FROM POLITICS TO PHILOSOPHY

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Politics led me to philosophy. Not the conventional politics of the two big American political parties but street-level agitation for peace and civil rights during the decade following World War Two. The government actively discouraged our activities. Unlike the measures it employed against dissidents like us, our actions were non-coercive, lawful, and public. As my political orientation and experiences have greatly influenced the choice and content of my philosophical projects, I shall interweave the personal narrative with the philosophical account and will include more detail than might be expected for purely academic purposes. Besides, the political background is not likely to be familiar to my readers and may be more interesting than the philosophical story.

My earliest political memory is of an experience in the early 1940s, when I was about seven. A friend came to school with traces of knife strokes on his face. That they bore the shape of a swastika was no coincidence, for anti-Semitism infected our divided Brooklyn neighborhood. The hatreds were mutual. Contempt for “gentiles” was commonplace on our side of the line.

Our public elementary school, situated on the neighborhood’s fault line, reflected the social division, but its policies were not even-handed. In school assemblies, for example, we celebrated only Christian holidays. I declined to participate in singing Christmas carols -- though that minor bit of passive resistance was probably not noticed.
My critical faculties were sharpened in an experimental class that occupied the last four years of elementary school. Our teachers led us into research projects and engaged us in critical analysis. We took apart advertising and political propaganda. Newspapers provided ample material, as a Red Scare was under way -- the one that was later called McCarthyism.

By the time we entered high school, a close friend and I had become active in a left-wing youth organization – the Young Progressives of America, which was the youth branch of the Progressive Party of the late 1940s and early 1950s. Given the government’s repressive measures, we assumed that our telephone conversations were not private. There was too much of a risk (later amply confirmed) that our conversations would be overheard by illicit, though official, eavesdroppers. So we omitted identifying references to persons and places.

In high school, I became one of the “usual suspects.” On one occasion my friend and I were suspended following the distribution of political leaflets near the school. We were summoned from class to see the Assistant Principal, who held us in his office for hours while he grilled us about our politics and our parents’ choice of publications. It was assumed that we had helped distribute the leaflets, although in fact we had nothing to do with that particular action.

In that political climate, I chose to study engineering in college, partly because of its political neutrality. By then I had become active in the Labor Youth League, which was the functional equivalent of a Young Communist League. Preoccupied with politics, after two years I dropped out of college. A friend suggested a machine shop where I might find suitable work. He advised me not to give his name as a reference, as he had earlier tried to unionize the workers.

It was a small shop, in which a handful of machinists produced specialized equipment that required careful, close-tolerance work. The crew was cheerful and friendly. Seeing my
aptitude, they taught me not only how to operate the various machine tools but how to “set them up” to meet the product specifications and how to grind tool bits for differing materials and applications. I quickly became a capable machinist.

A few months later, another friend told me of an apprenticeship that was open next to his workbench in a tool-and-die shop within a large factory. I was soon working with another group of friendly, skilled workers, who were responsible for creating and adapting the machines that were used in the manufacturing process. They too were happy to train a newcomer. I refurbished machine tools in our shop and made emergency repairs on the production lines in the larger factory.

The work was good, but the wages were low. This became significant another few months later, when my wife-to-be and I decided to get married. I sought a job that would support us both. A third political friend helped me find one in a factory that employed him as a pipe fitter.

The work was mainly on thick-walled high pressure pipes that had to be bent to precise angles, often in three dimensions, for installation in power plants abroad. Although it involved working with lengths of pipe that weighed three thousand pounds, the bending process was an art. At crucial stages, the pipe fabricating process required skilled machine tool work, and the company’s increasing production orders could no longer be met by the shop’s one machinist. So my friend told the foreman of my background, and before long I was once again working as a machinist, sometimes directing a crew.

I worked in that shop for more than a year, along with experienced welders and boilermakers who introduced me to their crafts. The shop was integrated, the workers comprising an ethnic rainbow, which was most unusual at the time, especially in the plumbers’
union, to which we were affiliated. Although the work we did was exceptionally technical and
difficult for the industry, the shop was subject to discrimination by the union.

