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WORKING PAPER NO. 00-11

MORAL JUDGMENT AND LEGAL THEORY

DAVID B. LYONS

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MORAL JUDGMENT AND LEGAL THEORY [1]

David Lyons[2]

My theme is the role of moral judgment in legal theory. My thesis is that moral judgment provides an important constraint on various aspects of legal theory. I shall illustrate that thesis by discussing, first, the so-called "separation" of law and morals (Section I); secondly, legal interpretation (Section II); and thirdly, the "rule of law" ideal (Section III).

I. The "Separation" of Law and Morals

A. The Separation thesis[3]

The name of this doctrine is misleading. It suggests the implausible idea that law and morals are isolated from one another or that theorists want them to be completely independent. Both suggestions are false. Every legal theorist understands that law and morality interact. What the law requires and allows has some effect on our views about the morality of conduct, and moral convictions have some effect on what the law requires and allows. The result of such causal interaction is some overlap between the law of a community and moral views within it. The influence of moral principles on law may be direct, as in the criminal law, and it may be indirect, as when democratic principles govern decision making processes rather than the substantive laws that emerge from those processes.

Theorists understand, however, that *causal* connections between the law of a community and moral views within it are not relevant to what is meant by the "separation" of law and

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[1]Revised version of a paper presented at the University of Warsaw and the Jagiellonian University in November 2000, to mark the Polish publication of *Ethics and the Rule of Law*: *Etika i rządy prawa* (Warsaw: ABC, 2000). I am grateful for the helpful and suggestive comments and questions that I received on those occasions.

[2]Professor of Law and of Philosophy, Boston University; Susan Linn Sage Professor of Philosophy Emeritus and Professor of Law Emeritus, Cornell University.

[3]I discuss this thesis more extensively in the title essay of *Moral Aspects of Legal Theory* (Cambridge: Cambridge University Press, 1993).

morals. At the same time, every legal theorist presumably wants law to be shaped, directly or indirectly, by sound moral principles.

As I understand the doctrine that is called "the separation of law and morals," its central claim is this: *law is subject to moral appraisal and does not automatically merit a favorable judgment.*

This doctrine is associated with "legal positivism." It is endorsed by Jeremy Bentham, John Austin, Herbert Hart, and many other so-called "positivists." But the doctrine is in fact much more widely accepted. Thomas Aquinas is classified as a "natural lawyer," but he begins a lengthy passage by asserting that "Laws framed by man are either just or unjust" and goes on to discuss various ways in which laws can be unjust and implications of the injustice of laws for the morality of conduct.[4]

In illustrating their acceptance of this doctrine, theorists often refer to "laws," as if the doctrine applies only to specific legal norms of conduct. They would presumably agree, however, that the standards of justice apply to other aspects of legal systems, too, such as constitutions, judicial decisions, and administrative regulations, as well as their applications. Moral standards also apply to the administration of law and the conduct of public officials. Every facet of a legal system would seem to be subject to moral appraisal, and no facet automatically merits a favorable judgment. In short, *law is morally fallible*.

What is the basis of this doctrine? Some suggest it is a claim about the relations between the concept of law and the concept of morality. That may be true. But we do not find systematic proofs of the doctrine in abstract, purely conceptual discussions about the concepts of law and morality. On the contrary, those writers – from Aquinas to Austin – who endorse or discuss the doctrine take it for granted.

I suggest that *our experience of law* is the basis for the doctrine. We could easily base it on recent experience; but the doctrine is not limited to recent legal systems. Humans have lived

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[4]Thomas Aquinas, *Summa Theologica,* I-II, q. 96, art. 4.

under law for many centuries, during which injustice has been commonplace.

B. Proof of the Doctrine.

Consider two clear examples of grave injustices that were made possible by law in modern times. One is the system of slavery that was developed in the English colonies of North America. When Africans were first brought in chains to those colonies, English law lacked any clear provisions for what became known as "chattel" slavery -- the system that enabled white men to treat black men, women and children as disposable property. Colonial records suggest that the legal status of African servants was ambiguous for the first fifty years.

Colonists in Virginia learned from Native Americans how to grow tobacco, which became for them a valuable cash crop. They recognized the advantages of having slaves do the work and enacted laws to make modern chattel slavery possible. The most significant legal changes were enacted during one decade of the 17th century. In 1662, for example, Virginia departed from English law in deciding that a child would follow the condition of its mother. This meant that the children of slaves would be slaves, and that slave owners could secure additional slaves (rather than dependents) when they raped their female slaves. In 1669 Virginia decided that slave owners would not be guilty of a felony for killing one of their slaves, on the stated ground that a property owner would not want to destroy his own valuable property. This decision authorized slave owners to control their slaves with lethal force. In 1667 Virginia departed from prior law by deciding that baptism and conversion to Christianity would not make one ineligible for slavery but was compatible with continued enslavement and in 1670 Virginia decided that all non-Christians who were imported would be slaves for life. These two decisions referred covertly to Africans and helped to create a racially-based system of slavery. Similar legislation was enacted in other English North American colonies around the same time. And so the modern system of chattel slavery, in its legally most brutal form, was consciously fashioned.[5]

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[5]See, e..g, A. Leon Higginbotham, Jr., *In the Matter of Color* (New York: Oxford University Press, 1978), chapter 2.

