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# Is There a Place for Morality in Law?

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## Introduction

The question of the interrelationship of law and morality has been an issue of central concern to legal theorists. Kelsen, Finnis and Dworkin perhaps represent three conventional strands in the debate.

Of the three, only Kelsen, insisting on a strict separation of law and morality, would agree with the statement “It is apparent that there is no place for morality in law”, although I will argue, he inadvertently lets a morality of orthodoxy in the back door. Finnis, a natural law proponent, argues that the law should be imbued with a morality discoverable by a process of practical reason, but that there is no necessary connection between the legal and the moral. Dworkin occupies the middle ground. Concerned to broaden legal analysis from a preoccupation with the pedigree of rules, he suggests that background principles of political morality inform the law. I will argue that Dworkin’s conception of morality is backward looking and denies an emancipatory aspect to law making.

Although starting from different premises, each theorist, admits a conservative morality to the legal sphere that is inadequate to the task of articulating a non-exclusionary vision for law.

## Part 1 — The Moral Law

Finnis describes a contemporary theory of natural law incorporating insights from modern positivism.<sup>1</sup> He seeks to rescue natural law from positivist caricatures of it as a theory seeking to confine and delimit the positive law to universalist ideas about human nature or the cosmic order. He refutes the idea that natural law requires

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1 Neil MacCormick *Natural Law Reconsidered* (1981) 1 Oxford Journal of Legal Studies 99 at 101.

laws which infringe morality be impugned as invalid. In so doing, he offers a re-interpretation of the theories of Aristotle and Aquinas.

Finnis attempts to formulate a rational basis for moral action. His central thesis is that the act of making law is an act which can and should be guided by moral principles which are a matter of objective reasonableness. Although, Finnis indeed posits a place for morality in the law, the type of morality Finnis has in mind is questionable. Because Finnis's morality is rooted in abstractions rather than in the historical or contemporary nature of society his thesis amounts to "an apologia for private property, the family and the State, supported not by science and reason but by fideism and frequent appeals to the 'self-evidence' of his premises, and...a liberal theory of justice"<sup>2</sup>. "Its general acceptance of the ideas in which the status quo is interpreted and explained places it within a kind of liberal democratic politics."<sup>3</sup>

Aristotle developed a teleological view of nature consisting in the capacity for development inherent in things. He recognised that "justice might be either conventional, varying from state to state according to the history and needs of particular communities or natural, that is, common to all mankind"<sup>4</sup> because it was based on the telos of humanity as being political association. This telos of humanity was discoverable by reason. In this way Aristotle saw the state, or more correctly, the Greek polis, as a natural entity. Situating classicist ethics and politics into the thirteenth century Christian world view, Aquinas saw in humanity a "natural inclination to know the truth about God and to live in society"<sup>5</sup>. Through reason, humanity could participate in God's plan for the universe (the eternal law). "[P]articipation in the eternal law by rational creatures is called the natural law"<sup>6</sup>. According to Aquinas, the positive law was not merely a reflection of the natural law. Positive law particularised the generalities of the natural law and also ensured the compliance of those of "evil disposition".

Drawing on the ideas that the state is a natural entity and that natural law is discoverable by reason, Finnis proclaims that there are a set of basic practical principles affirming "that life knowledge, play, aesthetic experience, friendship, practical reasonableness and religion are basic goods (ends, purposes, values) of human life"<sup>7</sup>. The basic goods are "objective values in the sense that every reasonable person must assent to their value as objects of human striving"<sup>8</sup>. These categories or combinations of them, Finnis argues, are broad enough to encompass any other goods that might be articulated, although it has been argued that the good of

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2 Valerie Kerruish *Philosophical Retreat: A Criticism of John Finnis' Theory of Natural Law* (1983) 15 University of Western Australia Law Review 224 at 225.

3 Ian Duncanson *Finnis and the Politics of Natural Law* (1989) 19 University of Western Australia Law Review 239 at 240.

4 Dennis Lloyd *The Idea of Law* Penguin, England, 1983 at 75.

5 Aquinas *Summa Theologica Art 2* extracted in M.D.A Freeman *Lloyd's Introduction to Jurisprudence* 6th ed. Sweet and Maxwell, 1994 at 134.

