Citation:
Green, A (2011) Expanding Law's Empire: Interpretivism, Morality and the Value of Legality. European Journal of Legal Studies, 4 (1). ISSN 1973-2937

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EXPANDING LAW'S EMPIRE: INTERPRETIVISM, MORALITY AND THE VALUE OF LEGALITY

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For interpretivist theories of law it is the value of legality that informs what counts as true legal propositions. The leading theory of legality in the interpretivist school is Ronald Dworkin's 'Law as Integrity'. This paper suggests that Dworkin's view fails to account for several features of modern legal practices, particularly those that deal with international and comparative legal standards. It also highlights some inconsistencies in law as integrity as a conception of the value of legality and suggests an alternative conception to correct for them. The result of this conception of legality provides the major thesis of this paper. This is that under an interpretivist theory, true propositions of law never conflict with what morality demands.

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I. INTRODUCTION

In this paper my thesis is that, under the legal-philosophical school of interpretivism, true propositions of law never conflict with what morality demands. Under interpretivism one understands law as a social phenomenon by engaging in interpretation, which is a type of reflective reasoning. Broken down into stages, the interpretive method is as follows:

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(i) The social phenomenon 'law' is capable of pre-interpretive identification. Before interpretation, however, we know nothing about it other than it exists and where to look in order to begin an investigation about it.[1]
(ii) When we begin looking we will discover that certain legal practices (activities, attitudes or propositions that we can justify as 'legal') will be considered paradigms. These paradigms form the starting point of interpretation.[2]
(iii) One interprets these paradigms as a complete doctrine, producing a theory of 'legality' or 'the point of law'.[3]
(iv) This theory allows one to reach conclusions about the content of other laws that expand (or otherwise alter) the list of paradigms (the 'post-interpretive stage').[4]
(v) This, in turn, allows one to modify one's theory of law (by returning to stage three).[5]

As a result of this process the concept of law continually evolves over time, giving rise to a richer theory of the original social practice.[6] I criticise Dworkin's approach to the second and third stages in my fifth section but take the overall methodology to be correct throughout.

My argument proceeds in four stages. In the first section of this paper I briefly address the question of moral objectivity as a preliminary issue. The importance placed on purpose and value by interpretivism means that it depends on moral truth and the character of normal moral argument. My defence of both therefore serves as the first half of a methodological introduction as well. In my second section I place my discussion of legality in context by outlining the interpretivist position that legal reasoning involves moral reasoning and that moral principles form the 'grounds' of law. This is the thesis that true legal propositions depend on morality *in some way*. This forms the second half of my methodological introduction.

In my third, fourth and fifth sections I discuss the dominant interpretivist theory of legality, "law as integrity", which proposes one theory of this relationship. Given that a large part of this essay is devoted to understanding integrity, defining it at this stage is a difficult task. Putatively, law as integrity could be defined as making the best moral sense of the legal practices of a particular community by attributing coherent conceptions of justice and fairness to them.

My third section discusses the relationship between integrity and equality of respect and the fourth evaluates law as integrity's emphasis on

community. In my fifth section I discuss the adjudicative principle of integrity and conclude that legality is better understood as a union of moral accuracy and equality of respect. This amended theory of legality facilitates my ultimate conclusion because it relies on universal moral principles rather than those of a particular community. This allows me to conclude that what is valuable about legality is ultimately getting the correct moral answer in everyday political and legal decisions. To use Dworkin's terminology, this is both the 'jurisprudential' and 'doctrinal' part of my argument.[7]

Understanding the value of legality is essential for an interpretivist because a theory of legality is a theory of what makes a statement 'legal' or, in other words, what makes a proposition of law true. In the sixth section of this paper I explain more fully what the implications of adopting my theory of legality are. Because 'the point' of law is to produce correct moral answers to political and inter-personal problems in the real world, I conclude that any true proposition of law must conform to this standard. In other words, true propositions of law must conform to what morality demands given the same set of facts.

II. A Preliminary Issue: Moral Objectivity from Moral Argument

Whether moral truth can be discovered by normal moral argument is highly contested. In order to engage in an analysis of interpretivism I first need to establish the case for the soundness of moral reasoning, upon which it depends. The metaphysical and epistemological soundness of moral argument have been frequently challenged. These challenges fall into three broad categories. Firstly, how do we prove that moral principles actually exist? Secondly, if they do exist, how can we become aware of them? Thirdly, does moral disagreement pose a problem for claims of moral objectivity?[8]

The first challenge, of whether moral principles 'exist', is a difficult one to discern. When dealing with practical morality we scarcely rest our convictions on the basis that there are physical 'things' 'out there' that somehow causally govern what is moral. I certainly do not argue for this view. Even if we do believe this, it is hard to see what it adds, as there is no way of examining the effects of this 'moral field' other than by engaging in moral argument in the normal way. However, much skepticism about moral right answers is based on the assumption that *unless* there is a moral field, there is no basis upon which to found moral truth.[9] This rests on a general epistemological assumption: a belief is only true if the thing that it is held about causes it to be held. This may work in the

natural sciences. I believe that water boils at one hundred degrees centigrade because water boiling at one hundred degrees centigrade causes me to. This clearly is not the case for a moral belief; there is no perceivable quality of 'wrongness' that jumps out of the act of murder for example. However, we have no reason to rule out moral objectivity on the basis that we cannot discover a causal relationship of this kind. For one thing this general epistemological position fails its own test.[10] There is no perceptible cause of the belief that beliefs are only true if the thing that they are held about caused them to be held.

It seems to me that the project of seeking to found moral principles in some non-moral metaphysics is a misconceived one. It is relatively common ground in philosophy that no statement about what *is* infers anything about what *should be*.[11] Morality is the domain of what should be. As a result, any statement about what should be must be a statement of morality itself.[12] The only meaningful question that one can ask about moral principles is therefore whether they should, morally speaking, be taken to exist. To ask anything else is to assume that bare facts can answer moral questions. Any assertion that correct moral answers are impossible because moral principles do not exist must therefore be taken to be a moral assertion. Such theories therefore self-destruct.

Some philosophers argue that theories of this sort are in fact statements *about* morality rather than *of* morality. This, it is claimed, protects metaphysical refutations of morality from self-destruction. Dworkin argues, quite rightly in my opinion, that this cannot be true. He uses the following example of a four way disagreement, which I adapt slightly to fit better this particular limb of the argument:

> "A: Abortion is morally wicked: we always in all circumstances have a categorical reason – a reason that does not depend on what anyone wants or thinks – to prevent and condemn it.
> B: On the contrary. In some circumstances abortion is morally required. Single teenage mothers with no resources have a categorical reason to abort.
> C: You are both wrong. Abortion is never either morally required or morally forbidden. No one has a categorical reason either way. It is always permissible and never mandatory, like cutting your fingernails.
> D: You are all three wrong. Abortion is never either morally forbidden or morally required *or* morally permissible [because moral principles do not exist]."[13]

It is clear that A-C are posing moral opinions but what about D? One

point can be made relatively quickly. D is clearly forwarding a *conclusion* that falls within the moral domain. D is expressing an opinion about what*should* be. She is essentially saying that if moral principles are not 'out there', everything is permitted. Justifying permissibility by claiming the absence of 'a moral reason' nevertheless rests on a reason *of some sort*. It seems appropriate to ask, given the principle that no bare fact can necessitate a moral conclusion, what sort of reason could this be? Let us consider an analogous conversation, this time between lawyers rather than moral philosophers:

> A: This contract is void because there is no consideration.
> B: This contract is not void because there is consideration.
> C: This contract is not void because consideration is not part of the English law of contract.
> D: This contract is neither void nor is it not void because there is no English law of contract.

Clearly persons A-C are adopting legal positions. Person D is also doing this. Although they seek to express their view of the contract as 'neither void nor...not void', the fact still remains that they think it non-binding. This is because the implication of there being no English law of contract is that no contracts in England can bind. The assumption that rests behind this is that only a law of contract could justify English contracts being of binding force. Theories such as this are substantive legal positions.

Returning to the moral disagreement considered by Dworkin, it becomes clear by analogy that position D is a moral position in that argument. To adopt a normative conclusion within the moral domain on the basis of a justifying reason is to forward a moral argument. The moral element of that reason here is that in arguing against moral truth, D is forwarding an argument that in order to adopt a valid moral position, moral truth must be possible. This is a particular example of a very common moral argument; that 'ought' implies 'can'. There is nothing purely factual about such arguments; they cannot be considered 'non-moral'. When one justifies a conclusion about what ought to be the case with a reason that purports to uphold that claim, one is making a moral argument. Once we accept the impossibility of making statements *about* morality that are not moral statements in themselves, it is clear that this sort of scepticism cannot escape self-destruction.

A further argument follows from this. If all forms of moral scepticism are themselves moral arguments then it follows that they are arguments for the proposition that it is morally good that there are no objective moral answers. Putting aside the self-contradiction in this statement, it seems

highly unlikely that the best available moral interpretation of morality is one in which answers cannot be reached. Therefore a powerful moral argument exists in favour of the moral objectivity I argue for in this section. It is *morally good* that a method of investigation exists that allows us to discover moral truth.

The second challenge is by far the more interesting. On the fairly safe assumption that morally correct answers can exist, we have to ask how we may reach those answers. The response to this epistemological question is implied in my analysis of the metaphysical objection I have just addressed. One proves that one has reached the correct moral answer through adducing an argument as to why that is the case. If I want to justify my views on same sex marriage for example, I provide a case for a particular application of certain moral principles. If these principles are themselves questioned, I must justify why I believe they are sound in themselves. If I can defeat any possible objection that may be raised with reasons that I honestly believe in, rather than obfuscating rhetoric, I have defended my claim and proved that my beliefs about same sex marriage are sound, or if you prefer, that they are 'true'.