That system was maintained for three hundred years and was abolished only after a bloody civil war.

My second example of grave injustice made possible by law is the system of colonial domination that was imposed on peoples of color throughout the world by nations in Europe and America. The colonial system has been maintained for six and a half centuries, and it has not yet ended.

The moral fallibility of law can now be shown as follows. Chattel slavery and colonial regimes were established by law and maintained by law enforcement. Those legal structures are, and have always been, outrageously unjust. That negative judgment illustrates the fact that law is subject to moral appraisal and does not automatically merit favorable judgment.

I have just presented a *non-theoretical* argument for the moral fallibility of law. My point is that the doctrine rests, not on theory, but on substantive moral judgment -- more precisely, on our capacity to recognize laws that are clearly unjust.

I must note a complication for my argument. My examples involve *outrageously* unjust legal arrangements. Some legal theorists may believe that laws cannot be outrageously unjust – that in such cases the social arrangements do not qualify, strictly speaking, as law. I believe that such a view is unsound; but I shall not argue the point. I shall instead suggest that such legal theorists presumably believe that there can be laws that are *moderately* unjust. An example might be a regressive tax law, which imposes a greater burden on those less able to pay and a lesser burden on those who are better able to pay because of the diminishing marginal utility of money to those who possess more of it. For such theorists, the class of unjust laws is smaller than I take it to be. Nevertheless, for such theorists, too, the separation thesis rests on their ability to recognize laws that are unjust.

C. Moral Theory and the Recognition of Injustice.

Consider the relationship between moral theory and the unfavorable moral judgment of chattel slavery and colonialism. These unfavorable judgments do not presuppose any particular moral theory. On the contrary, such judgments *are generally presupposed by* moral theories.

Chattel slavery and colonialism are *paradigmatic* examples of injustice: if *any* social arrangements are unjust, *these* are. We do not judge chattel slavery or colonialism to be unjust because we endorse a particular moral theory. Rather, we expect moral theories to endorse those judgments and to explain what's basically wrong with chattel slavery and colonialism.

Moral principles are neither "analytic" (true by virtue of the meanings of their terms) nor *a priori* (knowable independently of experience). If we develop not as social psychopaths but as normal human beings, we acquire a capacity for moral judgment and a range of substantive moral values. The specific values with which we begin our moral careers vary somewhat among us, but only to a remarkably limited degree. From a moral point of view, for example, we believe that fundamental differences in our treatment of others and public policies that discriminate among classes of people require justification on the basis of relevant factual differences between ourselves and others or between classes of persons. Thus discriminatory treatment is characteristically claimed to be justified, from a moral point of view, on the basis of alleged factual properties that supposedly render those who are discriminated against as better fitted for a subordinate role in society or as less deserving of concern and respect. Once we recognize the factual unsoundness of such claims, we begin to recognize the injustice of institutions such as chattel slavery. In parallel ways, we begin to recognize the immorality of rape and other forms of sexual abuse. In addition, as moral agents we recognize the moral implications of voluntary commitments such as promises and consent.

These developments result in the possibility of identifying a set of what John Rawls has called "considered moral judgments" or "provisional fixed points" in moral judgment, which provide some of the raw material for reasoning about moral principles.[6] These mid-level moral judgments serve as constraints on moral theories: no moral theory is plausible unless it condemns paradigmatically unjust social arrangements -- or else provides a powerful and persuasive explanation of our judgmental error. The unfavorable judgment of chattel slavery and

[6]See, e.g., *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), Chapter I.

colonialism are in that sense *epistemically prior to* moral theories.[7]

D. Legal Theory.

Now consider the relations between legal theory and our recognition of laws. Generally speaking, legal theory is epistemically posterior to our recognition of laws and other legal phenomena. Consider, for example, the theoretical appraisal of the classical positivist theory that laws are coercive commands issued by a "sovereign." We appraise such a theory by comparing its implications with (our independent knowledge of) legal phenomena. We condemn the theory if we determine that it fails to account for some legal phenomena, such as facilitative laws, the normal continuity of a legal system, and the persistence of individual laws despite changes in the identity of lawmakers.[8] In a similar way, we can criticize the theory that law is a "union of primary and secondary rules" for failing to distinguish legal systems from other social institutions with a similar internal structure.[9]

Our recognition of laws and other legal phenomena is epistemically prior to legal theory. These recognitions are of course provisional, but they nonetheless serve as constraints on legal theory. No legal theory is plausible unless it accommodates paradigmatic examples of legal phenomena – or else provides a powerful explanation of why the examples that do not fit the theory are misleading, an explanation that is better supported by reasons than our reasons for identifying the relevant examples as legal phenomena.