During this time, the Old Left was in crisis, the result of governmental harassment as well
as disillusioning revelations about the American Left and the Soviet Union. Without regretting
the path we had taken and without abandoning our political ideals, my wife and I dropped out of
organized political activity. Reading more widely -- especially in contemporary Marxist theory,
philosophy of education and philosophy of science -- I came to think that in the long run I would
prefer work that used more of my mental skills. I valued and enjoyed the work that I was doing -
- the camaraderie no less than the machine tool work – but I decided to change directions.

Lack of financial resources and ignorance of the possibilities limited what seemed
feasible. I was aware, however, that fine, tuition-free colleges were accessible -- the engineering
school I had left and New York City’s public municipal colleges.² Thinking that a workable
plan was to complete my engineering degree and seek a teaching career in that field, I returned to
those studies. This time, however, I took evening classes, so that I could continue working full-
time while my wife completed her studies. My job was physically demanding and involved
much overtime, which were incompatible with studying at night. With a reference from my
older brother, I was able to secure work as a draftsman in the engineering department of a large
sugar refinery.

It was a marvelous arrangement. Armed with measuring tape, pad, and pencil, I would
go into the refinery when changes were needed. After studying the situation, I’d return to my
drafting desk to draw up a proposal. My engineering supervisor had me design as well as draw.
It was sobering to realize that a real structure, filled with heavy machinery, based on my

² The Cooper Union School of Engineering, while private, provided free tuition to its students, as did the municipal
colleges New York City at the time.
calculations, built from my plans, would arise nearby: this was not merely a problem set for a class. I held that job for two years, until I returned to college full-time during my wife’s last year of graduate school.

After my thermodynamics class one evening, the instructor took me aside to urge me to move into a field that was more theoretical than mechanical engineering. His advice fitted my evolving interests. I thought at first of physics, which seemed a reasonable move from engineering. When I finally recognized what issues in my recent reading sparked my interest, however, I moved all the way to philosophy.

During all of this time, the FBI made sure that political activists knew that they were continuing to monitor us. Even after I had dropped out of regular political activity, FBI agents would come to my workplace, seeking information from me about others, issuing threats when I declined to cooperate. Agents would visit my employers, presumably to make good on their threats.

One personal confrontation was, for a change, more amusing than intimidating -- at least in retrospect. When I declined once again to cooperate with their inquiries, one of the agents said angrily that I would never be able to get work as an engineer. They knew that I was back in engineering school. But they did not yet know that I had decided to switch from engineering to philosophy.

At a later point I thought they might make good on their threats. This part of the story begins in 1957, when the U.S. was still drafting men into its standing army. After a lengthy and intimidating process, the U.S. Army formally determined that, for political reasons, I was unfit to serve in the military. I had mixed reactions to that outcome. I did not wish to participate in American military interventions abroad. I also knew that I took more seriously than my
government did the ideals of American democracy that had been so strongly emphasized as I was growing up during the war against fascism.

This story continues: After I entered graduate school three years later, the FBI continued in various ways to let me know that I remained a target of their attention. When I had all but completed my doctoral studies, my mentors offered to nominate me for a traveling fellowship. I hesitated to accept the nomination, partly because I was unsure the U.S. government would issue me a passport. I had been a prominent activist and had been disparaged officially by the Army. When I explained the predicament, my dissertation supervisor (John Rawls) assured me of university support. My wife and I decided that I should accept the nomination. In due course I was awarded the fellowship, and the government issued the passport -- perhaps because by then (1963) it had turned most of its attention away from the Old Left in order to concentrate on harassing activists in the civil rights movement.

In graduate school I was drawn to moral philosophy, for I discerned a tendency in the utilitarian literature to favor socially conventional rules. (I’ll explain that in a moment.) That perception was enough to engage my dissident inclinations: I determined to counter any academic bias towards social conformism. But utilitarian theories varied along several dimensions. One day, while trying to think about them systematically, I sketched a dialogue between two differing theories, which I personified for the purpose. When pressed to explain how they evaluated conduct, their judgments seemed unavoidably to converge. This led to the conclusion that competing versions of utilitarianism are “extensionally equivalent”: when

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3 As we were expecting our first child, I was also hesitant to turn down the attractive job offers I had received, which would be necessary if I allowed myself to be nominated.
4 My account will include work in moral and political as well as legal philosophy because they are central to my story and, in any case, legal philosophy is often understood broadly enough to encompass the issues on which I have worked.
applied rigorously, they come to the same exact evaluations of individual actions. The argument fully supporting that thesis was complex and had to be developed carefully. The result, drafted in two weeks of intensive work, was my doctoral dissertation. My attempt simply to understand the theories led unexpectedly to my project becoming relatively abstract, far removed from my counter-conformist concerns.