6 *Ibid.*

7 *Supra* n.2 at 226.

8 M.D.A Freeman *Lloyd's Introduction to Jurisprudence* 6th ed. Sweet and Maxwell, 1994 at 122.

productive and creative work is a notable absence<sup>9</sup>. Another notable absence is the incorporation of an ecological sensibility in its own right and not just as a possible addendum to the good of life.

One of the basic goods is practical reasonableness of which there are nine requirements. "The requirements are nine recognisably 'moral' precepts whose dictates one 'must' follow in order to participate fully in the good of practical reasonableness itself by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out. In effect the requirements enable one to act in a way usually called 'moral' in pursuing ends that in themselves are morally neutral"<sup>10</sup>. The basic goods together with the requirements of practical reasonableness enable the formulation of "a set of general moral standards"<sup>11</sup> providing a template for moral behaviour.

One of the major criticisms of natural law theories is that they illicitly derive statements about what "ought" to be from statements about what "is". Finnis argues that his normative conclusions are "not based on the observation of human or any other nature but rather on a reflective grasp of what is self-evidently good for human beings"<sup>12</sup>. The principles are indemonstrable but self-evident and are established "by the act of subjectively reflecting on our character as human beings"<sup>13</sup>.

The concept of "self-evidence" is a problematic one. A self-evident principle is only self-evident to the subject, in this case Finnis, and then only to the extent that it has become self-evident and not challenged by that subject's experience. It is quite conceivable that different people would come up with entirely different formulations of goods to be attained. Self-evidence provides no real explanation of how each agent generates their own list of basic values corresponding to Finnis's seven.

Margaret Davies observes that the principles are unobjectionable enough, largely due to their vagueness<sup>14</sup>. Indeed, the principles are too "broad to guide or even 'orient' our practical reasoning, unless each is understood in a more specific manner. If the existence of the principle may be...self-evident, its particular interpretation is certainly not"<sup>15</sup>. The good of life could incorporate an ecological sensibility or be confined to the life of a self-interested individual. Friendship could affirm a humanism or egoist relations between individuals. For Finnis, the linchpin of the whole theory is the self-evident nature of the principles, but the abstract nature of the goods means that "not only is denial impossible, and assent compelled, but the substance escapes altogether. One is reacting to abstractions"<sup>16</sup>.

So how does one become practically reasonable? Firstly, a person must have a

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9 *Supra* n.2 at 227.

10 Robert Scavone *Natural Law, Obligation and the Common Good: What Finnis Can't Tell Us* 43 University of Toronto Faculty of Law Review 90 at 100.

11 John Finnis *Natural Law and Natural Rights* Clarendon Press, Oxford, 1980 at 23.

12 *Supra* n.8 at 84.

13 *Supra* n.2 at 226.

14 Margaret Davies *Asking the law question* Sweet and Maxwell, Sydney, 1994 at 69.

15 *Supra* n.2 at 227.

16 *Supra* n.3 at 246.

rational and coherent plan of life. “One should see one’s life as a whole and oneself as a continuous rational agent”<sup>17</sup>. Perhaps a task that only the reasonable man is up to.

Secondly, there must be no arbitrary preferences amongst values. There are many ways of not being arbitrary, some more exclusionary and some more participatory. Ian Duncanson argues that practical reasonableness does not articulate a participatory vision. The formulation of “esoteric etiquettes of reasoning through which alone correctness may be achieved”<sup>18</sup> reinforces existing power structures unless people are given the capacity to challenge parameters within which they are confined. This “has, as its practical precondition, material changes to which concerned intellectuals can contribute only by supporting democratic processes”<sup>19</sup>. These changes can only result from analysis of existing power structures. Finnis’s theory, divorced as it is from the practical realities of society, is inadequate to the task.

Thirdly, there must be no arbitrary preferences among persons, although there is capacity for self-preference within reasonable bounds. It is difficult to determine at what point self-preference becomes unreasonable<sup>20</sup>. Ian Duncanson argues that there are two methods for attaining impartiality between partakers of the goods and avoiding bias of distribution. The first is to ensure that those making decisions about the distribution are not themselves benefited by the outcome. Aware that decisions may be affected by preference for oneself and for friends, Finnis resorts to the intervention of the “ideal observer”. However, the “decisive scripts” for the imaginary ideal observer are written by those “whose self-interest is supposed not to be in question.”<sup>21</sup> A second method is to enable “the parties among whom goods are to be distributed to discuss the issues involved on an equal footing, with an awareness of the constraints and as much information as is available about the possible consequences of any decisions which might be arrived at”<sup>22</sup>. This second method of “dialogical community” is not considered by Finnis whose conception of the possible is circumscribed by his tacit acceptance and entrenchment of the status quo.

