavours. To conclude, if we take the simple rule of courtesy and hat-doffing, to make an (internally) sceptical constructive interpretation about courtesy, for example, means no more than 'this courtesy practice' does not treat people as equals.

Dworkin will object to this description since his theory means that we cannot understand what the 'courtesy practice' requires unless we engage in constructive interpretation. To say what the practice requires and therefore 'means' implies that interpretation comes first: there is no 'raw' understanding of the practice without an attempt at seeing its point, or understanding it 'in its best light'. But a different kind of interpretation is possible, that which he considers but says does not apply to law. This is 'conversational' interpretation which 'makes sense' of a practice by taking as conclusive the point of view of the person engaged in the practice. It is particularly applicable to conversation and the communication of meaning. When faced with a sentence that is ambiguous or unclear on its face, we try to determine what was intended by the person who uttered the sentence, perhaps employing a 'principle of charity' to work out what the speaker would have said had he been aware of the ambiguity. The idea supplies an alternative way of looking at law which is factual and psychological because it depends on the beliefs, attitudes and intentions of actual people. It is not too problematic an idea to suppose that, in the society of hat-doffing, it is a *fact* that there is a rule that people understand to mean that men must doff their hats to women. On the questions of hat-doffing to women prisoners, or to great warriors, there are in all probability no answers at all. This is not a conclusion that should cause much surprise, for conversational interpretation brings out what people engaged in the practice actually believe, either overtly or through a process of reasonable inference from the posing of a hypothetical question.

Conversational interpretation contrasts radically with constructive judgements about integrity and it is not surprising that some positivists trumpet this version of interpretation in support.[23] But I propose something even further from the positivists than Dworkin's theory seems to require. Conversational interpretations can establish what people believe wrongly and the mere fact of wrongness is not a ground for discounting those beliefs in any calculation about what should be done. There are two main reasons.

23. Notably Andrei Marmor, but the idea is implicit in Raz who presumably thinks that it is a process of conversational interpretation that sorts out what the law 'claims' where there is controversy: *Interpretation and Legal Theory* (Oxford UP, 1992).

The first is that justice will inevitably distribute the right to decide to particular individuals or institutions, and so finding out what those individuals and institutions actually say, as determined by reference to their psychological states, is part of the process of justice, even when mistakes are made.[24] To give force to the just distribution of decision-making power, such decisions have to be final (or there will be an appeal or review that must end with some final decision). The finality of the decision then becomes an ingredient of any future judgement about what justice requires. This is not an odd idea at all and familiar to all lawyers and it is reasonable. It means that in some overall determination of what is just, mistakes have to be taken into account in order to do what is just. There is a second reason for taking into account what people believe wrongly which is that equality of respect requires it. It is arrogant to discount the views of others, genuinely held, and the fact that another holds a genuine view is something that must be taken into account in certain sorts of decisions even if that person is wrong. (It is not a question of 'she might be right'; you have no doubts she is wrong). An extreme example is the genuinely committed pacifist. We can think he is wrong and misguided yet believe to that it would be very wrong to make him enlist. In the law, conversational interpretations – psychological fact understandings – of what people believe, want intend, in making statutes, or deciding common law cases (employing the 'principle of charity' will) since taking people's *wrong* beliefs, intentions, etc, into account will be part of 'treating them with equality of respect'.

I have suggested a picture in which conversational rather than constructive interpretation determines certain basic facts about legal practice. I have also argued that an ideal of justice as equality of respect takes into account such facts in our identification of what the law is. The judicial duty therefore requires attention to statutes that are unjust (this will arise because of a moral democratic requirement) and to common laws whose content is unjust (this will arise mostly because of a moral requirement that people's reasonable expectations be met; loosely, we could call this the 'principle of certainty').