My next point is that certain *moral* judgments are epistemically prior to *legal* theory. What I mean is this. Our ability to recognize unproblematic examples of law *is combined with*

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[7]This assumes that reasoning towards "reflective equilibrium" (*ibid.*) is the fundamental method of moral theory. I assume further, though I cannot defend the point here, that the logical structure of moral theorizing is not relevantly different from the logical structure of theorizing about empirical matters.

[8]See, e.g., H.L.A. Hart. *The Concept of Law* (Oxford: Clarendon Press, 1961/1994), chapters III-IV.

[9]See *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1984), pp. 51-60.

our ability to recognize unproblematic examples of injustice, and the resulting combination enables us to recognize unproblematic examples of unjust laws. And from the premise that we can recognize unjust laws *we can infer* the separation thesis, that law is morally fallible.

The separation thesis then acts as a constraint on legal theory: no legal theory is plausible unless it allows for the possibility of unjust law – or else provides a powerful explanation of how the combination of moral judgment and legal recognition is mistaken, an explanation that is better supported by reasons than our reasons for identifying laws or other aspects of legal systems as unjust. Thus moral judgment acts as a constraint on legal theory.

My next point is that there is no abstract, purely theoretical basis for the separation thesis.[10] I shall distinguish three purely theoretical lines of argument that might be suggested for the thesis, and I shall argue that no such argument is available.

(1) We have very good reason to suppose that social facts generally determine that a society has law and what laws the society has. We also have very good reason to suppose that law is morally fallible. But we cannot infer the morally fallibility of law from the idea that law is a matter of social fact.

Such an inference might be possible if we could assume that justice has nothing to do with social facts. Then we might reason that law cannot be assumed to be just. By the same token, however, we might just as well reason that law is neither just nor unjust. If justice has nothing to do with social facts, then there is no such thing as a just or unjust law, objectively speaking. In that case, the separation thesis would be either false or empty. For the *point* of claiming that law is morally fallible is to allow for the possibility of unjust law. If justice had nothing to do with social facts, it would make no clear sense to allow for the possibility of unjust law.

(2) We might be able to infer that law is morally fallible if we could generally

[10]I sketched a similar argument in "Founders and Foundations of Legal Positivism," *Michigan Law Review* 82 (1984) 722-739.

characterize the social facts that determine when a society has law and what laws it has (call these L-facts) and the social facts that determine when law is unjust. If we could do both of those things, we *might* be able to show that L-facts determine (a) that law is subject to moral appraisal and (b) that law does not automatically merit a favorable judgment. If we could do that, then we would have a theoretical basis for the claim that law is morally fallible. But we cannot do that. For we have neither a well-confirmed legal theory nor a well-confirmed moral theory. Nor do we have a meta-theory of law or a meta-theory of justice that would enable us to show that law is morally fallible. Speaking more accurately, we have more reason to identify social phenomena as unjust law than to embrace any particular theory about law or justice. We understand law and justice well enough to identify paradigmatic examples of unjust law, but that reasoning is based on moral judgment and our ability to identify social pehnomena as law, not on moral theory, legal theory, or some combination of the two.

II. Moral Principles and the Interpretation of Law

Moral judgment plays an important but different role in relation to theories about the interpretation of law. This branch of legal theory hardly existed before the 1980s. Until then, the only widely embraced view about sound legal interpretation – in America at least – was that interpretation should follow the " original intentions" of the lawmakers.

A. Original Intent.

Many American lawyers and judges employ the language of "original intent"; many frame interpretive arguments in such terms. But the doctrine of original intent has never been developed into a full-fledged theory of legal interpretation – in the way, for example, that Bentham and Austin developed the idea that laws are coercive commands into a sophisticated theory about the nature of law. To consider original intent doctrine seriously, therefore, we must construct a theory out of the rhetoric.

I shall discuss the theory of original intent briefly, mainly summarizing points I have

made in other essays.[11] The purpose of discussing it here is to introduce what seems a more plausible and promising theory – the theory that Ronald Dworkin first called "naturalism" and now calls "law as integrity." (I'll refer to it by the simpler name.) Interpretive naturalism is of interest because it holds that substantive moral judgment plays a central role in sound legal interpretation. That point is relevant to my general theme. My further point is that this important theory of legal interpretation is limited by the morality of the law that is to be interpreted and thus by moral judgment.