Now to explain. Utilitarian theories evaluate conduct relative to the promotion of welfare but differ in the way they do so. “Act utilitarianism,” for example, holds that an act is morally permissible if, and only if, it promotes welfare at least as much as any alternative course of action. That theory had generally been regarded by theorists as the standard version of utilitarianism. Critics cited examples to show that the theory conflicted with our most reflective moral judgments by failing to take adequate account of our moral obligations, such as those that flow from promises and special relations. Some utilitarian theorists, sensitive to these examples, constructed utilitarian theories to withstand such criticism, e.g., by providing a utilitarian account of moral obligations. “Rule utilitarian” theories judge conduct by social rules that are believed to promote welfare and impose obligations. (The rule utilitarian theories that originally attracted my critical attention hold that rules of conventional morality promote welfare better than alternatives.) Other theories judge conduct by asking questions like “What if everyone did that?” The extensional equivalence argument holds that seemingly different utilitarian theories come to the same practical conclusions in their evaluations of conduct. More generally, such variations on utilitarianism could not solve its assumed problems, and some made them worse.

5 The extensional equivalence argument is actually broader, applying not just to utilitarian theories but to “consequentialist” theories generally -- theories which may embrace basic values in addition to or other than welfare. The extensional equivalence argument compares analogous theories, with identical theories of the good. It concerns only the ways in which those values are applied, that is, whether it makes any difference to evaluate acts individually, as members of sets of similar acts, or as required by useful rules. I refer to utilitarian theories in the text because that terminology is more widely familiar.
The following year, supported by the traveling fellowship, my wife, our infant son, and I lived in Oxford. My examining committee had urged me to turn the dissertation into a book. With further encouragement from my Oxford supervisor (Herbert Hart), I pursued the project, which lasted the entire year. I developed the argument in much greater detail, until I felt that I could do no more. At Hart’s invitation, I left the manuscript with the Clarendon Press.

My concerns about the extensional equivalence argument did not match those of its subsequent critics. I was unsure, for example, that it was legitimate to employ, as the argument demanded, descriptions of actions that were based entirely on the distinct concerns of the respective theories rather than descriptions that we would ordinarily use. That was an issue no critic mentioned.

The comment I found most worrisome was that I should have ascribed consequences to actions on a “marginal” rather than a “contributory” basis. In my argument I asked, in effect, how much of the difference an action helps make to the promotion of welfare is attributable to the act itself rather than to other contributing factors, such as the actions of other persons. My critic suggested that I should simply have asked what difference the act itself makes to welfare promotion, given the surrounding conditions. On reflection, I came to recognize that I often reasoned as the critic urged. Many years later I persuaded myself that the extensional equivalence argument works equally well when acts are judged on either basis -- but I never confirmed that comforting thought with a fully-developed written argument.

The extensional equivalence argument may have influenced the development of utilitarian theory. I had the impression that it diverted interest from rule utilitarianism back to act utilitarianism. As the latter theory seemed to me at odds with sensitive moral judgment, I did
not welcome that result. At any rate, the argument did not discourage the further development of utilitarianism in various configurations. Utilitarians are not easily discouraged.⁶

The most important contribution of the extensional equivalence argument may have been the example it sometimes seems to have set in attempting to reason rigorously about normative ethical theory. Theorizing about utilitarianism, for and against, often involves unsupported claims about the consequences of actions. The extensional equivalence argument does not rely on any such estimates. It aspired to, and suggested the possibility of, tight reasoning, even about a theory whose implications depend on contingent facts.

When we returned to the U.S. from our year in Oxford, the immigration agent took some time consulting his books while processing my passport. I assumed then, and in similar situations later, that my name had triggered a search. The result, however, was only a brief delay, with an impatient toddler.