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24. And so there will be principles generated by wrong beliefs that are nevertheless part of legal argument. Contrary to Kress & Alexander's 'Against Legal Principles', (1998) 82 *Iowa Law Review* 739, it is difficult to see how they are moral principles and not obvious why they should not be called legal principles. Waldron elaborates my point in 'The Need for Legal Principles', (1998) 82 *Iowa Law Review* 857, by saying that public choice principles cannot reproduce moral requirements although their production in accordance with appropriate rules of procedure may be justified morally. A brief example: morality may sometimes require some form of majority rule, and majorities do not necessarily decide morally.

It is also a generally under-recognised point that judges pick the brains and borrow the perceptions of other judges. Certainty is often not an issue in such cases, particularly those cases lacking a property element. Frequently, the judge understands the previous law as evidence of an already morally worked-out example, in much the way that a scientist will build upon other scientific experiments. The previous judge has dealt with a similar sort of case and the instant judge wants to borrow from that other judge's experience and moral perception. This is natural and, indeed, economically wise, for it saves a great deal of time. It explains the attractiveness, indeed relief, in finding a case in the reports in which the facts are almost the same as your client's. You can now see the way to argue it from what has gone on in that case. You do not have to assume it states the law, just that the participants in argument in the case have been through this sort of thing before. You now use their research and judgement to make your own judgement as to what equality – justice – directly requires.

This rather straightforward way of using precedents to produce arguments explains why 'persuasive' precedents – that is, precedents that the judges supposedly do not have to follow – are so important. The fact that this happens only obviously when judges refer to cases outside their own jurisdiction, should not hide this prominent use of jurisdictional precedents. Here, Blackstone's much derided reference to the 'accumulated wisdom and tradition' of the common law makes a lot of sense.

But questions about what in any particular case justice demands means that the judge will have to get the balance right between equality-as-respecting-what-people-intend/believe/want-even-if-wrong and the morality (equality) of 'what people psychologically intend/believe/want'. If equality of respect is better served by not putting into practice those views which equality of respect requires to be considered, the judge will have to decide against them. This seems a more straightforward way of making sense of our understanding that moral principles are part of legal argument. In the usual case in a reasonable democracy, wrong views about what is required are enforced because they are channelled through the legislature. Wrong lines of precedent are enforced because, to use Dworkin's term in the context of justice and not integrity, they are 'embedded mistakes' and have created expectations that not to meet would be to offend the fundamental principle of equality of respect. One effect of the account outlined here is that it creates an injunction for legislators stronger than integrity. Legislators are constrained by the requirement to be just rather than the requirement to produce law that speaks consistently.

The workability of law as justice

My general point has been that justice is the model for law rather than fairness (although I have suggested that fairness and justice are indistinct in some senses) and that therefore law is an ideal through which we understand the real world, in the same way as we understand real world markets through an ideal market. This throws law as integrity into a clearer light. Since it is a 'theory of the second best' we know that integrity and law-as-justice should be compatible. But put like this, it becomes clear that other models for law are possible. It means the model of social sources is possible, and better than integrity if it furthers justice better, and it is possible to imagine societies where general acceptance of a strict conceptual distinction between law and moral conscience will genuinely bring about a better sort of society. It depends entirely on what sort of society we are thinking about. In positivism's case it seems likely it would be a relatively unsophisticated one, perhaps one where more than anything some centralised co-ordination and organisation of society is what is needed to bring stability. Consider Dworkin's comments about the inadequacy of legal positivism:

> 'Government has become too complex to suit positivism's austerity. The thesis that a community's law consists only of the explicit commands of legislative bodies seems natural and convenient when explicit legislative codes can purport to supply all the law that a community needs. When technological change and commercial innovation outdistance the supply of positive law, however – as they increasingly did in the years following the Second World War – judges and other legal officials must turn to more general principles of strategy and fairness to adapt and develop law in response.'[25]

We can briefly consider whether law modelled on justice can work, say, in our own community. But this is not such an important requirement. We can say of wholly unjust societies that they 'haven't got law', the same way as we can say of pure communism, they 'haven't got markets'. My way of putting it in fact revives the dispute about whether Nazi law is 'really' law or not. The devil is in the word 'really' since when we view law as an ideal of justice, there is no 'really' that has any sensible meaning. Dworkin argues that this question is not important since our language is 'rich' enough to show why it is that we might be incline to call, say, Nazi law, 'law', and at the same time allow us to say that it 'lacks moral force'.