The fourth, fifth, sixth and seventh requirements of practical reasonableness are detachment, commitment, efficiency within reason and respect for all of the requirements. In addition, it requires the favouring and fostering of the common good of one’s communities and that one must act in accordance with one’s conscience. However, the “common good” may not exist. “Finnis, in his vision of humanity as a community, fails to notice that our equality in the sight of his god is not reflected in our social organisation... Notions like common humanity...justice, liberty, and a number of other concepts — do not amount to qualities which transcend other practices and knowledges, for they are themselves socially constructed and their meanings are bound to be socially contested”<sup>23</sup>.

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17 *Supra* n.3 at 256.

18 *Supra* n.3 at 259.

19 *Supra* n.3 at 259.

20 *Supra* n.2 at 228.

21 *Supra* n.3 at 261.

22 *Supra* n.3 at 260.

23 *Supra* n.3 at 267.

The idea of practical reasonableness is contingent and cannot be divorced from the value system of a particular society. As can be seen from the above discussion, Finnis's conception of the requirements of practical reason are not set in stone but represent choices made by a subject situated in a fairly advantageous position in a particular society.

"The basic requirement of practical reasonableness that one is to favour and foster the common good of one's communities, yields the requirements of justice"<sup>24</sup>. Justice may be distributive (ie. concerning the allocation of benefits and burdens held in common) or commutative (ie. concerning issues which arise in relations or dealings between individuals or groups where common stock is not directly in question). Finnis's account of how the concept of justice justifies private ownership of production is illustrative of the point that his conception of the common good has no emancipatory impulse but is instead directed to a maintenance of the status quo and the interests of a dominant majority and also that his theory is predicated upon man's domination of nature. It is a "rule" of human experience" that "natural resources...are more productively exploited and more carefully maintained by private enterprise...than by public enterprises"<sup>25</sup>. He claims that "justice requires private ownership of production, so long as there is re-distribution of the product"<sup>26</sup>. It is quite conceivable that other conceptions of the common good, if indeed it is not nonsense to talk of such a thing, would arrive at very different attitudes towards private property. Indeed for Finnis the argument becomes one between private enterprise and public (presumably state owned) enterprise. The idea of worker assemblies or communal ownership is not even countenanced. No evidence is adduced for the "rule" of human experience. At least we are spared from the claim that it is self-evident.

Following Aquinas, Finnis argues that "the positive law is a necessary medium for the expression of natural principles and for the development of a communal environment in which the 'goods' are attainable"<sup>27</sup>. "There are human goods that can be secured only through the institutions of human law" and there are "requirements of practical reasonableness that only those institutions can satisfy"<sup>28</sup>. Although for Finnis morality, in terms of practical reasonableness, should be a central concern of a legal order, he does not deny the basic positivist thesis of the conceptual distinction between posited law and morality: "the tradition of natural law theorising is not concerned to minimise the range and determinacy of positive law"<sup>29</sup>.

Aquinas taught that "an unjust law is no longer legal but rather a corruption of law" but Finnis stresses that this does not affect the validity of the law in a technical sense. Instead, the laws are rendered defective or substandard by virtue of their non-conformity with morality. This in turn weakens the moral case for obedience to

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24 *Supra* n.11 at 164.

25 *Supra* n.11 at 170.

26 *Supra* n.2 at 240.

27 *Supra* n.14 at 70.

28 *Supra* n.11 at 3.