Those who wanted some logically complex 'box-ticking' or criterial answer to this epistemological question will no doubt be disappointed. Yet it is difficult to see why they should be so. Outside the realm of pure mathematics and formal logic, we require no such stringent proof of the truth of our assertions. In the natural sciences I assert the truth that water boils at one hundred degrees centigrade by presenting evidence of that fact. If there suddenly emerges new evidence that water does not boil at that temperature, but rather at one hundred degrees Fahrenheit, then my conclusion is sensibly taken to be false. It seems to me that the principle that a conclusion is only sound in the natural sciences when supported by irrefutable evidence is not so different from the moral principle that a conclusion is only true when supported by an irrefutable argument. Both questions require a type of investigative process uniquely suited to pursuing truth within the field that they are raised.

It is admittedly true that an epistemology of morals rests on the conviction that sound argument is the appropriate method of determining moral truth. However, an epistemology of natural science likewise relies on the conviction that sensory perception of the natural world forms an effective basis for claiming truth about that world. The strength these convictions share is that they are integrated into the domains in which they are made. It is empirically supported that sensory perception of external events forms a sufficient basis for claims of truth about the natural world, through the understanding of phenomena such as light and

neurological activity. Likewise, it is a sound moral argument that sound argument forms sufficient grounds to believe a conviction to be true. Both these epistemological theories are theories *about* truth in the domains to which they pertain, but they are also theories *of* those domains. This is a type of circularity of course, but a circularity that is more indicative of soundness by virtue of its all encompassing consistency, than of fallacy.

Next we need to consider whether disagreement poses a theoretical bar to this epistemology. The assertion goes something like this: we might accept that irrefutable arguments render a moral position true, but doesn't moral disagreement indicate that this is never in fact possible? Before answering this question we need to make two distinctions. The first is between good faith and bad faith disagreements. The second is between uncertainty over an issue and the indeterminacy of that issue.

In the event that the disagreement is in bad faith, it should come as no surprise that moral objectivity is not threatened. I can argue fiercely that abortion is categorically wrong even if I believe it to be permissible. All I am doing is producing words, much the same as a scientist who swears that water boils at one hundred degrees Fahrenheit despite evidence to the contrary. In much the same way we can discount all those moral opinions that are manifestly stupid, unthinkingly held, or self-contradictory.

Firstly if a moral opinion is deeply counter intuitive and seemingly baseless, such as the belief that human suffering is morally irrelevant, then the mere fact that it is posed offers no threat to objectivity in morals. One might as well claim that science is under serious epistemological threat from creationism. One of course needs some criterion for determining whether something is ridiculous in that way. The one that recommends itself immediately is asking whether a right minded person could be convinced of the proposition, even if it formed part of a consistent moral theory. In any event, such beliefs are uncommon to say the least and so do not go to the core of the disagreement challenge.

A much more interesting type of bad faith moral opinion is that which is unthinkingly held. My father has the fervent belief that people with expensive tastes should not have those tastes supplemented under a morally correct system of distributed justice. This *conclusion* may well turn out to be correct upon examination. However, as a moral claim it is epistemologically worthless without critical examination of the reasons behind it.[14] In a recent discussion over dinner my father confessed to having failed to consider an analogy between those with parentally nurtured and inescapable expensive tastes and those with physical disabilities. [15] He refused to examine the soundness of the proposition

however on the basis of a gut reaction. This can scarcely claim to be an epistemologically thorough stab at moral truth. This is so because moral propositions are true only by virtue of the argument that supports them. Unlike a bare fact, which could be sensibly understood to be independent of a method designed to investigate it, a moral proposition is metaphysically intertwined with the argument that proves it. To put this in crudely metaphorical terms, the moral proposition *is* the argument that justifies it. In the domain of morality the line between epistemology and metaphysics is blurred, if indeed it exists at all.[16]

This sort of bad faith argument also falls foul of the straightforward moral argument for moral objectivity I outlined above. If we abdicate our moral responsibility to pursue the truth by justifying our beliefs, then we can no longer attest to the positive metaphysical claim that accessible moral truth exists for good moral reasons. In this way the epistemological is linked again to the metaphysical. The existence of morals and our capacity to understand them form part of an inter-dependent web of conviction.

This leads on to the final type of bad faith moral opinion: the self-contradictory conviction. This can take two forms. The first is where a belief contradicts itself in a simple sense. An example of this is a rejection of human dignity. I cannot consistently maintain the proposition that my life is objectively important because it is mine, but that yours is not because it is not mine. In order to justify the objective importance of my life with any reason other than the mere fact of personal preference, which is a purely subjective reason, I will have to appeal to the valuable characteristics of my life. These include concepts such as autonomy, dignity and uniqueness. Once I have done this however, my failure to identify the same qualities in your life opens me to self-contradiction.

The second type of self-contradiction is where a moral belief is internally consistent but is inconsistent with some other conviction that an individual purports to hold alongside it.[17] For example, I cannot consistently maintain that even if racism is biologically pre-determined it is still wrong and at the same time view homosexuality as wrong on the basis that it is 'unnatural'.[18] This is because the premise of one argument rests on the priority the moral dignity of autonomous individuals holds over bare fact, which is exactly what the other argument opposes.

Contradiction invalidates moral opinions for two reasons. Firstly it is indicative of bad faith belief in the second sense; it exposes a failure on behalf of the individual to examine their views. This abdication of moral responsibility constitutes an immoral (or at the very least amoral) approach to moral argument and therefore is a non-starter epistemologically

speaking. One cannot justify moral truth if one is not aiming to. Secondly, the contradiction alone demonstrates that the understanding of principle that such a moral opinion is based on is an incomplete understanding. If an account of principle contradicts itself, then it is illogical. To claim that 'A therefore B' and 'A therefore not B' renders one of those statements false by definition. This holds whether the contradiction is express or implied. I have given several examples of contradicting moral claims already, both of the 'lower level' (such as the egoism and homosexuality examples) and of the 'higher level' of the moral epistemological claim that 'no moral opinions can be true (except that one)'. Both fall foul of the same logical principle and are invalid as a result.

That covers bad faith disagreements. If disagreement on a particular issue still exists even after all these thresholds have been passed, we are faced with a situation where two individuals (or perhaps one individual within themselves) have reached an argumentative deadlock. There are two explanations of such a possibility. On the one hand the issue is uncertain; on the other it is indeterminate.[19] Uncertainty is relatively easy to understand. Anyone who takes moral problems seriously will have encountered uncertainty at some stage. We may be unsure, for example, whether euthanasia is justified as an assisted autonomous act, or morally forbidden as an act of murder. However, such uncertainty cannot be taken to disprove the epistemological soundness of moral argument. That would be analogous to arguing that uncertainty over the existence of Higgs Boson particles serves as a disproof of the investigative methods of physics.[20] Uncertainty alone cannot amount to a positive case against an investigative method that otherwise seems to fit a domain well. Indeed, if uncertainty never existed, there would be no need for investigation in the first place.

Indeterminacy purports to be a somewhat more serious claim. If a moral issue is indeterminate then there is no answer one way or the other. One example raised by Joseph Raz is the ethical choice between a life dedicated to music and a life dedicated to the law.[21] It is a relatively popular view that these two lives cannot be compared in any meaningful way. This cannot, however, disprove moral objectivity. If a situation arises where no argument can be made to show why option A is better than option B, the moral answer is highly likely to be: 'Do either A or B'. This is not a disproof of moral objectivity, rather it assumes it.[22] As a result a positive argument for moral indeterminacy must be made in each case. Such an argument will likely be very difficult to make in hard cases because they already suffer from uncertainty. Where there is genuine uncertainty, something that requires a positive moral argument cannot be merely assumed.[23] This therefore creates no problems for the account of moral

truth I have developed.

III. Setting out Interpretivism: Moral Reasoning as Part of Law

In this section I set out the interpretivist position on how one discovers the law of a particular legal system. I will present Dworkin's argument that we need to identify the moral principles that justify our political practices rather than simply looking to agreed sources of law. I also set out the exact role principles hold in legal argument under interpretivism as an argumentative precursor to my discussion of legality.