Upon our return we moved to Ithaca, New York, the home of Cornell University. Early on it appeared that I had been identified within the university administration as one of the “usual suspects.” (Had the FBI already come to call?) In the spring of 1965, during my first year at Cornell, I was one of a small group of faculty members asked by a high university official for advice concerning a student protest which was expected that evening when Averill Harriman (then U.S. ambassador without portfolio) was to give a speech on campus. It was assumed that Harriman would defend widening American military interventions abroad -- in Southeast Asia, where it was supporting a corrupt and unpopular government, and in the Caribbean, where it had just sent Marines into the Dominican Republic to insure that its government would be acceptable to ours.

⁶ The same seems true of many philosophers who embrace general theories about right and wrong. They seem much more confident than I could imagine being about such matters.
It was agreed that Harriman should give a brief talk instead of his prepared speech and then respond to questions from the audience. In the event, the audience was well behaved but Harriman wasn’t. He responded to students who questioned U.S. military interventions by suggesting that they were “communists.” His stupid and intemperate response outraged the audience, and he hastily departed. The students thereupon decided to occupy the university meeting hall in symbolic protest. A clever faculty colleague prevented potential problems by securing permission from the university administration for the students to stay there overnight — provided that we two served as faculty chaperones! And so began my political career at Cornell.

Over the years, I would be drawn from time to time into campus developments that reflected the more troubled world outside. In the spring of 1969, for example, I helped pull together a tiny group of faculty members who urged the university faculty to change its mind and listen to African American students whose grievances had led them briefly to occupy a university building. When we feared that faculty intransigence would result in the occupation of another building by black students, outside police brought to campus, and the shedding of blood, we offered to put ourselves in the potential line of fire: if they occupied a building, we would go along to reduce the likelihood of an armed police attack. Fortunately for all, the vast majority of Cornell students agreed that the faculty should listen to the black students’ grievances, the faculty reconsidered its position, and violence was averted.

Another crisis developed in 1985, when students remained in the university’s central administration building after it closed for the day, as part of the international campaign to seek divestment from companies doing business with South Africa, so as to put pressure on the South African apartheid government to accept major reforms. The small initial contingent of students committing this most decorous form of civil disobedience was thereafter joined each day by
hundreds of other Cornellians. Within a week the campus police had made twelve hundred arrests. As I was on sabbatic leave for the academic year and thus had more free time than most other faculty members, I assumed a good deal of responsibility for working with student and staff organizers. The campaign was long and frustrating. The university president and the board of trustees were anxious to defend a benefactor to the university whose company was heavily invested in South Africa.

For a variety of reasons, my philosophical work expanded into legal and political theory. My last graduate school seminar had devoted half the semester to Hart’s recently published *The Concept of Law*. In Oxford the following year I attended Hart’s lectures and seminars, among others. Shortly after joining the Cornell philosophy department, a senior colleague suggested that I look into the topic of rights. I sought advice about readings on the subject and Hart’s suggestions led me into the jurisprudential literature. When the department reformed its undergraduate offerings, I created a course on the philosophy of law. I taught seminars on topics such as punishment. In 1969 a new member of the law faculty asked me to help him introduce analytical jurisprudence to the law school, and I co-taught his seminar on legal theory. I was soon invited to teach my own courses in that school and in 1979 to join its faculty. And so I came to divide my teaching and research between the two academic units, philosophy and law.

An early research project that bridged the two fields was on Bentham. Agreeing to contribute a volume on Bentham to a new series, I taught a seminar on some of his principal works, and found myself puzzling over his explanation of utilitarianism. Conventionally regarded as a creator of utilitarian theory, Bentham differed in his focus from most theorists who supposedly followed his lead. Save for John Stuart Mill, most utilitarian philosophers have seemed preoccupied with particular acts performed by individuals, whereas Bentham was chiefly
concerned with law and other institutions. In his *Introduction to the Principles of Morals and Legislation*, however, Bentham distinguishes the two realms and offers distinct criteria for them: the community’s interest for public policy and the agent’s interest for private action. Only such a “dual” interpretation seems to take Bentham at his word. The publications in which I presented that reading may have encouraged others to look more closely at what Bentham actually wrote -- which was a message that Hart was more forcefully conveying in his revelatory work in the new collection of Bentham’s writings.

Around the time my Bentham project ended, John Rawls’s *A Theory of Justice* appeared, which some appreciative reviewers declared meant the demise of utilitarianism. I was no champion of the condemned theory, but the history of ethics suggests that its obituary was premature. Rawls himself treats utilitarianism as the chief alternative to his conception of social justice.