25. 'Thirty Years On' (2003) 115 *Harvard Law Review* 1655, 1677.

However, law as justice is at least equally as 'realistic' as providing a basis of legal argument as integrity. i. For law as justice to be workable there has to be a rough consensus on justice, but we saw that was also the case for integrity. ii. Integrity's virtue was that it would provide a 'legitimate ground for community' – people are being 'spoken to with one voice' – but justice would provide a better ground for legitimacy: it is surely better that people understand that the law endeavours to treat each and every individual with equality of respect and to be united in that consensus (sure, it is controversial, but what is not?) iii. It is not at all clear that arguments about what justice requires would be any more controversial than arguments about what integrity requires. iv. A small point, perhaps, but justice, rather than integrity, has better appeal on the question why we think of courts as courts of justice, as judges as justices, of the scales on top of court-houses as scales of *justice*, why we think that the fundamental residual discretion of all judges is not allow their courts to become 'instruments of justice' and so on. v. Above all, however, at the point at which it seems least plausible to separate justice from integrity, the point where a judge might find that it is better for him to lie that apply the law, we can make good sense of the judicial duty to be just.

Real and hypothetical cases

I shall conclude with several comments about difficult cases. We feel uncomfortable at the idea that a judge can say that although his decision is unjust the law does not permit otherwise. The Diane Pretty case was perhaps such a case.[26] Diane Pretty suffered from motor neurone disease and stated her wish on many occasions that she wished to die 'as life now had no meaning for her'. She could not kill herself, as she was immobile because of the disease and her husband who, with her consent, was willing to kill her, would have been criminally liable for assisting her suicide had he done so. In the ideally just world, he should have been allowed to do so without the stigma of illegality. But the House of Lords said this would be illegally assisting suicide and so Dianne Pretty died a painful and awkward death despite what was widely acknowledged to be her clear and genuine desire. Lord Bingham was clear about the matter, saying that the role of court 'was not entitled or fitted to act as a moral or ethical arbiter ...' and

26. See *Pretty* v. *DPP and Home Secretary* [2001] UKHL 61.

instead had 'to ascertain and apply the law of the land'. He was well aware of the prospect facing Diane Pretty of dying unpleasantly:

> 'No one of ordinary sensitivity could be unmoved by the frightening ordeal which faces Mrs Diane Pretty ... She suffers from motor neurone disease, a progressive degenerative illness from which she has no hope of recovery. She has only a short time to live and faces the prospect of a humiliating and distressing death.'

What made her death worse would have been her knowing her death was not as it need have been nor as she, nor her husband, wished it to be. Nevertheless, the House of Lords decided in a way that had this 'ethical' result. To decide 'in accordance with law' was therefore to make the moral judgement that Dianne Pretty's right to a decent death, one that would have respected her convictions, was outweighed by some other moral consideration. But what other consideration was relevant? None, if a fundamental right to equality of respect is really to be observed. Was it necessary to keep Diane Pretty alive, in this appalling way, to drive it home to all sorts of people that they should think carefully before killing someone in similar circumstances? There is just insufficient evidence that this way of doing things would *deliver that* message and in any case other ways of delivering that message without the inhumane consequences of the decision made by House of Lords in this case.