Back now to original intent. If we take original intent rhetoric literally, as its supporters seem to do, original intent doctrine holds that those who interpret and apply a law must follow the intentions of those who gave the law to us. Interpreters should be guided by what the lawmakers had in mind.[12]

This doctrine faces at least three very serious theoretical difficulties. In the first place, it lacks any clear justifying rationale. The theory applies to written law, such as statutes and written constitutions. When changes are enacted, however, specific texts are officially adopted, not the lawmakers' unstated intentions. Neither the texts nor the rules regulating enactments refer to what the lawmakers had in mind. Intentionalism therefore requires a powerful theoretical rationale, because it holds that interpreters must follow lawmakers' intentions even when those intentions are not reflected in the texts that were enacted into law.

Some supporters of intentionalist interpretation defend it by appealing to the separation of

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[11]See especially "Original Intent and Legal Interpretation," *Australian Journal of Legal Philosophy* 24 (1999) 1-26.

[12]These intentionalists (as I shall call them) also assume that interpretations based on original intent can be "value-free"– that judges do not need to make value judgments when they interpret the law. That is a mistake. Consider, e.g., the constitutional provision that private property may not be taken for public use without just compensation. If the lawmakers intended anything, it was presumably that private property not be taken for public use without just compensation. But as neither they nor existing law provided criteria of justice in compensation, interpretation of this provision requires a determination of such criteria, which cannot be done without exercising moral judgment. In such a case, an interpreter could not follow the original intentions of the lawmakers without exercising moral judgment.

powers, legislative supremacy, or representative government. But these notions tell us only that judges should apply the law; they do not tell us how to understand it. Some supporters of intentionalist interpretation appear to believe that the meaning of a text is determined by the intentions of the person who drafts the text. But that is clearly a mistake. The intentions of language users are relevant to meaning, but not in so simple and direct a manner. This is shown most readily as follows. We sometimes use the wrong words to express what we have in mind. That is possible only because the words have meanings that are *not* determined by what we have in mind.

In the second place, the doctrine of original intent is ambiguous, and in more than one way. It is ambiguous regarding *whose* intentions should be followed and *which* of the lawmakers' intentions should be followed. These ambiguities are displayed in reasoning that refers to original intent. When intentionalists discuss a statute, they always refer to the intentions of legislators – members of the legislative assembly whose votes effect changes in the law. But in a constitutional context, American lawyers refer to the intentions of the "framers" – those who drafted and proposed the constitution or amendments to it – rather than the intentions of those whose votes effected the constitutional change. This shift in focus lacks any rationale, and appears arbitrary. Intentionalists do not seem to be aware of the shift, and thus they fail to explain or even address it. But there is as much reason to consider the intentions of one group as the other and no reason to assume that their intentions are identical, so the ambiguity is potentially troublesome, as I explain below

The other ambiguity is this: intentionalists sometimes refer to lawmakers' *purposive* intentions – what the lawmakers meant to accomplish by the legal change -- and sometimes they refer instead to the lawmakers' *applicational* intentions – how the lawmakers intended the law to apply. Once again, this shift in focus appears arbitrary and seems not to be noticed by intentionalists.

The problem is not merely that intentionalist interpreters arbitrarily focus on one group of lawmakers or one type of intention to the exclusion of the others. The problem is *incoherence*.

Consider, for example, the second shift that I mentioned. Lawmakers can be expected to have both purposive and applicational intentions with respect to a bill that they support. Both intentions seem relevant, and intentionalism has no *a priori* reason to discount one or the other.

But our understanding of cause and effect is limited, so lawmakers sometimes have mistaken ideas about how the law should be applied in order to achieve its intended purpose. To require courts to apply a given law so as to achieve the lawmakers' aims *can be incompatible with* requiring courts to apply the same law in accordance with the lawmakers' applicational intentions. The doctrine thus generates *inconsistent guidance* for the courts. The doctrine claims, furthermore, that a law applies to a situation if and only if the application accords with the lawmakers' intentions. But when lawmakers' purposive intentions conflict with their applicational intentions, the doctrine generates straightforward *contradictions*: it claims that a particular law applies to the situation in question and claims also that the same law does not apply to the situation.

No theory that generates contradictory assertions can be true. But it is unclear that there is any reasonable, nonarbitrary way to revise the doctrine so as to prevent its generating inconsistencies.

The third problem for the doctrine of original intent results from the fact that most law is made not by individuals but by groups of individuals such as legislatures. When laws are made by groups, intentionalism presumably requires that interpreters follow relevant intentions that can be ascribed to the enacting groups. But that is easier said than done. Legal rules determine how law can be changed, but they do not determine when we can truly ascribe intentions to the legislature. We have no general principles for doing so. Because legislative processes vary and are frequently complex, it is difficult, and it may be impossible, to construct a general formula for the purpose. The problem is how to infer an intention of the legislature as a whole from the intentions of the several individuals who were involved in the legislative process. Intentionalists do not seem to recognize this problem, and they do not address it.