29 *Supra* n.11 at 290.

the law. MacCormick states that “the natural law tradition affirms the possible existence of such laws, while denying or downgrading their morally compelling quality and insisting on their essential defectiveness as law”<sup>30</sup>. However, Finnis goes on to argue “that circumstances may demand that an unjust law be obeyed because to disobey it would weaken the legal system as a whole...In other words, the mere fact that a law has been authoritatively created gives it some weight in moral terms: the purpose of the legal system is to further the common good, and the existence of the legal system merits protection. A disobedient act which tends to weaken the legal system may therefore be unjustified.”<sup>31</sup>

The reason that law has some innate moral quality derives from the opportunity of rulers to foster the common good which is a requirement of practical reasonableness<sup>32</sup>. However, Finnis gives no satisfactory account of the state and why it is that this centralist instrumentality is able to foster the common good. Indeed, the idea of the state being able to do so has filtered down from Aristotle but it seems clear that Aristotle’s idea of the state being natural was with reference to the small sized Greek city state and not to modern liberal democratic entities such as Finnis obviously has in mind.

Finnis commits two errors. Firstly, “his account does not even consider the possibility of there being structural divisions of a fundamental kind in a social order, productive of opposed interests and opposed conceptions of, among other things, common good”<sup>33</sup>, instead he assumes a fictitious homogeneity of the political community. Secondly, “in presuming the inferability of a common interest from current modes of social organisation, and from currently dominant modes of thinking about ‘all societies’, Finnis offers not a critique but a refinement of the age’s ‘ruling ideas’”<sup>34</sup>. “All that is left to generate the obligation to obey the law is the assumption that any order is better than none.”<sup>35</sup>

Finnis seeks to describe an objective morality which can inform and evaluate the law. However, it is clear that his formulation is conditioned by his acceptance of the society in which he lives and circumscribed by his personal conception of the possible. His account is not grounded in social realities but in abstractions. The result is a law imbued with a morality that essentially serves the interests of the elite.

To see Finnis’s attempt at articulating an objective morality in this way is not to say that such principles do not have a bearing on posited law. It is however a warning that our ideas of morality are socially constructed and historically rooted. Morality as a concept is in dialectical tension with society and its law.

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30 Neil MacCormick *The Separation of Law and Morals* in George (ed) *Natural Law Theory: Contemporary Essays* Clarendon Press, Oxford, 1992 at 109.

31 *Supra* n.14 at 71.

32 *Supra* n.11 at 263.

33 *Supra* n.3 at 273.

34 *Supra* n.3 at 274.

35 *Supra* n.2 at 240.

## Part 2 — The Amoral Law

A caricature of legal positivism is that it is unconcerned with moral questions. However, as MacCormick points out this insistence on a separation of law and morality is to ensure that the law is not given automatic moral respect but is subject to “watchful and jealous scrutiny”<sup>36</sup>. Conflation of the moral and the legal may lead to an uncritical legitimation of the legal order<sup>37</sup>.

Kelsen is usually called a positivist because his theory insists on a strict separation of law and morality. However, his theory of a system of norms is conceptually distinct from positivism which he criticises for confusing law with facts whereas natural lawyers confuse law with morality<sup>38</sup>. In seeking to provide objective criteria for recognising the pedigree of a rule, Kelsen is concerned to describe what is the law divorced from an interrogation of its content. In attempting to provide a scientific analysis of law he excludes all political and ethical elements.

The science of law consists of the examination of the nature and organisation of normative propositions. Legal norms are expressions of ‘oughts’ but these ‘oughts’ are to be distinguished from ‘oughts’ of value. Value ‘oughts’ shape the content of legal propositions. Legal ‘oughts’ are distinguishable because they are backed by sanction — it is the prescription of a sanction that imparts law-quality to a norm. Because morality is relegated to the realm of emotion, it is essentially a subjective and relative concern and cannot therefore be admitted to the science of law as an objective phenomenon. However, “if value judgments, such as moral factors, form an inevitable feature of the climate of legal development, as is generally admitted, it is difficult to see the justification for this exclusionary attitude”<sup>39</sup>. As Raz comments, the study of law should be adjusted to its object, and if the object cannot be studied scientifically then the study should not strive to be scientific<sup>40</sup>.

Kelsen roots his theory in Kant. Kant ascribed reason two roles: theoretical reason concerns description (‘is’) and is a function of thought, while practical reason concerns prescription (‘ought’) and is a function of will<sup>41</sup>. Kelsen denies the existence of practical reason: “The difference between ‘is and ‘ought’ is not between two modes of reason but between reason itself (corresponding to Kant’s theoretical reason...) and emotion.”<sup>42</sup> Morality for Kelsen is a matter of subjective preference and cannot be described objectively. Kelsen then surmounts this apparent obstacle to the creation of a science of “oughts” by relying on Kant’s view that the “objective world is transmuted by certain categories applied to it by the mind of

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36 *Supra* n.30 at 107.