This case is one that could have been decided by direct appeal to justice. Dworkin could not allow the directness of the appeal to justice in the Pretty case, but he might approve the result. The case concerned the judicial review of the Director of Public Prosecution's refusal to grant Diane Pretty's husband immunity from prosecution if he 'assisted her suicide' which, while suicide is not an offence in English law, is an offence. S.2(4) provided that any proposed prosecutions for assisted suicide had obtained the consent of the Director. An argument from integrity is possible, constructed as the defence's was from the Human Rights Act 1998 which includes rights not to be subjected to 'inhuman and degrading treatment', to 'personal autonomy over one's body' and to be free from discrimination (Diane Pretty was disabled and could not exercise self-autonomy over her own body). It must have been up to her to decide that there was nothing left that was 'intrinsically good' about her life; nothing worth protecting – or indeed, that all that remained as worth protecting about her life was a dignified death. That will seem a startling conclusion to many, and to some in the House of Lords and Court of Appeal, but that would be a startling conclusion of course to anyone who thought that the courts should not consider 'moral or ethical' questions when working out what the law was. But my

conclusion goes further since the appeal to the Human Rights Act is in some ways irrelevant to it, although the substance of the rights asserted in Diane Pretty's case would be part of the argument. Law as justice requires the argument to be seen as a direct appeal to the most fundamental principle of justice that no person should be treated with disrespect, to their conscience, their convictions and their pain (there is often, of course, a balancing to be done, against others' consciences, convictions, etc, but there was no problem of that sort in Pretty). A court which viewed the question in this light, in which what is just and what is legal are part of the same question about how to decide, could not see the Pretty case as raising a problem of judicial conscience.

We also feel that sometimes the reason we think a case is decided correctly is the appeal directly to the justice of the case. In *Lloyd's Bank* v. *Bundy*, a father, concerned for his son's rather badly run business, put full trust in his bank to give him advice as to whether it was wise for him to raise money to lend to his son against the security of his own farm.[27] There was, perhaps, an element of duress, and perhaps a conflict of interest on the part of the bank. But the money was handed over, the son's business failed, and the old man was faced with the forced sale of his farm. From the bank's point of view, there was a reasonable expectation that its money would be secured according to securities law. Of what help is the appeal to integrity here? Lloyd's Bank proposed a decision that denied Bundy decency: this was no way to treat a trusting old man given that the only respect in rivalry was that to be given to those banks, and like institutions, who rely on being able to secure property against money they have lent. The reference to 'inequality of bargaining power' has some support from the cases, but the case has been long criticised for having insufficient 'hold' in the law, although nowadays lawyers generally approve the result. That approval might be dependent on skilful response to the 'feel' of the law, that the different categories of case – duress, for example – are best united under the term 'inequality of bargaining power'. But it does not have to be this way: Bundy was treated not as the way an old and over-trusting person should be treated and he stood to lose his house as a result. Here the appeal to justice works.

The same argument applies for statutes. Sometimes the direct issue is not best described as the reading of a statute. Consider s.51 of the Adoption Act 1976, which says:

27. [1974] 3 All ER 757.

> '... the Registrar General shall on application ... by an adopted person ... supply to that person ... such information as is necessary to enable that person to obtain a certified copy of the record of his birth.'

In *Smith* v. *Registrar of Births*, Smith, who was adopted, put his medical condition of mental disorder down to the fact that he was adopted and blamed his natural mother.[28] Twice he had attacked people thinking them to be his natural mother and he was confined to Broadmoor. He claimed an absolute right under s.51 to find out who his natural mother was. There was evidence to suppose that he would then track his mother down and seriously injure her. Law-as-justice, like law-as-integrity, requires that the judge has to understand these words a particular way and neither relies on some 'pre-interpretive meaning', as commonly supposed, that 'all' people have a right to their birth certificate without qualification, under s.51. Both models allow us to assume that the reading should be in accordance with the fundamental principle of equality. Integrity's argument is more detached than justice since it starts with the record. Have Parliament and the common law protected vulnerable people such as Smith's mother before? The Homicide Act and the common law make it an offence to murder and to commit assaults of varying degrees of seriousness. The law on accessories makes it clear that it is an offense knowingly to provide the means to commit an offence. So it shows a lack of integrity on the part of the law if it reads the words of s.51 as giving Smith a right to his birth certificate. The facts of the Homicide Act and the Accessories and Abettors Act 1861, and their reasonable interpretations are part of the argument in finding out what s.51 means, assuming that Parliament 'spoke with an equal voice to all'.