Dworkin famously argued that principles play an important role in legal argument. Firstly he presented doctrinal evidence, citing a number of cases in which we can observe principles being used.[24] Secondly he argued that such principles are logically distinct from rules on the basis that they have a dimension of 'weight' rather than requiring 'all-or-nothing' application.[25] By this he meant that a rule provides an answer for every situation in which it is engaged. For example, 'in chess bishops must move along diagonals' leaves no room for exceptions. One either does or does not apply it. Exceptions are included in the rule itself: a rule with exceptions is merely complex.[26] This is because what constitutes a rule is a matter of form. A rule is a rule if it sets out when it applies, how it applies and what the result of its application should be. The content of the rule is irrelevant to identifying it as a rule. Principles are different; their application is dependent on their substance.[27] A principle will only apply if it contains something of value, morally relevant to the particular problem being faced.[28] The result of this dependence on substance is that a principle does not direct action in the same way a rule does, but instead suggests a potential outcome based on the merit of its substance.[29] A good way to unpack this is to think of a principle, such as 'people who do wrong should be told why', as including a 'but for' clause. This might be written as: 'people who do wrong should be told why; *unless* any other relevant moral considerations should prevent it'. The element of weight comes in when two principles interact. Imagine our example principle comes up against a competing principle, that of 'ignorance is bliss'. In deciding whether to tell my child that shaking the bag with his goldfish in is wrong because he will kill the goldfish, I have to 'weigh' the respective merit of maintaining my child's bliss against the value of his moral education. This is a question that can only be answered by considering what I find valuable about these principles and, as a result, what the outcome should be. There is nothing about the form or substance of these two principles that directs me one way or the other without such consideration. However, when I have made the decision we might be

tempted to phrase my conclusion in the form of a rule so that, if the same problem comes up again, I can quickly determine the solution.[30]It should come as no surprise to the discerning reader that this reasoning process is more or less identical to the moral reasoning method I defended in the previous section.[31]

Dworkin suggested that we have to engage in principled argument in hard cases because only by considering what is valuable about the law can judges apply it to new sets of facts. In other words, when the rules 'run out' one must look to why those rules are there in the first place to determine how they should be extended. However, the truly innovative element of his argument was to say that this was not an act of law making, but rather one of application. We are applying the law, he says, when we draw moral conclusions based on the principles that justify the law. This means that 'the law' is the underlying moral theory that justifies legal practices.[32]

H.L.A. Hart disputes this analysis of principles in his famous *Postscript*. Hart's contention was that a principle is merely a rule that has not had all its exceptions accounted for. In other words, when we rely on principles, we are merely applying unspecific rules.[33] He argues so in response to an inconsistency in Dworkin's early work in which the latter argues that whilst rules are all-or-nothing, the *rule* in *Riggs v Palmer* was outweighed by the principle that no one should profit from their own wrongdoing.[34] The reason Hart saw inconsistency here was admittedly a failure of Dworkin's, but a failure of expression rather than reason. What Dworkin should be taken as arguing is that the principle supporting the rule in *Riggs*, not the rule itself, was being weighed against the principle that no one should profit from their own wrongdoing. The statutory rule was an expression of that principle, which presupposed the superiority of its substance. The rule was not applied at all in *Riggs* because that assumption was false. Hart fails to answer this. He claims instead that *some* principles are identified by their pedigree rather than their worth.[35] This is of course an avoidance of, rather than an answer to, the interpretivist challenge. Furthermore, Hart fails to provide a reason for why pedigree matters in some cases but not others. If we are to require obedience to particular legal decisions based on their pedigree, we must provide a moral justification for the importance of pedigree. When it comes to deciding whether we depart from precedent or restrain ourselves, we must engage in this moral debate. This is exactly what interpretivism asks us to do in the first place: find out what is valuable about the law in order to make a judgement about what the law requires. We gain nothing by framing this question as whether adhering to the doctrine of precedent is good or bad, because asking whether the law requires us to adhere to it involves exactly the same questions. Since legal practice includes this sort

of argument all the time, why would we over-complicate things by considering such matters to be extra-legal?

Responses to this have been few and far between. Joseph Raz has argued that principles are not included or excluded from the law but rather 'non-incorporated'.[36] The meaning behind this is puzzling. Clearly Raz cannot mean that there is some half-way point between inclusion and exclusion; 'non-incorporation' cannot be a third logical option. A principle is either part of the law or it is not. To argue otherwise would be to commit to a view whereby even the most obvious hypothetical conclusion about the easiest case would not be law, even if it was patently obvious that any judge would rule that way. If a legal principle explains legal paradigms and sits well with one's legal theory then it is simply part of the law. If it does not, then it is not. Alternatively, Raz might be taken to claim, as Dworkin seems to think, that a judge can make decisions in accordance with the law but not about the law.[37] An example he uses is the First Amendment of the United States Constitution which requires judges to make moral judgements about free speech without giving those judgements legal status.[38] I find this distinction unhelpful. Judges are part of a social system designed to regulate human behaviour. There is nothing qualitatively, in terms of a judgement's normative force, to be distinguished by holding the moral elements to be non-legal. Perhaps Raz postulates that moral judgements of this kind do not have the same precedential value or do not command the same duty to obey. Given Raz's normal justification thesis I find this difficult to believe: he is genuinely concerned with the moral substance of the law.[39] This seems to reduce his objection to one of terminology. He has decided what counts as 'law' before taking account of the intricacies of practice and applies this *a priori* taxonomy to it. This might be instrumentally useful, but this is not an essay about the instrumental value of legal positivism.[40] However, we can conclude that given that moral principles form a core part of our legal practices, such taxonomy cannot help us understand those practices, and merely serves as common terminology for discussing them. Perhaps this is a worthwhile pursuit, but it is not the one we are engaged in here. When examining interpretivism we are concerned with whether moral reasons are determinative in legal *reasoning*.

We have seen that under interpretivism principles play a justificatory role in legal argument, telling us what is valuable about the law. We have also seen that they are part of the law, in that recourse to principles is necessary to answer difficult legal questions. We must now ask whether certain moral reasons have a monopoly on legal reasoning. If that is the case then legal systems can only be reasonably viewed as a truncated version of morality. What we are interested in is not whether there are

certain moral problems that the law will never deal with, as this is a factual, rather than conceptual question. What concerns us is whether certain moral reasons have such a monopoly on legal reasoning that they operate to exclude others that should be taken into account under normal moral reasoning. In order to do this I will examine the prevalent interpretivist theory of legality, law as integrity, in the sections that follow.

IV. Integrity and Equality of Concern and Respect

Law as integrity is a value, rather than a truth conditional rule or positivistic test, and as a result can be the subject of reasonable disagreement. A very basic definition of political integrity is that it is the value of a community personified treating its members as being worthy of equal concern and respect through consistently applying its own conceptions of justice and fairness to them. In this section I will analyse "equality of concern and respect" (hereafter equality of respect) and examine the relationship between that value and the general principle of consistency developed above. This exercise will allow us to pinpoint what is valuable about integrity and make some conclusions about its alleged status as a value. This, in turn, will further our understanding of legality.

Equality of respect can sensibly be seen as a moral value. It is the notion that people should treat each other as being of the same value as human beings without discriminating on the basis of irrelevant characteristics.[41] To use Dworkin's example, whether the year in which someone was born was an odd or even number should have nothing to do with whether or not that person's choices should be respected.[42] Respect itself is a complex concept that includes taking into account someone's best interests, opinions and autonomy. It is rooted in reciprocity and requires one to treat another as one would wish to be treated in their position with their characteristics. A relationship based on mutual respect is not reciprocatory in the way an agreement to further mutual interests or benefit is. The parties do not do so out of desire for personal gain. Equality of respect is an altruistic value because it requires one to respect others because they deserve to be respected. Historically the value is deeply rooted in the Kantian notion of the 'kingdom of ends'.[43]

Equality of respect is formal only at the level of the respect afforded; it is a deeply substantive theory of equality at the applied level, requiring treatment to suit the individual needs of the object of respect. Dworkin's argument that the disabled enjoy fewer personal resources as a result of their disability and that such inequality is worthy of compensation is an excellent example of this.[44] The equality arises from applying a

consistent network of correct moral values to all people so that they receive the treatment they deserve.

Integrity flows directly from equality of respect in conjunction with interpretive methodology. Given the facts of a particular legal system, integrity requires a reading of those facts that best complies with equality of respect.[45] I will discuss the notion of 'the facts of a particular legal system' later but for now it serves to note that all the moral work of integrity is done by the separate value of equal respect. This has a particular manifestation in the requirement of consistency. Integrity's insistence on interpreting the law consistently comes from the requirement that people should not have different principles applied to them, or the same principles applied differently, for arbitrary reasons. Of course, the upshot of this must be that if departing from past practice actually furthers equality of respect then integrity requires it.[46] To argue otherwise is argue on a basis other than equality of respect and thereby rob integrity of its basic moral force. The conclusion that consistency is important only because substantive moral reasons make it so adds a further dimension to its epistemological function and is of paramount importance for us. As Gerald Postema puts it, we might be 'morally required to follow immoral principles'.[47] I will examine this seeming dichotomy in my final section but it suffices to conclude at this stage that moral reasoning is engaged at all levels of this theory of legality. Furthermore, any argument against law as integrity's moral justification must be an argument that shows true propositions of morality sometimes conflict with equality of respect. Given the deeply abstract and altruistic nature of this value, such an argument will be very difficult to make.

Dworkin defines integrity as a distinct political value that 'sits between' fairness (defined as the correct method of organising a political system) and justice (defined as the correct outcomes of political decisions).[48] Stephen Guest disputes this clear separation by arguing that equality of respect is the foundational value of justice, fairness and integrity, which serves to tie all three together.[49] He claims that we can only understand justice in particular by appealing to the idea that we should afford equal respect to individuals.[50] Whether this is all that justice rests on, or whether notions like punishment play a role on a similar level of abstraction, doesn't matter for our present discussion. Certainly it seems very difficult to conceive of a workable conception of justice that isn't committed to some conception of equality of respect. This suggests that integrity itself is either indistinct from justice in all essentials or is merely a theory of applied justice and fairness.[51] This bodes well for the ultimate conclusion of this paper, as applied morality is still morality.

V. Integrity and Community

Integrity as I have discussed it so far has been reducible to a moral justification for consistency based on equality of respect. For Dworkin, however, an important aspect of integrity is its relation to the political community, which he takes to be the nation state. This is where law as integrity starts getting complex, because we move from talking about the values of equality, justice and fairness to talking about a particular community's conceptions of them. Law as integrity argues that in discovering the content of the law one must look to the principles that best justify the particular practices of an actual community. These principles, when considered together, indicate a particular conception of justice and fairness held by that community personified.[52] Integrity demands a uniform application of that conception.[53] Dworkin argues that law as integrity so defined is the best justification going for political legitimacy.[54] In this section I consider what, if any, moral weight is generated by the fact that such principles belong to the community. This is important because if the fact that the principles we apply come from our community is determinative of their legal validity, my thesis would appear to be a non-starter.