Although Rawls compares his theory of justice with a version of utilitarianism, he does not consider the only significant theory of justice that had been developed by a utilitarian, namely, John Stuart Mill’s. That theory has two stages. Mill first analyzes morality in terms of rules that determine moral obligations and, in the case of justice, moral rights as well. Then he argues that the rules are to be identified by means of a utilitarian test. The theory is presented sketchily, but my work on Bentham offered some clarifying clues. Mill criticized much in Bentham, but not Bentham’s conception of rules. That suggests how to explicate Mill’s theories of justice and morality, in terms of useful rules with sanctions attached.

My Mill project asked, in effect, whether utilitarianism could ground a plausible theory of moral rights. Mill’s theory might do so if his conceptual analysis of rights in terms of moral rules reasonably excludes the possibility of approving the violation of useful rules when welfare
would be maximized by doing so. I argued that Mill does not justify such a theory of rights and, in any case, that such a view would be incompatible with a utilitarian’s overriding commitment to promoting welfare. Generalizing from Mill’s case, it looks as if any utilitarian approach to moral rights would be undermined by the compromises it must make with direct utilitarian reasoning. Of course, some utilitarians disagree; some do not care; and others have reconstructed Mill’s theories differently.

Beyond Bentham, my work in legal theory has had two main parts: the “separation” of law and morals and the problem of legal interpretation.

In *The Concept of Law*, Hart seems to endorse the view “that there is no necessary connection between law and morals, or law as it is and law as it ought to be.” As he would probably have agreed, that formulation of the separation thesis needs refinement. Some “necessary connections” are irrelevant to the thesis. On the one hand, Hart acknowledged that prevailing moral values interact with law, which means that there may be *causally* necessary connections between the two. On the other hand, it is sometimes suggested that those who presume to speak on behalf of the law characteristically claim that it does justice. Even if such a claim were a conceptually necessary feature of law, it would seem irrelevant to the separation thesis.

The central idea of the thesis seems to be expressed by the platitude that laws (in the ordinary, everyday sense) can be just or unjust, morally defensible or indefensible. Hart did not frame the separation thesis in this way, perhaps because he believed that a book like *The Concept of Law* should be neutral between skeptical and objectivist views of moral judgment. Hart suggested that laws lack conceptually necessary connections with any moral standards by which
they may be judged. As a critic of skeptical conceptions of morality, I prefer to say that laws lack conceptually necessary connections with the standards by which they are properly judged.

One commonplace qualification of the separation thesis is implied by the idea that adherence to law constitutes a species of justice – “formal” justice. The idea seems to overgeneralize a valid point: that injustice can be done not only by applying unjust law but also by officials failing to follow the law. While Hart seems to embrace the idea of formal justice, he also suggests how the valid point requires qualification; for he says that injustice occurs when official deviation from the law embodies “prejudice, interest, or caprice.” So qualified, the valid point does not imply that an official acts unjustly when he refuses to follow an unjust law precisely in order to prevent an injustice. No injustice of any kind would have been done, for example, if a Nazi official deliberately refused to accept conclusive evidence that a particular person qualified for transport to an extermination camp.

A point related to the separation of law and morals is that the burden of proof falls on one who claims there is a moral obligation to obey the law. That is because a law’s injustice generates a moral presumption against compliance with it. Theorists who embrace the idea that we have a moral obligation to obey the law generally recognize that the obligation does not exist in all circumstances and that, when it does exist, it might be overridden. So the idea is best understood as the claim that there may be good moral reason for all persons in a given community to comply with each and every one of its laws, the unjust as well as the just.

I argue that this idea requires further qualification. I see no reason to suppose, for example, that one could be morally required to participate in genocide or some other violation of a fundamental right. It is not that the moral obligation would be overridden in such a case but rather that a moral obligation could not normally extend so far.
These points apply to officials as well as to private persons. It seems possible for those who assume a public trust to acquire a special, more stringent moral obligation of fidelity to law. Such an obligation depends, however, on the circumstances of the case and the character of the law. If an individual is coerced into official service by a repressive regime, she may have no moral obligation to enforce the law. And some of the laws she is called upon to implement may involve systematic violations of fundamental rights. For such reasons, it is implausible to suppose that officials always have a moral obligation of fidelity to all of the laws that they are legally required to implement or enforce.