I have no doubt that intentions *can* sometimes be assigned to groups. But we must allow

for the fact that the members of a lawmaking body can have differing ideas about the purpose or the application of a proposed law. I assume that we can truly ascribe an intention to a legislature even when not all of the legislators think alike about a proposed law. We can do so if, for example, the vast majority of the legislators (or the vast majority of those who voted for the law) thought about the proposed law in a similar way. In such a case, and no doubt others, we can say that there was an *intentional consensus*.

Let's assume that purposive and applicational intentions can sometimes be soundly attributed to a legislature. My point is that legislation can be enacted when there is *no* intentional consensus. The rules that determine when a law is enacted do not imply or assume that there is an intentional consensus. And familiar facts about the legislative process make it extremely likely that law is sometimes enacted when there is no intentional consensus among the lawmakers. Those who vote for a bill do not always have the same purposive intentions or applicational intentions for it. Not all of those who vote for a bill even form relevant intentions. For lawmakers do not attend all sessions of the legislative assembly, and when they do attend they do not always pay attention to the debate. Lawmakers sometimes vote under party discipline or because they believe their votes will serve some extraneous objective, such as securing their own reelection or favors from lobbyists. As a consequence, lawmakers sometimes vote on a bill without any clear idea of its content, purpose, or applications. And when a legislator votes for a bill, we cannot assume that she endorses the purposive or applicational intentions of those legislators who have them.

Here, then, is the problem. The doctrine of original intent tells us that interpretation and application of the law must follow the intentions of the lawmakers. When legislation is enacted in the absence of an intentional consensus, the doctrine of original intent implies that *the enacted statute has no proper interpretation or application*. The doctrine can, and sometimes does, imply this of statutes that on all other grounds are regarded as meaningful and applicable to a readily specifiable range of fact situations. This fact renders the doctrine of original intent implausible. And I see no plausible way of revising the doctrine so as to prevent its generating

such implausible implications.

B. Justification-based Interpretation.

But I believe we should distinguish here between legal practice and legal theory. I have been discussing the theory of original intent that is suggested by academic writing and legal rhetoric. My criticisms apply to legal practice only insofar as it reflects the doctrine I have sketched. Some interpretive arguments that may seem intentionalist, because of the language they employ, can be understood differently – as independent of intentionalist doctrine. Because intentionalist doctrine is implausible, we should, whenever possible, understand intentionalist rhetoric as representing a workable mode of interpretation.

That is sometimes possible. Often, when lawyers and judges talk about original intent, they do not refer at all to the mental states of the lawmakers. When lawyers and judges ascribes purposes to laws, they can often be understood as identifying a *reasonable purpose that could justify* the law. These purposive interpretations are not burdened by the problems of intentionalist interpretations. Justification-based interpretations avoid the ambiguities of original intent doctrine and they do not assume an intentional consensus among the lawmakers.

Justification-based interpretation has another advantage over intentionalist interpretation. It has a rationale, for it seems to involve a morally defensible approach to legal interpretation. Here is why. Law tells us what we must or must not do, and it threatens sanctions for disobedience. Law regulates death and taxes, war and peace, and innumerable other matters that are of direct, vital interest to individuals. Moral justification is *required* for such governmental actions. Someone whose interests are affected by law *has a right* to be treated in a morally defensible way. We take this for granted in our everyday thinking about the law, and those who presume to speak on behalf of the law usually *claim* that it justifies what is done to people in its name.

The required moral justification of particular legal judgments cannot assume the consent of the parties or the fairness to them of the system as a whole. Many of those who come before courts do so under duress and have lacked a reasonable opportunity to affect the content of the

laws. Many defendants participate only to avoid default or contempt judgments. We cannot assume that, if they had a choice, they would approve of the laws that determine their fates or that they are morally committed to the law that is applied. The justification of the adverse treatment that some receive under the law cannot be based on the generally fair treatment they receive, for they may be subject to systematic discrimination. What is typically done to people in the name of the law typically requires direct, substantive moral justification.

The point of a justification-based approach is that it promises to *increase the likelihood* that the application of law is morally justifiable. When interpretation renders *a law* morally justifiable, its *application* is more likely to be justifiable than the application of the same law under an interpretation that renders it *un*justifiable. The more justifiable the law being applied, the more justifiable its applications are likely to be. That provides a reason for interpreting laws so that they are justifiable, and as justifiable as possible.