Dworkin describes a 'true' political community as generating political obligations in the same way that more familiar associative communities such as families or friendship groups do. These latter groups are held to produce *pro tanto* moral obligations on the basis of being a member of that group rather than for reasons of consent or general duties of justice.[55] For Dworkin only 'true' communities create obligations of this kind and in order to be considered such they must first be 'bare' communities in some identifiable social sense.[56] The conditions for a 'true' community are that the relationship is *special* in that it is distinguishable by its particular value from background duties, *personal* in that all members consider the obligations to bind individual members to each of their fellows and for an *equal concern and respect* to exist between the members. This is not a psychological state but a moral proposition; it doesn't matter whether the members of the group feel like this but rather that they should.[57] Dworkin claims that such a community goes hand in hand with obligations to adhere to the principles of the community taken as a whole.[58]

There are several things about this that are not clear. Firstly, as Leslie Green points out, Dworkin fails to provide a detailed definition of a 'bare' community.[59] This might seem a relatively trivial point to an interpretivist, who is concerned with theorising about our normal social practices. However, in the present instant to trivialise this point would be

a mistake. In Europe this is particularly so given the importance of regional legal systems such as the European Union and the Council of Europe's treaty bodies. In the UK, for example, are principles derived from national legal practices, the practices of all of Europe and/or the practices of the Union? Should this be on economic issues alone or on fundamental rights as well? Furthermore in political communities that have more than one legal system due to federalism or devolution, should we be concerned with the principles of the whole or of its parts? The model of community Dworkin uses seems too simplistic to account for the inter-percolating systems that comprise modern legal practice. In addition, it is becoming increasingly popular in political philosophy to reject the moral relevance of the nation state.[60] Surely we should be making moral arguments about what should count as a community rather than relying on a 'bare' factual filter to shut us off from considering certain possibilities.

The next issue is that there seems to be tension between the requirements that a community be considered 'special' and that its members must have equal concern and respect for members of that community.[61]Presumably a community's members must have concern as a result of their special relationship in order to create any meaningful distinction between the community and the rest of the world. However, can any understanding of equality of respect be commensurate with such partiality? Isn't the very core of equality of respect vested in universality and impartiality? This seems to lend support to Guest's argument that the core of justice is equality of respect and that integrity seems to be justice diluted.[62] This in turn suggests that legality based on equality in that way should be a universal moral principle and should not take parochial conceptions of justice and fairness as the grounds of law.

This criticism is all the more forceful in light of the importance of moral responsibility to moral truth.[63] It seems difficult to imagine a good faith moral justification of equality of respect that allows differentiation between persons based on their membership of a particular nation. How can I claim to respect people as valuable in themselves if this respect only extends to those who share my nationality? This seems to be a moral argument of bad faith in the ways I describe above. In any event, it seems more appropriate to ground moral justifications of partiality in some other *ethical* thesis, such as the importance of partiality in developing a human's capacity to love deeply and emotionally engage. Of course, such a thesis sits very poorly with the anonymous nature of a political community.

The final problem is that even if we take political communities to be associative in the way that Dworkin conceives of them, that would not give

rise to a general obligation to obey their commands. Leslie Green points out the initial difficulty Dworkin faces: the moral force of an association depends on the substance of the association itself, rather than the form, because association in abstract has no moral point or purpose like concrete associations such as family or friendship do.[64] It cannot be the case that any associative community so defined generates moral obligations. Dworkin concedes this in his reply, commenting that wicked communities can generate no such obligations.[65] That objection cannot take us far however because Dworkin's definition of a 'true' community has a substantive moral element, that of equality of respect. As Stephen Perry notes, this value is the most plausible candidate for providing the intrinsic worth of a political community, a worth that would seem necessary to generate even *prima facie* moral obligations.[66] Nonetheless, given the tension between that concept and the necessary partiality of an association, we cannot use it to defend associative communities as obligation generating in themselves. This is because if the moral force of associative communities rests on a value that, properly understood, requires those outside the community to be treated the same way, then the community adds nothing of moral relevance. We have no moral reason to hold the moral views of our own community as worthy of more respect than those of other groups. As such we have no reason to base our legal system on those principles exclusively.

Green then goes on to dispute Dworkin's example of a community that is otherwise egalitarian but demands that daughters defer to the wishes of their fathers regarding marriage. In this example the requirement is itself unjust but nonetheless well meaning: it stems from an incorrect conception of equality of respect, rather than a failure to hold that value.[67] Dworkin accepts that this would be a case of injustice but still maintains that the community's expectations generate moral force.[68] He concludes that though reasons of justice might require disobedience, the existence of a *prima facie* obligation is evidenced by the regret we would expect the daughter to feel for disobeying her father and the apology he could legitimately expect.[69] Green points out, rightly I think, that this is not evidence of a violated duty of obedience, but rather of a separate obligation to respect the father's wishes or even to respect the community itself. [70] The crucial point is that it does not contribute to the normative force of the community's decrees because it is overridden the instant a countervailing moral reason of any force is provided. It fails, in other words, to contribute to the overall project of Dworkin's theory of law as integrity, which is to demonstrate the value of legality as the justification of domestic law's coercive power. Dworkin acknowledges this in his reply, going so far as to say that integrity (understood as principled consistency alone) cannot justify a duty to obey

the law regardless of its content.[71] Associative communities can perhaps justify a moral duty to adopt certain attitudes, but not one of obedience. Only genuine moral authority can do that. Indeed attitudes just shy of obedience might be best understood as justified by the universal duty to respect all persons equally, which as we have seen cannot be tied to particular communities anyway.

A final position remains to be considered. Does community produce some sort of non-moral normativity that justifies the binding of people to a partially moral code? Some philosophers, such as Korsgaard, have discussed what 'founds' normativity.[72] Certainly, on the model of moral truth that I have argued for, morality as a normative system needs no further foundation. Given that true moral beliefs *are* the arguments that support them, it would seem to be a tautology to speak of justifying morality; it is like speaking of the need to justify justification.[73] What one has to ask is whether any non-moral justification of normative propositions is possible.

Jules Coleman suggests that we may have 'content-independent moral reasons' to obey the law.[74] I find this assertion highly bemusing. Coleman indicates that considerations such as fair play justify obedience to law regardless of content. This displays a fundamental misunderstanding of justification. Treating any old moral reason as justificatory on the basis that it has some applicability to a situation is not how justification works. When examining whether fair play justifies obedience to the law we must consider the countervailing moral effect of the legal proposition we are asked to obey. If we do not then we are guilty of bad faith by explicitly choosing not to assess principles that may be (and to make this an interesting problem in first place) probably are, contradictory to the position we adopt. As I showed in Section I, this has the paradoxical quality of being a morally irresponsible moral position. I doubt, however, that Coleman is committed to such a view. Indeed, he accepts that law can normatively 'misfire' by virtue of failing to deliver the proper moral 'point of view'.[75] This strikes me merely as a somewhat over-complicated way of saying that normativity rests on moral justification. There seems to be no basis for non-moral normativity in an argument such as this.

Korsgaard's discussion of justifications for normativity highlights one interesting theory in the shape of the 'volunteerism' of philosophers such as Thomas Hobbes. This is the familiar claim that normativity can be grounded in the special authority held by a particular body or person over others.[76] Authority of this sort is gained through the capacity to enforce. Legal philosophy threw command theory out with the ark, but as a justification for normativity such theories purport to justify, rather than

describe, obedience. I can see no prospect of success here. Unless we are to reject the idea that no 'is' directly leads to an 'ought', an additional and plainly *moral*reason is required to tell us why such authority holds normative force. There is no non-moral normativity to be had here either. It seems best to abandon the search altogether. The need to justify any normative claim will invariably lead one back to morality at some stage and as we have seen, there are no good moral reasons going for the intrinsic force of community.

If we are still convinced that legality is intrinsically tied up with community values then we are left in a tricky position. As we have seen so far, hard cases of law are solved by appealing to the moral principles that justify the law in order to discover what the answer should be. This, interpretivism dictates, is what applying 'the law' actually means. However, if we are to assume that our principles are generated by the community, and not by what morality actually demands, then there is nothing of moral value in our principles (because a community generates no serious moral weight) and our task becomes impossible.[77] Law as integrity shoots itself in the interpretivist foot.