37 *Supra* n.8 at 274.

38 *Supra* n.8 at 272.

39 *Supra* n.8 at 58.

40 Joseph Raz *The Purity of the Pure Theory* extracted in Freeman Lloyd’s *Introduction to Jurisprudence* at 329.

41 Iain Stewart *The Critical Legal Science of Hans Kelsen* (1990) 17 *Journal of Law and Society* 273 at 277.

42 *Ibid.*

the onlooker.”<sup>43</sup>

In Kant’s view we know things not ‘in themselves’, but only as they appear to us. The appearance of things to us is as material provided by the senses that is moulded under forms of thought called ‘categories’. One of Kant’s categories is that of “is(*sein*)”, under which descriptions are constructed. Kelsen develops and adopts a new category “ought(*sollen*)” under which it is possible to describe “oughts”<sup>44</sup>. The operation of this category permits a kind of science in which norms may be described without any admixture of evaluation.<sup>45</sup>

In keeping with the Kantian and Humerian tradition, Kelsen insists that “ought” statements cannot be derived from statements about what “is”. Kelsen states that the validity of a norm — essentially a description of what ought to be — is not derived from any “is” of fact outside the law, it derives from another ought proposition standing behind it. A norm then, seeks to describe how a person ought to act but it is not concerned with how people in fact behave, or why people behave as they do. A rule is valid not because it is likely to be obeyed but by virtue of another rule imparting validity to it. The issue of whether people do in fact comply with the law is a separate issue concerning the efficacy of the law.

The relationship of efficacy and validity is such that a norm is considered to be valid only if it belongs to a system of norms, and to an order which on the whole is efficacious. Efficacy is a condition of validity but not the reason for validity. A legal norm is valid before it is effective, but its continuing validity depends on the effectiveness of the legal system as a whole.

By the process of deriving ever more particular norms from general norms, Kelsen sets up a hierarchy of norms, the validity of which ultimately reside in the basic norm or *grundnorm*. This abstract principle grounds laws legitimacy. The *grundnorm* is in some sense extra-legal because its validity does not rest on other norms. But Kelsen points out that the choice of *grundnorm* is not arbitrary because it depends on the principle of efficacy. In another sense therefore, it is of internal concern. The validity of the basic norm is in the end indemonstrable. The basic norm is intended to guarantee the closure of a legal system but paradoxically because it is neither inside or outside the system “the law cannot...simply be a closed or self-identifying structure” because the basic norm is itself not only a fiction but self-contradictory. “It is self-contradictory because it represents an ultimate empowerment of the law, and thus implies that there is an even higher authority.”<sup>46</sup> “It is rather like the idea of the world supported on an elephant, the rules not permitting you to ask what supports the elephant.”<sup>47</sup>

Kelsen’s principle of efficacy is concerned with whether the legal system is on the whole obeyed by the people and not with how that obedience is obtained. This

43 *Supra* n.8 at 271.

44 *Supra* n.41 at 279.

45 *Supra* n.41 at 279.

46 *Supra* n.14 at 268.

47 *Supra* n.4 at 194.



method of legitimation has been criticised as “dangerous” because “it appears to invest effective coercion with disproportionate value” and “silly because no one has ever been persuaded that the mere presence of effective coercion is sufficient to answer all inquiries about the validity of an order”<sup>48</sup>. What is the criteria for determining if a system as a whole is efficacious? Is the system still efficacious if minorities are deprived of basic human rights? Is a system efficacious if everybody obeys oppressive laws on pain of death? Kelsen does not elaborate on these questions. On the face of it, the theory seems unconcerned that the efficacy of a legal system is ensured through the use of violent force by the state against the populace.