C. Interpretive Naturalism.

Dworkin's naturalism is a form of justification-based interpretation. Although Dworkin's reasoning is different than the rationale I have suggested for a justification-based approach, his argument, like mine, also makes use of moral judgment. Dworkin contends, first, that interpretive naturalism best describes and justifies law in general, understood as the practice of regulating a state's use of force by reference to past authoritative decisions. Moral judgment plays a significant role in Dworkin's interpretation of law *as a whole.*

According to interpretive naturalism, substantive moral judgment also plays a role in the interpretation of a particular legal system's laws: the interpretation of law depends on the moral principles that best justify past decisions. A statute or judicial precedent, for example, is to be interpreted so that its application best serves the principles that justify the original legislative or judicial decision. This is the second level at which moral judgment plays a substantive role in Dworkin's theory.

Dworkin understands, however, that constitutional, legislative, and judicial decisions cannot always be justified. Although his position is unclear, he appears to address this problem

in two ways. He appears to hold, first, that there can be sound justifications for *enforcing* laws that cannot themselves be defended on the merits. This reasoning might apply, for example, to the enforcement of an unjust tax law that has been enacted by a legislature whose existence and authority can be justified on the basis of democratic principles. Second, Dworkin assumes that some moral principles that cannot themselves be defended without qualification are nonetheless capable of justifying legal decisions. I'll call these *non-ideal* principles.

Both of these points represent moral limits to naturalistic interpretation. First, if the sole moral justification for enforcing a given statute is indirect, because the statute itself is unjustifiable, and naturalistic interpretation depends on the principles that justify a statute, then the statute is not capable of receiving naturalistic interpretation. Therefore, if an unjustifiable statute may justifiably be enforced, it must presumably be applied in accordance with its apparent, uninterpreted, meaning. In this respect, substantive moral judgment marks a limit of naturalistic interpretation.

Second, if the best interpretation of a given law is provided by non-ideal principles, it is unclear how to justify those applications of the law that represent its difference from an alternative law that could have been justified by fully defensible principles. The only justification I can imagine for such an application of a statute or precedent is indirect, and this again excludes naturalistic interpretation. In this respect, too, substantive moral judgment marks a limit of naturalistic interpretation.

There is a further moral limit to interpretive naturalism. Indirect justifications for the enforcement of unjust laws presuppose that the legal system satisfies, overall, minimum requirements of political morality. This means, for example, that the political structure supports a reasonably fair distribution of political power and a reasonably just distribution of resources. We have sufficient experience with law and sufficient competence in moral judgment, however, to conclude that such conditions do not always exist. I believe that they have rarely existed. This marks a very significant impact of substantive moral judgment on justification-based interpretive legal theory. Moral judgment enables us to infer that the most promising theory of

legal interpretation has very limited application.

III. The Rule of Law[13]

I turn now to a third set of examples illustrating significant connections between moral judgment and legal theory. During the past fifty years, problems of interpretation and the idea of a moral obligation to obey the law (in other words, "political obligation") have received a great deal of attention from American legal theorists. These two developments are closely connected, partly because both have involved reference to the "rule of law" ideal. I shall also suggest that these discussions reveal the defective moral vision of American legal theory.

Concern about legal interpretation was provoked by the famous case of *Brown v. Board of Education*.[14] In that 1954 decision the US Supreme Court held that the federal Constitution prohibits racial segregation in public schools. In so deciding *Brown,* the Court suggested that it would begin to enforce constitutional rights of African Americans that had been systematically violated since their establishment after the Civil War nearly a century earlier. For that reason, supporters of the status quo recognized that the entire system of white supremacy known as "Jim Crow" was at risk.

Among legal scholars the interpretive issue was framed in terms of original intent. Critics of the Court's decision in *Brown v. Board of Education* argued that the 39th Congress, which had proposed the 14th amendment to the Constitution – the relevant constitutional provision – *had not intended* that it be used to prohibit racial segregation in public schools. They inferred from this that the 14th amendment *did not prohibit* racial segregation in public schools.

Few defenders of the Court's decision in *Brown* challenged the idea of intentionalist interpretation. Along with the critics, defenders of the *Brown* decision tended to assume that legal interpretation should be guided by the original intentions of the lawmakers. Some

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[13]This section draws upon material in my paper "Moral Judgment, Historical Reality, and Civil Disobedience," *Philosophy & Public Affairs* 27 (1998) 31-49.

[14]347 U.S. 483 (1954).

defended the Court's decision by arguing that we have inadequate evidence of the relevant intentions. Other defenders argued more radically that courts should depart from the law, as determined by original intent, because the system of white supremacy is morally indefensible. A substantial body of academic literature resulted from this debate, but it shed little theoretical light on the issues.