This situation arises because Dworkin claims two things that, on closer consideration, are actually inconsistent. Firstly he says that we can reach a sceptical conclusion that the law is of no value and that our project should be abandoned.[78] Secondly he says that we can still count integrity (defined as principled consistency) as sovereign over what the law is in an unjust but consistently principled system.[79] How can we interpret with principles, whose argumentative force is determined by their moral substance, when those principles are devoid of such substance? Stephen Guest suggests that we can do this by making an interpretation from the point of view of a judge who believes that these principles hold value.[80] He distinguishes, as Dworkin does, between the grounds (or truth conditions) and the (moral) force of law. It is supposedly possible under law as integrity to understand the law of an immoral legal system to be law whilst condemning it as unjustifiable, because our language is 'flexible' enough to describe it as such.[81] This cannot be though, for interpretivism requires us to discover what the law is by enquiring into its moral force.[82]

Dworkin accepts that we make correct moral judgements by developing a network of interconnected and mutually supportive values.[83] He is also committed to the view that we reach correct moral answers by adopting an attitude of moral responsibility and reflecting upon the soundness of the arguments for our conviction.[84] It is hard to see, given this methodology, how we would go about interpreting the practices of an

unjust system in such a way that we could consider its evil principles as grounds of law. How does one understand the principle of racial superiority when one engages in reflective reasoning and has to commensurate it with values such as moral responsibility? Could a Nazi judge actually make a consistent justification of legal practice if the principles he is applying are deeply irrational? This seems unlikely. In order to construct a coherent body of principles on this basis we would have to commit to some principles that were so blatantly absurd that they would fail to stand up to the most simple moral examination. A principle that cannot stand on its own merits can scarcely be held to justify legal practice, even if it is perfectly consistent with it. After all (and it bears repeating) it is the *substance* of the principle that gives it the role it has in legal interpretation. In the case of an evil legal system wouldn't a more natural conclusion be that, because its legal practices were incapable of meaningful interpretation, it has no law at all? Wouldn't it make more sense to conclude that it merely has coercive force being applied on an inconsistent, unexamined and unintelligible basis?

How can we save integrity from this mess? I believe that we can do so by eliminating the element of community that distinguishes integrity from equality of respect. We can use commonly held views of what counts as equality of respect *as a starting point*, but would have to assess them as moral arguments, rather than considering them established canon. If we have a prevalent or traditional conception of this idea and country X has one that stands up to moral scrutiny better, we should prefer their conception when considering what our law demands.[85] This is very similar to Stephen Guest's notion of law as justice.[86] If we make a general justification of our legal practices through the value of equality of respect directly, then we don't need to struggle with the problem of obeying a particular community's principles as definitive grounds of law. Instead we can argue for the use of genuine principles: that is, principles that stand up to normal moral scrutiny. Such an account of principles fits well with legal practices such as appealing to foreign precedents because it explains why we think substantively correct moral conclusions matter in hard cases.[87] As such, this theory has the benefit of explaining some common legal practices in addition to avoiding the problems engendered by attempting to argue, as Dworkin does, for the importance of moral reasoning on the one hand and community values on the other. Appealing to universal, as opposed to community based, moral principles affords us the luxury of not being tied to tradition when considering what conception of those principles makes sense. Such freedom to speculate means that we can engage in moral reasoning in a far more responsible way. As lawyers we can proceed on the basis that we are applying principles we believe to be true, rather than those we don't.

Of course, this once again reduces integrity to a theory of *which* moral standards legal propositions have to satisfy. It is a theory of legal morality and cannot be used to dispute my thesis that true legal propositions never conflict with what morality requires under an interpretivist model. We are back where we were at the beginning of this section: if you want to dispute the morality of legality you have to dispute the morality of equal concern and respect.

VI. INTEGRITY AND THE DIMENSION OF FIT

In this section I turn from abstract discussions of the moral value of integrity to see whether this moral value in fact justifies legal practice (as a theory of legality must). I ask whether integrity explains our adherence to precedent and whether alternative explanations might suit that phenomenon better. I end this section by suggesting that law as integrity leaves out an important element of legal practice: that of moral progress.

The adjudicative principle of integrity is famously composed of an element of fit (making sure that one's theory in fact explains legal practices) and one of justification (ensuring that the theory explains what is valuable about the practices). These two elements are not separable but form part of a single interpretive exercise.[88] The element of fit is not one of mechanical consistency but rather one of interpretive consistency. This means that it doesn't demand us to fit a judicial decision with past practice but to make a decision fit with the principles that justify past practice.[89] My discussion of integrity so far has highlighted the problems with viewing the (possibly unsound) principles of a particular community as the grounds of law. The adjudicative principle of integrity is designed to reflect this conclusion that I so hotly dispute. Nevertheless there is something intuitively appealing about it. We paradigmatically argue from the past political decisions of our own community rather than those of others. Indeed the whole system of arguing from authority, rather than on the basis of sound moral argument, suggests that our legal practices value something about such sources. A major task for my thesis is therefore to explain this practice in such a way that justifies my previous conclusion that it is morality, and not a moral reading of past practice alone, that gives legal propositions their truth.

First I want to make a methodological point. The idea of 'fit' and 'justification' is actually one common to all interpretive methodology and not unique to legal reasoning. Dworkin's analogy of the chain novel demonstrates this.[90] In normal interpretive methodology one assumes there is a substance one 'fits' one's interpretation to. Interestingly in all of

Dworkin's examples this is a settled matter. In his chain novel example his authors fit their interpretation to the existing text. Hercules fits his legal interpretation to the collection of political decisions presented to him by his fictional variant of the American legal system.[91] The problem with this is that in real life there is no such thing as a fixed list of legal sources. In the UK we accept that among our legal sources are things such as statues and case law. However we also refer to academic commentary, international standards and comparative jurisprudence. The latter are taken to be non-binding of course, but this is only a feature of Anglo-American legal systems. In Germany for example, courts often treat past decisions and academic commentary as equally persuasive.[92] In countries with a written constitution it would seem easier to locate the definitive list of legal sources that we may 'fit' our interpretation to. However legal practice almost always expands on such documents. The case of *Marbury v Madison* in the US is a key example of this.[93] The Supreme Court actually increased (or at least pointed out the logical extent of) the power of its own decisions through legal interpretation. *Marbury* is instructive because it illustrates that what we ultimately need to 'fit' as interpreters is not legal sources but rather legal practice. Legal practice is, unfortunately, not something that we can refer to in written format because it comprises more than official decisions. It includes methods of reasoning and substantive moral convictions. For example, in the UK Parliament is considered sovereign by many. Whilst we could provide a historical account of how this came to be, we would have no *reason* to accept this tradition as part of our legal practices, only an *explanation* of how we became aware of the possibility of counting it as such. We must hold a substantive moral conviction that Parliament *should* be sovereign in order to justify why we consider obedience to it as part of our legal practices. Even fidelity to a written constitution requires an underlying moral theory. If not, one could not proceed with moral-principle-based legal reasoning, as judges can so obviously be seen to be doing. Without independent justifications of their existence, legal practices cannot be interpreted. Legal interpretation requires the interpreter to identify the practices that count. Making the best sense of legal practice cannot be the same as interpreting a novel or a collection of official decisions.

Note that I am not repeating the 'Hercules is a myth' objection.[94] For Dworkin, Hercules is an ideal that illustrates how a real judge should reason. My objection is that a real judge simply cannot reason this way. This is because in order to have a concept of fit one requires a positive moral theory of what should count as the sources of law one is interpreting. Ask yourself the following question: why do statutes count as sources of law? An American lawyer might respond by citing his nation's

constitution. He faces exactly the same problem there though. Ultimately all that one can ever do is to provide a substantive moral reason why a particular source counts as an appropriate target of interpretation. Law as integrity fails to do this because it assumes that the question of what counts as legal practice is a settled matter. Take the example of international law and the creation of *jus cogens* norms. Traditional theories of international law suggest that it develops from different varieties of state action or consent.[95] We could adopt a Dworkinian approach to this and argue that the global community of states is what we draw our legal practice from and that the grounds of law are the principles that best justify that state practice. However state practice can purportedly create norms that then exist regardless of whether state practice conforms to them. Do we accept the application of these norms as part of our legal practice or do we reject them as inconsistent with our practices thus far? Whatever we decide, we will have to provide a reason for including or excluding them other than the fact that they exist. To use another example, official decisions of a political community include arrests made by the police. Do we count these as part of our legal practice and require a theory of legality to account for the reason why more young black males end up being arrested for the same offences than young white females? Of course we do not, for we have good moral reasons not to count these actions as part of our legal practices. So why do we place so much weight on the opinions of a judge writing one hundred years ago and not on a modern academic at the height of his powers? It seems difficult to answer this question other than by providing a moral answer.[96] Legality therefore requires moral justifications for every aspect of legal practice. If a legal practice has none, then there is no reason for considering it to be a worthy object of interpretation.[97]

This conclusion has less of an impact upon our current legal practices than one might think. As previously stated, we can already provide positive moral reasons for why statutes and case law 'count' and prosecution demographics do not. By forwarding the conclusion I have, I am not suggesting that all our present sources of law are invalid, merely that everything treated as a source of law must have a moral justification. Nine times out of ten leading cases provide a wholly justifiable moral basis for a legal decision. Every now and again however, such as in the case of *R v R*, authority should be and is overturned for moral reasons.[98] A theory of legality that places justification at the heart of 'fit' accounts very well for this. That a positive moral value can change our approach to interpretation should be no surprise, as a theory of interpretation is itself a moral theory.

I can now move on to discuss the substance of the doctrinal stage of law as integrity. It provides us with a very good reason why we should accept

statutes as valid sources of law regardless of their content. Equality of respect, it is argued, requires us to respect the moral value of the moral beliefs of others even when they are wrong.[99] We can justify enforcing a statute in some circumstances if the result of doing so demonstrates a greater equality of respect than not doing so. The explanation is not as obvious for law as integrity's treatment of judicial decisions. As Fred Schauer points out, "only when past wrong decisions can [allegedly] provide reasons for decision despite their wrongness, and therefore precisely because of their pastness", do we cast about for some content-independent moral weight.[100] Dworkin's answer to this problem is that past judicial decisions create "embedded mistakes", which if not propagated, would violate equality of respect by causing people's expectations to be frustrated.[101] Such a mistake loses its "gravitational force" and cannot contribute to the interpretation of other propositions of law but retains its "specific authority" to govern its particular circumstances. Leaving aside the question of where to draw the line between a decision's gravitational force and specific authority, it is morally questionable why one should enforce a wrong decision of a past judge when there is no democratic force behind it. To put the question another way, does equality of respect really require us to maintain embedded mistakes because respect implies satisfying a person's expectations of authority?