Although Kelsen is concerned to banish moral questions to the realm of the purely subjective, I would argue that certain value judgements are implicit in the theory and further that the theory justifies a morality of orthodoxy. Cohen argues that Kelsen’s approach is necessarily value laden because “by limiting the tests of legal validity to proof by strict logical entailment, the Pure Theory chooses from among competing methodological possibilities and frames its inquiry in such a way as to exclude moral and other “alien” elements from its method of proof...his approach is selected, not compelled”<sup>49</sup>. He goes on to argue that the absence of any moral component is a consequence of the effort to separate law and morals which is a matter not of logic or science but “an expression of the liberal desire to preserve individual autonomy and to preserve the diversity of morals which is in constant danger of ideological and government interference”<sup>50</sup>. It is apparent that Kelsen’s view could amount to a legitimation of oppressive legal order since his “notion of legal validity looks only to the *grundnorm* and to the dominant will of those who have the power to create and maintain an effective legal order, it is primarily a view from the top of the community structure that relies on submissiveness from below”<sup>51</sup>. Alternative sources of legitimacy for example, morality or community expectations and desires can only act as restraints on an oppressive system “to the extent that they are built into the *grundnorm* itself, or to the extent that they appear in the calculus of effective power heeded by those in authority”<sup>52</sup>.

One of the principal claims of Kelsen’s theory is that the law shapes itself. Norms derive their validity from other more general norms thus setting up a field of non-contradictory meaning. Given this incident of internal validation, orthodox views are perpetuated and remain unchallenged unless, of course, the legal system as a whole loses its efficacy. Even though Kelsen claims to be interested in only the form of proscription and not the content of norms, the grant of validity by reference to a norm’s pedigree leads to a *de facto* endorsement of the content of the norm.

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48 Cowan *Law Without Force* 59 CALIF. L. REV. 683 quoted in Julius Cohen *The Political Element in Legal Theory: A Look at Kelsen’s Pure Theory* (1978) 88 Yale Law Journal 1 at 11.

49 Julius Cohen *The Political Element in Legal Theory: A Look at Kelsen’s Pure Theory* (1978) 88 Yale Law Journal 1 at 9.

50 *Ibid* at 14.

51 *Ibid* at 14.

52 *Ibid* at 14.

One implication is a society deriving its *morality* from its *laws*, circumventing reason altogether.

Kelsen envisions an inflexible legal system which is abstracted from and immune to challenge by grass-roots or minority interests. Although he insists on a separation of law and morality, the theory incorporates a morality of orthodoxy with a frightening capacity to grant validity to an oppressive legal order. More so than mere efficacy, it is *adequacy* and *inclusiveness* that must be constantly demanded of a legal system. With an ever proliferating diversity of marginal interest groups (not to mention weird science) making very reasonable demands upon the law, we are hardly serving our society by offering rationalisations of the status quo for legal theory.

### Part 3 — Dworkin's Half-way House

Dworkin proposes a middle way between positivism and natural law attempting to articulate the relationship between the political morality of a community and its law.<sup>53</sup> He attempts to “transform discourse about the nature of law from a discourse about rules to one of rights and principles”<sup>54</sup>. There is no strict separation of law and morality instead, there are legal principles that “are vehicles for conveying moral principles into the courtroom”<sup>55</sup>

In a sustained attack against the positivist account of law as a collection of rules identifiable by their pedigree, Dworkin argues that this account is simplistic and ignores the fact that lawyers and judges characteristically make use of other sorts of standards in their reasoning about particular legal rights and obligations. He states that lawyers “make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards”<sup>56</sup>. Policies are standards setting out goals to be reached. A principle is a “standard that is to be observed...because it is a requirement of justice or fairness or some other dimension of morality”<sup>57</sup>. Arguments of principle are arguments intended to establish an individual right, whereas arguments of policy are arguments intended to establish a collective good.

In Dworkin's conception recourse to these background principles is justified because, “the legal order stems from a background morality some of whose principles are embodied in political institutions. The rules made by institutional office holders are a partial and incomplete bodying-out of the principles subserved by the institutions. The rights of legal persons are founded in these institutional principles, and are only partly concretised via explicit rules. Hence silence or ambiguity in the rules merely obliges us to have direct recourse to the principles which are anyway the true and ultimate ground of legal rights”<sup>58</sup>.

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53 *Supra* n.14 at 60.