It seems relatively weak to say that integrity required that result *because* English law prohibited murder and assaults, since justice would have required those prohibitions anyway. There is a faster way to it. It would be unjust, or unfair, to Smith's mother to put her at risk. We can assume that in the way we read the words of s.51. Imagine, however, that there is an exception clause to s.51 that states clearly that, even if someone's life or physical or mental well-being would be seriously endangered by the providing of a birth certificate, the applicant nevertheless has such a right. In this case, the principle of justice, or fairness, that the legislature (in a democratic community) can legislate will be balanced against a principle of justice, or fairness, to Smith's mother.

Extreme cases. i. What if Parliament abolishes the vote for all but for paid-up Labour party members? It is not a difficult argument to say that

28. [1991] 2 QB 393.

Parliament's authority derives from a fundamental principle that equality of respect for people requires equality of voting rights and that this fundamental principle has been breached and so Parliament does not have the authority to create this statute. In this extreme case, some subsidiary principle of justice or fairness could demand that people comply with this law on the grounds that stability must be preserved, even though the legislation has no legitimacy, but this seems odd at least if we have US-UK democracy in mind.

ii. The Fugitive Slave Act 1850 interpreted in a very straightforward way meant that citizens of Northern states were required to return escaping slaves from the South. Indeed, it is part of the reading of the Act to understand that it was born of a compromise between the North and the South to preserve the Union. It treated people in morally irrelevant ways and this is what made it unjust. According to law-as-integrity, the law may require something so unjust that the judge has to wrestle with his conscience. Although he is morally committed to applying the law as he considers it to be, in some cases arising under the Fugitive Slave Act he might have to resign or even lie. According to law-as-justice, his decision can raise directly the problem with the Fugitive Slave Act that it is – in practically all respects – a checkerboard statute. He can then balance how unjust the Act is in relation to the facts before him against the justice of enforcing Federal legislation. But there is a threshold at which a judge must ask himself whether the justice of enforcing any legislation is overweighed by its content. Mostly, as we know, he should accept the legislation, but in the slave legislation he might decide that the compromise represented by the legislation was more unjust than the justice brought about in preserving the Union. All this can be expressed in terms of what the law is, since, as I have argued, law-as-justice is a model that does not create a disjunction between what the judge thinks as a matter of private conscience and what the law requires. Rather, he is part of a structure of decision-making that is continuously subject to the demands of justice.

iii. Nazi law: S.1 of the 1941 'Decree on Criminal Justice Regarding Poles and Jews in Incorporated Eastern Territories' made it an offence for Poles and Jews, punishable by death, to quote, 'if they demonstrated an anti-German attitude through malicious acts' such as 'making anti-German remarks' or 'acting so as to lower the *prestige* of the German people'.[29] Many thousands of people met horrible deaths by virtue of this decree, over a period of more than three years. Law-as-integrity allows us

29. *Reichsgesetzblatt I* (1941), 759.

to be internally sceptical about this law since it is not too difficult to argue that not only does it issue from an immoral body, it has no independent moral content. But even to say we can exercise scepticism about this order is not strong enough. It directly contravenes justice and so is not law.

Conclusion

My argument has been that both Dworkin's idea of integrity and his idea of interpretation can be understood in a more straightforward way than he supposes. Given the fundamental principle of equality at the root of justice and fairness, it is not surprising that the virtue of integrity is really the virtue of responding to different requirements of justice. The legislature and the courts each play different parts in determining what the balance between the rights to fundamental equality of respect belonging to each member of the community. If this is correct, no-one need be in a position where there is a clash between what their individual conscience says and what they believe they must declare to be required by law.

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