There is certainly a principle of legitimate expectations in public law that might be given as evidence for this.[102] However, it seems odd to justify a doctrinal error, no matter how deeply embedded, as worthy of being upheld on the basis of respect. Surely it would demonstrate greater respect to apply correct moral reasoning to an individual rather than bind them by morally inappropriate standards, even if these standards benefit them? After all, as I commented in my third section, equality of respect requires action appropriate to the object of respect and not necessarily the treatment such a person either expects or desires. Furthermore the adjudicative principle of integrity is concerned with "horizontal consistency...amongst the principles a community *now* enforces" (emphasis added).[103] To count the age of a precedent as relevant implies that maintaining a particular set of principles is in fact important, which might be counted as an internal inconsistency of law as integrity.

Indeed, a drawn line between "principles now enforced" and 'old' principles needs must be blurred. If we take every new judicial decision in a hard case as altering the interpretation integrity requires, at least in part, then all attempts to justify precedent with equal treatment must fail. This is because every time a new decision is reached, and legal practice alters, the principles we adopt will alter in their application even if not

immediately in their substance. New legal possibilities will suggest themselves and a certain amount of follow-up litigation will result. Time passing is obviously important and just because change is incremental we should not be tempted to deny that it is change.

If, on the other hand, we accept that the correct standards for determining true propositions of law are moral standards, rather than the best moral interpretations of a changing set of legal practices, we can re-establish Dworkin's claim that judges reasoning morally are applying the law rather than changing it.[104] Since principles enforced by a community change over time and judicial decisions form a large part of the interpretive basis of such principles, it seems hard to avoid the charge that judges change the law if the grounds of law are the principles adopted by the community. If the principles used are true moral principles, rather than principles that depend for their weight in part on emanating from an associative community, then the judges really do apply, rather than make, the law. That is because what counts as a true moral principle is metaphysically restricted to those supported by an unassailable moral argument. When we appeal to moral principles in the normal way we seek to establish a case for all places at all times. If law is based on such a case then it cannot *be* changed, only progressively realised.

Some might object at this stage that such a theory of legality sits very badly with the practice of precedent and that judges are hardly infallible when it comes to determining correct moral principles anyway. I fully accept the latter point and it is for that very reason that I reject the former. Given the problems law as integrity seems to encounter in explaining precedent I propose an alternative conception of legality. Dworkin comments in his discussion of legality that 'accuracy', the value of implementing the correct moral answer, was favoured by the ancient natural lawyers because it enables the law to instantiate God's will.[105] I propose that accuracy is an important aspect of legality, and one that law as integrity neglects, because it instantiates, not God's will, but correct moral reasoning. If we view precedent, not as a collection of definitive conclusions on matters of principle, but as an ongoing project of investigation into the nature of an ideal set of social relations, then we can develop a view of legality that promotes the importance of moral development. Since the early days of moral philosophy scholars have used moral arguments to enquire into the meaning of important concepts and to develop theories of virtue and state. It is widely accepted that we develop our moral theories best when many minds engage on important issues and understanding flourishes in academic debates when critics emerge and theories are put to the test.[106] Even more progress is made with ideas when philosophers apply them to new problems and seek coherence across broader ranges of

examples.[107] Precedent can be seen as fulfilling an analogous role.

I am not suggesting that what counts as a true proposition of law changes as moral progress is made, but rather that getting the law right is aided by developing a corpus of discussion of various issues because that corpus itself aids moral investigation. Under such a model, precedent would only be worth following if it was morally correct but it would still be a valuable contribution to an ongoing project even if it were wrong. This model of the value of precedent accounts very easily for instances where established precedent is overturned. Any contentious decision that overturned established precedent, such as *R v R* in the UK or *Brown v Board of Education of Topeka* in the US, can be seen as justified because it got the law right not just in terms of consistency but in terms of content.[108] Adherence to past practice when in doubt also has the established merit of ensuring that fewer mistakes are made.[109]

Such a theory of legality might be 'forward looking' in a sense, but should not be confused with theories such as legal pragmatism, which are forward looking because they require judges to consider what rules might be instrumentally useful for the future.[110] Instead this conception of legality is one that recognises law's momentum as an evolving system of principles based on moral investigation. It always aims, however, to get matters of principle correct in the present. It is the past that is questioned – the future is not speculated about.

Under a theory of legality that emphasises the importance of moral investigation, equality of respect could still be the fundamental value of a legal system. Indeed the two seem to sit very well together as both equality of respect and accuracy require in-depth moral justification of legal decisions in order to prove why the solution adopted justifies the way the parties are treated. Furthermore, the value of precedent would be maintained under such a conception of legality: judges would be pushed to emphasise why reaching a different decision in the present case was required. The emphasis would be on why a different solution was reached, rather than why a previous decision should be repeated. The result of this is that the equality of respect that law as integrity promotes, that of ensuring that consistent principles are applied to all, would be better served by adopting this less stringent adherence to precedent. For after all, how could we describe a person as being of integrity if they failed to question their own beliefs? Surely the consistency of integrity comes from reflective concern for others rather than dogmatism or arrogant belief in one's moral perfection? Perhaps this 'new' theory of legality I am arguing for is in fact a variety of integrity itself. It doesn't matter what I call it. The important point is that it describes the value of legality as one that

actively aims to transcend parochial conceptions of value rather than being held back by them. Accepting this theory of legality requires one to accept my overall thesis as well. This is because legality (for interpretivists) is what gives rise to the truth conditions of law and this theory of legality requires the best possible moral answer to any legal question.

This theory of legality might seem counter-intuitive to some but only if one focuses on the legal practice of *stare decisis* alone. It is important to bear in mind that we are seeking a justification of legality that captures the value of all our legal practices taken together. I believe that this union of accuracy and equality best justifies legal practices such as judicial use of academic writings, comparative doctrine and international standards in formally dualist systems. It also helps explain the increased importance of dialogue between national and international courts, in addition to that between courts and legislatures.[111] These practices are easily understandable through a theory of progressive accuracy. Furthermore, whilst it might have serious implications for the nature of the value of past precedent, it could very easily leave the duty of lower courts to obey higher courts untouched. We might seek to justify the latter with arguments of efficiency, claiming that it would just be practically unworkable to have an appeal system without vertical precedent of this kind. After all, to a theory of legality that places emphasis upon accuracy, quality of reasoning is of paramount importance. If the courts have no time to reason at length because of flooded dockets then the whole legal project goes down the drain. Vertical precedent might be an entirely justifiable solution to this problem.[112]

It should also be remembered that whilst the common law world agonizes over *stare decisis*, very many legal systems who also prize legality have no formal system of precedent and treat past cases as persuasive only. There is also no strict doctrine of precedent in international law and judicial decisions are only 'subsidiary means' of interpreting other sources under Article 38 of the Statute of the International Court of Justice. Incidentally, the same weight is given in that statute to academic opinion. Furthermore, in the UK, the Supreme Court has the power to override any of its previous decisions following the judgement of the House of Lords in the Practice Statement so as not to 'unduly restrict the proper development of the law'. [113] The UK Court of Appeal also has the power to override its own decisions in criminal cases due to concern for individual justice. In civil cases whilst it is formally bound to its past interpretations of the law it can override its own previous decisions in the event of mistaken views about the existence of legal decisions or when there is a conflict in the doctrine.[114] A union of accuracy and equality explains this more flexible approach to precedent and reflects the current state of legal practice

better than law as integrity.

VII. Law: Morality in Context

In this section I expand upon the conclusion that, for interpretivists, true propositions of law depend upon what morality demands. I adopt an understanding of morality that reflects the both the theory of moral truth advocated above and the theory of legality that I have developed. This is that 'what morality requires' must be answers to specific questions given the context in which they are asked and not what those answers would be, were it not for that context. This is both because of the correct standards of moral reasoning described in Section I and because legal questions deal with real problems, not simple thought experiments. It is important, as a result, to root moral questions in the choices that people have to make. As Dworkin puts it in the context of the allocation of resources:

"...we should begin in ethics...The mix of personal ambitions, attitudes, and preferences that I find in...the overall state of the world's resources, is not in itself either fair or unfair to me; on the contrary,*that mix is among the facts that fix what it is fair or unfair* for me to do or to have." (Emphasis added.)[115]

It should be clear from my discussion of legality so far that I consider it to promote correct moral decisions of this nature. I argue that it does so through an equal commitment to both accuracy and equality of respect. Even if my previous criticisms of law as integrity are not convincing, I have at least demonstrated that morality underpins every aspect of *that* conception of legality.[116] As a result of legality requiring moral justification all the way down, legal propositions must be morally sound.[117] The interesting question is what legal reasoning based on moral soundness alone might look like.

Practical moral judgements are highly contextual. It might be acceptable for the law to allow something to happen that might be considered wrong in isolation. The moral question addressed to a legal decision-maker is not whether the outcome contains only aspects that are right in themselves but whether the overall outcome is the best possible or not. This is exactly the same as the moral question that we would ask in the same circumstances. The only difference is that the legal question is asked as part of our legal practices.