Those who wished to maintain the Jim Crow system of white supremacy also resisted the modest demands of the reinvigorated civil rights movement. In doing so they knowingly employed unlawful as well as lawful means. I refer here not only to private individuals but also, and most importantly, to public officials, in all branches of government. Unlawful measures involving public officials ranged from the secret provision by state governments of illicit financial support for White Citizens Councils, which were dedicated to maintaining the subjugation of African Americans, to officials' complicity in murderous attacks on civil rights supporters.

The civil rights movement had never ceased within the black community, but it received new impetus from the mid-century war against fascism, international recognition of human rights, and colonial liberation movements throughout the world. The actions of those who campaigned for civil rights, such as boycotts of stores and public bus lines that maintained discriminatory practices, were generally lawful. Some civil rights actions, such as lunch counter "sit-ins," included minor violations of local law. In the 1963 campaign against discriminatory practices of local shops in Birmingham, Alabama, Martin Luther King and his associates violated a ban on demonstrations that was issued unlawfully by a local court. Critics of the civil rights movement condemned such acts as violations of political obligation and serious threats to "the rule of law." Their reasoning was as shallow as the academic arguments that invoked original intent.

Let's look at the idea of political obligation, and let's begin with truisms. Laws can be just or unjust. Just laws merit respect; but the same *cannot be assumed* about unjust laws. Part of the point of political obligation is to *argue* for obedience to *un*just law. To achieve this point,

political obligation is given wide scope: it concerns all the laws of a system and all those to whom the laws apply.[15]

Because unjust laws do not automatically merit respect, the claim that there is a moral obligation to obey the law requires a powerful combination of moral and factual support. There can be sound arguments for political obligation, but their scope as well as their implications are limited by the principles they invoke and the social conditions those principles assume.

Here's an example. We can acquire obligations by consenting to them, and a traditional argument for political obligation invokes the idea of consent. But one cannot plausibly use such a principle to argue for a *general* obligation to obey the law, because in fact few individuals ever consent to abide by all of the laws that apply to them. The consent argument for political obligation relies on an historical fiction.

I wish to focus, however, on *moral* limits to arguments for political obligation and on moral limits of any such obligation. I assume that consent, like promises, can be void *ab initio* for moral reasons, and as a result can fail to generate a valid and binding moral obligation. I assume, for example, that one cannot acquire a moral obligation to participate in genocide or force someone into slavery simply by consenting to participate in genocide or to force someone into slavery. I assume, further, that comparable limits apply to open-ended commitments, such as consenting to abide by the laws of one's community. If those laws require one to engage in genocide or to force others into slavery, any moral obligation that results from consenting to obey does not apply to such outrageously immoral laws.

In recent years, the consent argument has largely been displaced by a fairness argument for political obligation. The fairness argument says that one is morally obligated to comply with social rules whose benefits one has sought and enjoyed. A failure to comply with the rules under those circumstances is regarded as "free riding" or "free loading." Because some of the benefits

[15]To be plausible, of course, political obligation must be understood as "defeasible" – as a moral requirement that can be overridden when conflicting moral considerations are more weighty in particular circumstances.

of living under law are widely distributed, it is argued that fairness requires obedience to law.[16]

The fairness argument is regulated, and is therefore limited, by a fairness principle. A fairness principle presumably requires that the benefits conferred and burdens imposed by the laws are distributed fairly. Otherwise the rules would be exploitative, and fairness cannot sanction exploitation. Fairness cannot require, for example, that you acquiesce in an unfairly small share of benefits or an unfairly large share of burdens so that others can benefit at your expense. You are not avoiding your fair share of burdens when you resist being exploited. It follows that a fairness principle can support obligation *only* in societies whose laws distribute benefits and burdens *fairly.*

The preceding point requires qualification. If a fairness argument calling for compliance with *un*just law is possible, then political obligation may be required by fairness when benefits and burdens are distributed in a manner that is *not perfectly* just. To allow for this possibility, theorists assume that political obligation can obtain when a system is (as they say) "nearly just," "reasonably just," or "fundamentally just." Theorists do not explain what these vague terms mean, and I will not try to explain them. For present purposes, I will reason from the opposite direction by drawing upon upon a suggestion made by Rawls about conditions that are *incompatible with* political obligation.

Rawls argues that "in the long run the burden of injustice should be more or less evenly distributed over different groups within society, and the hardships of unjust policies should not weigh too heavily in any particular case." He maintains that political obligation “is problematic for permanent minorities that have suffered from injustice for many years."[17] I agree.

Consider, for example, chattel slavery in America. The conduct of chattel slaves was regulated by law. But it is implausible to suppose that *fairness* required slaves to abide by laws

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[16]The basic points that I shall make about this argument apply to arguments for political obligation generally.