Now to legal interpretation: Soon after joining the Cornell law faculty I was urged by colleagues to venture into constitutional law because of its philosophical assumptions. That was an intriguing prospect for someone interested and experienced in political action that was dedicated to the realization of democratic principles. Embarking on the project, I quickly came to appreciate how untypical it had been for the U.S. courts, in the third quarter of twentieth century, to enforce our most prized constitutional rights. I learned how the Supreme Court’s desegregation decision in *Brown v. Board of Education* had not been welcomed by a number of legal academics and had engendered a politically charged but theoretically confused field of constitutional theory.

Consider the theory that asks courts to follow “original intent” – a view I’ll call intentionalism. When legislation and written constitutions must be applied, lawyers and theorists often seek guidance from the “intentions” of the lawmakers. I have argued that this theory, taken literally, is implausible. An individual lawmaker may support a statute intending it to have certain applications so that it might serve some intended purpose. But the lawmaker may be mistaken about what applications of the law would serve the desired end. If the law were applied
as intended, it might undermine rather than serve the intended purpose, in which case
intentionalism generates conflicting imperatives – to apply and not to apply the same law to the
same fact-situation – which, of course, is guidance it is impossible to follow – and arguably self-
contradictory. Also, when a legal change results from the actions of several persons, such as the
members of a legislative assembly, sometimes no intention is shared widely enough within the
group to justify ascribing an intention to the law makers or their enactment, in which case
intentionalism implies, implausibly, that a perfectly intelligible law has *no* meaning or proper
application!

In any other field, such consequences would discredit a theory. It is unclear, however,
that my arguments have had any impact on theorists who work on the issue of legal
interpretation.

One reason may be that those who employ intentionalist legal reasoning appeal
indiscriminately to intended applications and intended purposes, without considering whether
those intentions are in fact compatible or, indeed, whether any relevant intention was widely
enough shared within the enacting body.

Another reason is that frequently the attribution of an intention to a set of law makers (or
to the law they have enacted) seems tacitly to reflect a value judgment about the law: that it can
readily be seen to serve a *reasonable* (and thus reasonably justifying) purpose. On the one hand,
because the value judgment is uncontroversial, it is not identified as such. On the other hand, the
(justifying) purpose is ascribed to the law without any evidence that there was an intentional
consensus among its enactors. This practice is significant because some who embrace
intentionalism insist that laws can be interpreted without exercising value judgment and should
always be interpreted in a value-neutral manner. That claim and the accompanying aim are
defeated when a purpose is ascribed to a law not on historical grounds but rather because the alleged “purpose” provides a justifying rationale for the law.

A related theory holds that the meaning of a law is determined not by the lawmakers’ intentions but by the “original understanding” of what the law meant when it was enacted or ratified. As an original understanding can concern the law’s purpose as well as its applications, this theory faces the difficulties that seem fatal to intentionalism. If the theory refers instead to an original understanding of the text, it will be incapable of helping if there had been no original consensus about the text’s meaning or if the consensus does not determine how the law should apply to the unanticipated fact situation that must now be addressed.

Intentionalist and comparable theories focus entirely on written law, such as legislative enactments and written constitutions. They ignore some of the law in a “common law” system like ours – the part that is generated when courts provide authoritative interpretations of the law. Because judicial precedents contribute to our law, our system requires a more complex interpretive theory.

This gap was addressed in the 1980s when interpretive legal theory was revived by Ronald Dworkin. Dworkin argues that interpreting law involves the exercise of moral judgment as well as the attribution of moral principles to the law. He grounds this view on a more general theory about the interpretation of social practices.

Dworkin’s theory holds that past authoritative decisions -- constitutional, legislative and judicial -- should be understood in terms of those moral principles that show past practice in the best light, which involves justifying past decisions (as far as that is possible). This approach is by no means foreign to legal practice; examples are readily found in judicial opinions and

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7 Dworkin’s earlier work, in my view, was neither clear nor general enough to ground a theory of legal interpretation.
Dworkin does not claim, however, that judges or lawyers always reason in this way but rather that the approach is more defensible than the alternatives.