One example of this might be judicial review of a hypothetical American income tax statute.[118] Raising income tax to 99% would be immoral and as a result unlawful under the theory of legality I have proposed. It

would have crippling effects on individual economic autonomy and would frustrate the 'Blessings of Liberty' that should be protected for each individual as well as arguably being against 'the general welfare of the United States'.[119] Such an argument would rest on a theory of liberty that included economic autonomy and a theory of general welfare that required protecting such liberty. Not only might such principles be identified in current views about American legal practices but (more importantly for the value of accuracy) might stand as an independent moral theory of taxation. Here the correct legal solution would be to strike down the statute on the basis that the injustice it would create outweighs all countervailing considerations.

If income tax was set at a less obviously wrong level, say 12%, the court would have no obvious moral reason to overturn it. Even if the ideal level of income tax for promoting liberty and welfare in the U.S.A. is 11.5% the Supreme Court might refuse to review the statute on moral grounds, even if it had the relevant expertise. It might cite reasons such as upholding the separation of powers or the democratic force of the statute.[120] Note that political values, such as democracy, are engaged here: the Supreme Court is not simply being pragmatic, but is engaging in matters of principle. Here the correct moral solution would be to uphold a taxation level, which considered in isolation of the legal practices it is implemented by, would be less than ideal.

It is of course useful to think of how the problem should be answered if the institution applying it didn't exist. This promotes the very accuracy that I have argued is so important to legality. Imagining a world in which no one held incorrect moral views and no genuine mistakes were made is important for promoting individual justice. However, as our discussion of legality indicates, morality is not reducible to the right outcomes to particular problems in isolation of their place in a wider social system. In order to find out what morality truly requires in a particular case we have to take everything into account - including our institutional framework, differences in opinion and collective fallibility. Dworkin makes the distinction between pure (dealing only with justice) and inclusive (dealing with fairness and due process as well) integrity for that reason.[121] For him the value of legality is found in inclusive integrity, which requires this all-things-considered, practical moral reasoning. This understanding of what morality demands is the same for my theory of legality. I maintain that sometimes, such as when a statute is passed by a democratic process, it is morally required to uphold something that seems to flout justice (in the sense that Dworkin defines it).[122] This is because justice so defined, is not all there is to morality.

So, the short answer to the question of how my theory of legality changes legal reasoning is 'not much'. But this makes sense. After all, I have attempted to propose a theory that fits, as well as justifies, current legal practice. The difference is one of attitude and degree: we should be prepared to defend and question everything on substantive moral grounds. We do this to a great extent already. I am merely arguing that it is time to acknowledge and exemplify it.

Assuming that my conceptions of legality and moral reasoning are correct, then my thesis that (for an interpretivist) legal propositions never conflict with what morality demands is also correct. If law requires moral justification and moral justification proceeds on the basis of providing the best possible answer, then any proposition of law that fails to satisfy that standard is false. After all why should we be so modest – sensibly in my view – about our ability to discover the best moral answer, and yet so bold as to assume that any of our legal propositions are easier to justify? Given the total dependence of law on morality, it seems only such self-assurance stands in the way of my thesis. Surely that is not reason enough to deny it?

8. Conclusion

I entitled this essay 'Expanding Law's Empire' because that is exactly what I have attempted to do. I have developed an interpretivist theory of legality that is not community based but universal and promotes pursuit of the perfect legal order. I have attempted throughout to remain true to interpretivist methodology whilst arguing for a 'natural law' conclusion. The notion of law as 'right reason...[which is] unchanging and everlasting' might seem outmoded but can be amended through the modern school of interpretivism to provide a sound justification of legality.[123] This theory of legality takes law's purpose to be providing the correct moral answer to a particular problem given a specific set of facts. In many ways, moving from Dworkinian interpretivism to natural law interpretivism is a matter of degree more than anything else. My arguments have, for the most part, constituted a positive moral case for a universalist conception of legality. I am not proposing a new theory of analytical jurisprudence, merely asserting what I feel to be a better interpretation of legal practice.

As we have seen, legal reasoning so conceived is identical to moral reasoning and both reasoning processes demand us to consider the same material. It seems logical that if two phenomena (in this case legal reasoning and moral reasoning) share identical characteristics, then they are the same. We might be ambitious enough to conclude that not only does a true legal proposition never conflict and/or depends on the answer to an identical moral question, but that they are the *same* proposition metaphysically. [124] I leave open the question of whether this is

correct, as practically it doesn't seem to matter. The results of my conclusions are that courts need to take moral arguments more seriously and be prepared to question the moral basis of established authorities. It is better to realise the gravity of the task facing our judges than to simply ignore the importance of morality to law.

REFERENCES

[1] Ronald Dworkin, *Law's Empire* (Hart Publishing, 1986) 65.
[2] Ibid. at 72; Ronald Dworkin, *Justice for Hedgehogs* (Belknap Havard, 2011) 160-163 I take 'paradigm' to mean a legal proposition, attitude or activity that is taken to be appropriate or true by the majority. An example is opinion that in criminal trials the burden of proof is on the prosecution. Such 'common knowledge' is not unshakeable, as every proposition has to satisfy law's truth conditions, whatever these may turn out to be. (See Mark Greenberg, 'How Facts Make Law' in Scott Hershovitz (ed)*Exploring Law's Empire: the Jurisprudence of Ronald Dworkin*(Oxford University Press, 2006) 226.) A paradigm might be dismissed as incorrect after one's legal theory develops an account of such truth conditions.
[3] Dworkin, *Law's Empire* at 87.
[4] Ibid at 48.
[5] Ibid at 89.
[6] Ibid at 48-49.
[7] Ronald Dworkin, *Justice in Robes* (Belknap Harvard, 2006) 12-13.
[8] Dworkin, *Justice for Hedgehogs*, 23-96. Dworkin goes into these challenges in far more detail than I can and I broadly agree with the position he takes. In particular, he discusses a variety of different types of skepticism in some detail in relation to the first challenge. In this paper I restrict myself to what he describes as 'global external skepticism'; theories that attack moral objectivity wholesale and at the conceptual level.
[9] Graham Harman, *The Nature of Morality: An Introduction to Ethics* (Oxford University Press, 1977), 3-21; Nicholas Sturgeon, 'Moral Explanations' in Russ Shafer-Landau & Terence Cuneo (eds), *Foundations of Ethics* (Blackwell, 2007), 337-352.
[10] Dworkin, *Justice for Hedgehogs*, 76.
[11] See for example: David Hume, *Treaties on Human Nature*, Book I, Part I, Section I; Richard Hare, *The Language of Morals* (Oxford University Press, 1952) 29, 44; Dworkin, *Justice for Hedgehogs,* 44-46; Arthur Prior, *Logic and the Basis of Ethics*(Oxford University Press, 1949) 32-33. However, this principle has been disputed by those subscribing to 'ethical naturalism': Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press, 2001) 192-238.
[12] Even the logical principle that 'ought implies can' is a moral assertion.
[13] Dworkin, *Justice for Hedgehogs*, 42.
[14] Dworkin, *Justice for Hedgehogs*, 114-117.
[15] Gerry Cohen, 'On the Currency of Egalitarian Justice', (1989) 99 Ethics 906.
[16] Dworkin, *Justice for Hedgehogs*, 116.
[17] A debate currently rages between 'value holists' and 'value pluralists' as to whether global coherence at the level of values is a necessary condition for moral truth. I do not have the space to go into that debate here, but discuss the matter in Alexander Green 'An Absolute Theory of Convention Rights: Why the ECHR Gives

Rise to Legal Rights that Cannot Conflict with Each Other', (2010) 16 UCLJR 75. In any event this does not matter. The global consistency that concerns us here is that of concrete moral opinion. One could accept that values can conflict and still demand a consistent theory of appropriate resolution.

[18] It scarcely needs to be said, but I do not believe that racism is biologically inherent, nor do I believe that homosexuality is unnatural, never mind immoral.

[19] Dworkin, *Justice for Hedgehogs*, 90-96.

[20] W.-M. Yao *et al.* 'Searches for Higgs Bosons', (2006) *G* 33 Journal of Physics 1.

[21] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 332.

[22] As a result arguments from indeterminacy are best understood as a form of 'internal' moral skepticism. See Dworkin, *Justice for Hedgehogs*, 89-96.

[23] Ibid.

[24] Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 23.

[25] Ibid at 24-8.

[26] Ibid at 25.

[27] Ibid at 26.

[28] Nicos Stavropolous, 'Why Principles?' *University of Oxford Faculty of Law Legal Studies Research Paper Series*, Working Paper No 28/2007, 5.

[29] Dworkin, *Taking Rights Seriously*, 26-27.

[30] Ibid at 28.

[31] Dworkin has recently clarified his own position as a result of this similarity. He is anxious to dismiss what he calls a 'two-systems' picture of law and morality (Dworkin, *Justice for Hedgehogs*, 402-409). I broadly agree with this characterisation of his work but will not pursue the matter further.

[32] Ronald Dworkin, *Justice in Robes* (Belknap Harvard, 2006) 14.

[33] Herbert Hart, *The Concept of Law* (Oxford University Press, 1997) 260-263.

[34] 115 N.Y. 506 (1889).

[35] Hart, *The Concept of Law*, 264.

[36] Joseph Raz, 'Incorporation by Law' (2004) 10 Legal Theory 1, 12.

[37] Dworkin, *Justice in Robes*, 235-236.

[38] Raz, 'Incorporation by Law', 10.

[39] Raz, *The Morality of Freedom*, 53.

[40] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 167.

[41] Ronald Dworkin, *Sovereign Virtue* (Harvard University Press, 2000) 6.

[42] Dworkin, *Law's Empire*, 179.