[17]*A Theory of Justice*, p. 355.

that supported their enslavement. In the terms suggested by Rawls, chattel slaves were "permanent minorities" who "suffered from injustice for many years." In the slave societies of North America, the burdens of injustice were not distributed in a "reasonably just" manner but were exceedingly exploitative.

Consider, secondly, colonial rule in Asia, Africa, Latin America, and the Pacific islands, and take India as an example. Gandhi pointed out the enormous cost to India of British rule, which was exploitative, economically devastating, racist, degrading, violent, and brutal.[18] For many generations, the burdens of injustice weighed heavily upon the people of India. (In that case, indeed, the unfairly disadvantaged group was not a minority.) It is implausible to suppose that *fairness* required Indians to respect British colonial law.

Lastly, consider the American system of white supremacy called Jim Crow. Not long after the U.S. Constitution was amended to provide some basic rights for African Americans, the U.S. government stopped enforcing those rights. Through violence, terror, and fraud, white supremacy was firmly re-established in the former slave states. African Americans were excluded from the political process. Protections against rape, kidnaping, harassment, and murder were denied. The economic system was rigidly stratified along racial lines. African Americans constituted a permanent minority on whom the burdens of unequal justice weighed heavily. It is implausible to hold that *fairness* required African Americans to respect laws that supported Jim Crow.

In each of these cases, a population was subjected to deeply entrenched, systematic, and serious injustice. The examples suggest that political obligation cannot coexist with serious, systematic injustice that is so deeply entrenched.

I am not claiming that there are no sound moral arguments for obedience to law in such societies. Political obligation is not the only moral factor that can favor compliance. Moral

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[18]See, e.g., Bhikhu Parekh, *Gandhi's Political Philosophy* (London: Macmillan, 1971), pp. 127-128.

principles can require obedience to a subset of laws in a given legal system without requiring obedience to all of them. For example: (1) Moral principles call for compliance with laws that prohibit immoral behavior (*mala in se*). One does not normally have the moral right to assault, cheat, coerce, harass, imprison, or kill another human being, for example, and one is morally required to comply with laws that prohibit such conduct – not because it's the law, but because such conduct would be wrong. (2) Moral principles can require compliance with promises and other voluntary commitments. That includes an oath to be bound by the code of conduct for a profession, such as medicine or law – provided, of course, that the code does not sanction morally outrageous conduct. (3) Even those who are treated unjustly by a system can have moral reason to comply with unjust laws -- when, for example, disobedience would expose innocent persons to risks they have not agreed to assume. (4) We can even have moral reason to support a regime that is profoundly unjust -- when it is endangered, for example, by forces that threaten to impose much worse injustice. None of this assumes or implies political obligation.

Legal theorists in America were fully aware of the Jim Crow system, its outrageous brutality, cruelty, and injustice. Despite that knowledge, legal theorists generally endorsed the idea of a moral obligation to obey the law. It is impossible to do that, unless one systematically *discounts* violations of the rights and interests of African Americans. American legal theory was both the victim and the perpetrator of racist attitudes.

I want now to connect the issues of political obligation and legal interpretation through the ideal of "the rule of law." Critics of the Supreme Court's decision in *Brown v. Board of Education* and critics of civil rights campaigns both invoked the rule of law ideal. According to its critics, the U.S. Supreme Court violated the rule of law by failing to follow original intent. According to their critics, civil rights campaigners violated the rule of law by failing to comply with court orders and local laws.

Both criticisms were misguided. On the one hand, original intent reasoning is difficult if not impossible to defend. On the other hand, civil rights campaigners generally acted within the law, and when they did violate a law they generally did so responsibly, causing inconvenience at

worst and no danger to others. By contrast, the system they campaigned against was built upon systematic violations of law, especially unlawful acts by public officials.

I want to emphasize the last point, because it concerns the rule of law. I am not referring here to the official application of Jim Crow laws. The Jim Crow system was established and maintained by unlawful violence, terror, coercion, harassment, intimidation, and lynching. Protections against rape, kidnaping, and murder were denied African Americans. *Public officials not only refused to enforce the law, they were often involved in the most serious violations of law, including murder.*

It is tragically ironic that the rule of law ideal should have been invoked against the Supreme Court and the civil rights movement. For the rule of law ideal chiefly concerns official conduct, and the officials who supported Jim Crow by their actions and inaction were the ones who most egregiously lacked fidelity to law, who showed contempt for the rule of law ideal.

Much of my research in recent years has centered on American history. This stemmed from an interest in the theory and practice of political resistance and in the historical relations between racism and American law. My own experience since the Second World War as well as these studies have persuaded me that, at least in my part of the world, a very substantial portion of serious law violations – arguably the most serious portion of them – are committed not by private individuals but by government officials. Insofar as legal theory has ignored these facts, it has failed to live up to its own moral and intellectual ideals.