I have argued that Dworkin’s theory cannot apply generally. The problem is that legal practice (like other social practices) is not always justifiable. Dworkin is aware, of course, that it may not be possible to justify all past authoritative decisions, and that some judicial precedents may reasonably be regarded as “mistakes.” That is familiar judicial practice. But it does not solve the problem. Trouble arises not only when an entire legal system is morally corrupt, as some systems have seemed to be, but also when individual statutes or constitutional provisions are morally indefensible.8 Dworkin’s theory, which requires that statutes and constitutional provisions be interpreted so that they serve some truly justifying rationale, encounters the following predicament: first, we have no reason to assume that every statute or constitutional provision enjoys even a minimal measure of moral justification, and some reason to suppose the contrary; second, courts are not free to discount totally unjustifiable statutes or constitutional provisions as “mistakes” that need not be enforced; third, such a statute or constitutional provision can be meaningful enough to have determinate applications in some range of cases. Because Dworkin’s theory holds that the legal meaning and proper application of statutes and constitutional provisions are determined by the principles that provide them with some measure of genuine moral justification, it implies that a morally indefensible statute or constitutional provision cannot be interpreted and lacks legally appropriate application. It would seem to follow that the theory is false or, at best, crucially incomplete.

We are left with a conundrum – whether we can identify a plausible, generally applicable approach to the interpretation of law.

8 It is arguable, for example, that the fugitive slave clause of the U.S. Constitution was morally unjustifiable.
My recent work has concentrated on the experiences of peoples of color in the United States and the antecedent British colonies over the past four centuries. This is political history, but it raises continuing questions of political morality. Governmental policies in this area have involved systematic discrimination, enslavement, and genocide. Two of the most obvious issues are what forms of resistance can morally be justified and what kinds of corrective justice are now morally required.

Prior to my recent work in this area I had addressed the issue of civil disobedience. I was moved to do so upon finding that some of the recent literature misrepresented the judgments I associate with principled criticism of social injustice. Test cases were available in three of the leading theorists and practitioners of civil disobedience: Henry David Thoreau, Mohandas Gandhi, and Martin Luther King, Jr.

A significant portion of the recent philosophical literature assumes that those who engage in civil disobedience regard the systems within which they act as sufficiently just to generate a moral presumption favoring obedience to law and thus that such activists faced a moral dilemma framed by a duty of justice and an obligation of fidelity to law. This view of the matter represents a striking gap between political theory and political practice. As the political concerns of Thoreau, Gandhi, and King centered, respectively, on chattel slavery, British colonial rule, and Jim Crow, it would have been unreasonable for any one of them to have regarded the prevailing system as generating a moral presumption favoring obedience to all of the law, including the laws supporting slavery, enforcing British colonial rule, or giving us Jim Crow. And they were reasonable men.

The writings of Thoreau, Gandhi, and King confirm their radically negative judgments of the systems under which they lived. King, for example, emphasized the awful gap that existed
between America’s democratic ideals and its outrageous political practice under Jim Crow. Following a suggestion made by Rawls, I argued that a moral obligation to obey the law is impossible in any community with deeply entrenched, systematic injustice. In such circumstances, there is no moral presumption favoring obedience to some of the community’s laws. This does not tell us what kind of disobedience can be justified, or precisely when, but it clears the way for a more realistic and defensible conception of political deliberation.

The second issue, of corrective justice, has often been framed in terms of reparations for slavery. As slavery was abolished a century and a half ago, this way of thinking about the issue suggests that individuals’ claims for compensation today must be based on estimates of the disadvantages they currently suffer that can be traced to wrongs that were done long ago by slaveholders to slaves. As many generations have intervened, estimates of compensation that is morally required today would be, at best, practically impossible. The same applies to the identification of valid claimants and of those who today can justly be called upon to pay.

But that way of framing the corrective justice issue is misleading. It obscures the fact that Reconstruction was aborted after the Civil War and that government policies at all levels led to the creation of Jim Crow, another violent system of racial subordination, which continued well into the second half of the twentieth century. Current conditions flow from practices of racial subordination that persisted until the relatively recent past.

Slavery and Jim Crow were abolished, but without compensation for their victims. And their legacy is measurable, e.g., in the enormous wealth gap between white and black Americans. It is exemplified in the deeply rooted disadvantages of African American children, whose conditions challenge the American ideal of equal opportunity. In their case, corrective justice
calls for massive, sustained programs in medical services, housing, education, and other necessities of contemporary life.

That returns us to politics, as seems appropriate.
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