[43] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Mary Gregor (ed) (Cambridge University Press, 1997) 41-42.

[44] Dworkin, *Sovereign Virtue*, 80-81; Stephen Guest, 'Integrity, Equality and Justice' in Allard & Frydman (eds) *Dworkin with his replies.* Revue. Internationale de Philosphie series (Bruxelles: Diffusion: Presses Universitaires de France) 341.Dworkin links responsibility to equality, which allows him to differentiate between handicaps and preferences on the basis of whether choice was involved (*Sovereign Virtue*, 293-298). This is, admittedly, contentious (see generally Cohen, 'On the Currency of Egalitarian Justice').

[45] Dworkin, *Law's Empire*, 400.

[46] Guest, 'Integrity, Equality and Justice', 349.

[47] Gerald Postema, 'Integrity: Justice in Workclothes' in Justin Burley (ed) *Dworkin and His Critics* (Blackwell, 2004) 291.

[48] Dworkin, *Law's Empire*, 179-180.

[49] Guest, 'Integrity, Equality and Justice', 342.

[50] Ibid at 349.
[51] Ibid. at 335; Postema, 'Integrity: Justice in Workclothes', 299.
[52] Had I the scope, I would dispute the appropriateness of discussing 'personified communities'. Dworkin (*Law's Empire*, 170-175) fails to prove that the community *can* act as a moral agent. This is important for arguing that we *should* recognise it as such. I suspect that personification is only a form of shorthand and that official impartiality is better explained by seeing private sphere partiality as the exception, rather than the rule, as a matter of *personal* morality. Such shorthand is problematic, because it removes subtleties. A point of importance for my thesis is that if a community cannot be personified then it cannot act from its own conceptions of justice or fairness. This might indicate that an ongoing investigation into justice and fairness' true meaning is morally required by the law (see section four).
[53] Dworkin, *Law's Empire*, 213.
[54] Ibid at 411.
[55] Ibid at 199.
[56] Dworkin, *Law's Empire*, 207-208. It is worth noting that in Dworkin's moral philosophy, the idea of 'community' is used to refer to a group of people who share moral concepts for the purpose of arguing over various interpretations of those concepts. (See *Justice for Hedgehogs*, 159-163, 170-171.) It seems a fair conclusion that associative communities within Dworkin's legal philosophy are a type of 'community' in that broader sense. However, it pays to distinguish an associative community from an interpretive community, because in the latter there is no personification or coercion.
[57] Dworkin, *Law's Empire*, 209.
[58] Ibid at 190.
[59] Leslie Green, 'Associative Obligations and the State' in Justin Burley (ed) *Dworkin and His Critics*, 283.
[60] Peter Singer, 'Famine, Affluence, and Morality' (1972) 1 Philosophy and Public Affairs 229.
[61] Trevor Allan fails to recognise the independent value of equality of respect in his recent article on integrity. Trevor Allan, 'Law, Justice and Integrity: The Paradox of Wicked Legal Systems' (2009) 29 OJLS 711.
[62] Supra n 49.
[63] Dworkin, *Justice for Hedgehogs*, 99-122, 179-180.
[64] Green, 'Associative Obligations and the State', 271.
[65] Ronald Dworkin, 'Replies to Critics' in Justin Burley (ed) *Dworkin and His Critics* (Blackwell, 2004) 378.
[66] Perry, 'Associative Obligations and the Obligation to Obey the Law', 201. Note that Dworkin's response to this, that such a community need not have intrinsic value to generate obligations, seems out of synch with his writing on political values. Compare: Dworkin, 'Response' in *Exploring Law's Empire,* 304 to Dworkin, *Justice in Robes*, 158-159. The value of friendship is cited as having intrinsic value in the latter whilst the intrinsic value of associative communities (of which friendship is a paradigm) is denied in the former. This suggests that 'community' might not be a political value for Dworkin. If that is the case, then it is hard to see what a community can add by way of obligatory force to a legal proposition.
[67] Dworkin, *Law's Empire*, 205.
[68] Ibid at 202.
[69] Ibid at 205.
[70] Green, 'Associative Obligations and the State', 273.

[71] Dworkin, 'Replies to Critics', 378.
[72] Christine Korsgaard, 'The Sources of Normativity', (1992) 12 *Tanner Lectures on Human Values* 19-112.
[73] It is worth noting however that Korsgaard herself seems to think the question is better understood as what grounds morality (Ibid at 23).
[74] Jules Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence', (2007) 27 OJLS 581.
[75] Ibid.
[76] Korsgaard, 'Sources of Normativity', 26-30.
[77] Ironically, Dworkin makes this point himself, albeit in a very different context. See Dworkin, *Justice for Hedgehogs*, 34.
[78] Dworkin, *Law's Empire*, 203.
[79] Ibid at 218.
[80] Stephen Guest, *Ronald Dworkin* (Stanford, 1991) 84.
[81] Ibid at 83-84.
[82] Perry, 'Associative Obligations and the Obligation to Obey the Law', 186.
[83] Dworkin, *Justice for Hedgehogs,* 107-109, 117-122; Dworkin, *Justice in Robes*, 160.
[84] Dworkin, *Justice in Robes*, 162; Dworkin, *Justice for Hedgehogs*, 99-120, 179-180.
[85] In any event I find it difficult to believe that many legal systems have a settled conceptions of equality of respect anyway. The point is that we should not shy away from moral reasons just because we cannot find them in our traditionally accepted sources.
[86] Stephen Guest, 'Why the Law is Just', *Current Legal Problems* (Oxford University Press, 2000) 35.
[87] Guest, 'Integrity, Equality and Justice', 349.
[88] Dworkin, *Justice in Robes*, 15.
[89] Dworkin, *Law's Empire*, 219; See also Dworkin, *Justice for Hedgehogs*, 123-156 where the examples are mostly of art and poetry.
[90] Ibid at 228.
[91] Ibid at 245.
[92] David Gerber, 'Authority, Community and the Civil Law Commentary: An Example from German Competition Law' (1994) 42 AJCL 531.
[93] 5 U.S. (1 Cranch) 137 (1803).
[94] Dworkin, *Law's Empire*, 264-5.
[95] Samantha Besson, 'Theorising the Sources of International Law' in Samantha Besson & John Tassioulas (eds) *The Philosophy of International Law* (Oxford University Press, 2010) 175.
[96] Guest, 'Integrity, Equality and Justice', 347.
[97] Allan refers to this as "sources of law...grounded in conviction". Allan, 'Law, Justice and Integrity', 726.
[98] **[1992] 1 AC 599.**
[99] Guest, 'Integrity, Equality and Justice', 348.
[100] Frederick Schauer, 'Precedent and the Necessary Externality of Constitutional Norms' (1994) 17 Harv. J.L. & Pub. Pol'y 48.
[101] Dworkin, *Taking Rights Seriously*, 121-122; Guest, 'Integrity, Equality and Justice', 349.
[102] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, per Lord Diplock at 408. Note that the paradigm of such a principle is when an administrative authority makes representations to, or consistently treats a particular

individual a particular way. This is loosely analogous to precedent but could just as easily be justified by a theory of promising.

[103] Dworkin, *Law's Empire*, 227.

[104] Ibid.

[105] Dworkin, *Justice in Robes*, 173-174.

[106] See generally Plato, *The Republic*, Desmond Lee trans. (Penguin, 2003).

[107] For example: Rosalind Hursthouse, 'Virtue Theory and Abortion', (1991) 20 Philosophy and Public Affairs 223-246.

[108] [1991] 1 WLR 767; 347 U.S. 483 (1954).

[109] Dworkin, *Justice in Robes*, 173.

[110] Dworkin, *Law's Empire*, 226.

[111] Tom Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] Public Law 306.

[112] Scott Hershovitz, 'Integrity and Stare Decisis', in Scott Hershovitz (ed) *Exploring Law's Empire* (Oxford University Press, 2006) 107-108.

[113] [1966] 3 All ER 77 Note that the Supreme Court is technically a separate entity from the House of Lords and so this decision can only be considered to apply to them*pro tanto*.

[114] *Young v Bristol Aeroplane Co*. [1944] 1 KB 718; *R (on the application of Kadhim) v Brent London Borough Housing Benefit Review Board* [2001] 2 WLR 1674.

[115] Dworkin, *Sovereign Virtue*, 298.

[116] Indeed, Dworkin has recently declared this to be the case in *Justice for Hedgehogs*, 405-407.

[117] As stated above, for interpretivists, all legal propositions must be morally justified. However, this does not imply that all morally justifiable propositions are legal. The moral justification required is one that provides a reason why a proposition should be treated *with the force of law*. There are other aspects of morality that might not achieve this status, for example virtue based ethics or supererogatory commitments. See Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 3-30.

[118] I am not suggesting that this is correct legal or moral reasoning but merely offer it as a sketch of the sort of considerations that will be involved.

[119] United States Constitution, Preamble and Article 1, Section 8, Clause 1.

[120] My thesis is a jurisprudential, not constitutional. I leave open exactly what sort of body should be making adjudicative decisions and where the correct separation of powers lies.

[121] Dworkin, *Law's Empire*, 405-7.

[122] Ibid at 178-81.

[123] Cicero, De Republica, III, xxii, 33, quoted in A.P. D'Entreves, Natural Law (Hutchison, 1951) 20.

[124] Whilst this seems commonsensical, it has been disputed: Ian Hacking, 'The Identity of Indiscernibles' (1975) 72(9) The Journal of Philosophy 249-256. As mentioned above, Dworkin has now committed himself to this view (supra nt. 31).