54 Sandra Berns *Concise Jurisprudence* The Federation Press, Sydney, 1993 at 40.

55 S Bottomley et al (eds) *Law in Context* The Federation Press, Leichhardt, 1991 at 28.

56 Ronald Dworkin *Taking Rights Seriously* Duckworth, London, 1977 at 22.

57 *Ibid.*

58 Neil MacCormick *HLA HART* 1981, at 27.

Dworkin is situated firmly within the liberal tradition, and, drawing inspiration from Kant sees the individual as an end in himself or herself, and not merely as a means to an end. Because of this particular conception of the individual, rights may not be overlooked in favour of maximising collective benefit or general welfare. Priority is given to the right over the good. In addition to rights declared expressly in legal instruments, there are background rights, the most fundamental of which is the right to equal concern and respect. These background rights form the fundament of the legal system and are called legal principles. In hard cases, the judge has recourse to these principles. However, Dworkin stresses that this recourse is not merely an instance of judicial discretion. For Dworkin and for his hypothetical judge, Hercules, there is always a right answer. Because the judge is using foundational principles, the judge is not making law but simply declaring the pre-existing rights and obligations of the parties. This marks a departure from positivists who claim that the "open textured" nature of rules means that the rules run out in unusual cases and the judge is required to exercise discretion.

As Dworkin states, "The rights thesis, that judicial decisions enforce existing rights, suggests...[that] institutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate. Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions...judges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past."<sup>59</sup>

This idea that judges find the right answer by recourse to relevant principles is suspiciously simple. Surely, greater discretion is required when interpreting or elucidating principles because the principles are even less clear than the rules. As MacCormick states, "legal systems result from a patchwork of historical assertions of contentious and changing political principles, political compromises and mere political muddles. That from which laws emerge is controversial."<sup>60</sup>

Dworkin's reliance on the concept of background rights which may be used as "trumps" against government or other interference is itself problematic. Dworkin states that the existence of rights is indemonstrable but that this does not mean that they are non-existent. Alastair MacIntyre agrees but points out quite rightly that the argument "could equally be used to defend claims about unicorns and witches"<sup>61</sup>.

So how are these principles of political morality elucidated? Dworkin argues that to understand the nature of law and the role of the judge it is essential to view legal argument itself as a social practice and to examine it from the point of view of

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59 *Supra* n.56 at 87.

60 *Supra* n.58 at 130.

61 Alastair MacIntyre *After Virtue*, 2nd edition, London Duckworth, 1985, quoted in Sandra Berns *Concise Jurisprudence* at 43.

a participant in that practice. "Constructive interpretation" is Dworkin's method for interpreting the practice of law. "The adjudicative principle of integrity instructs judges to identify legal rights and duties...on the assumption that they were all created by a single author — the community personified — expressing a coherent conception of justice and fairness"<sup>62</sup>. Dworkin states that "Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best *constructive interpretation* of the political structure and legal doctrine of their community. They try to make that complex structure and record the best there can be."<sup>63</sup>

There are three stages to constructive interpretation: "At the pre-interpretive stage, the participant identifies the rules and standards that tentatively constitute the practice...At the interpretive stage, the interpreter settles on some general justification for the main elements of the practice identified at the first analytic stage. Finally, there is a post-interpretive...stage at which the participant adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage"<sup>64</sup>

Dworkin argues that the process of constructive interpretation requires the adoption of the internal point of view — it is necessary to take up a role inside a particular practice to interpret the practice. However, this attitude is problematic, because "the history of our legal and political traditions...has made it clear that many of the arguments accepted within the practice were constructed from a perspective which systematically denied that certain individuals existed as legal subjects...Taking up a position within a practice...as profoundly exclusionary as the practice of law is, therefore, fraught with ambiguity"<sup>65</sup>. The internal view conceals the fact that we are not merely "participants" in a practice but the embodied subjects of law. Within our communities we are men and women, members of different races and cultures, affluent and impoverished, ruling and ruled.

Law as integrity provides a justification for the obligation to obey the law. Dworkin looks at obligations arising by virtue of social practices within biological or social groups. He goes on to argue that only obligations arising from "true communities" are binding<sup>66</sup>. In a "true community", members of the group "must believe that the group's obligations are specific, extending to members but not to 'outsiders'". Secondly, they must believe that these obligations...run directly between the members rather than pertaining to the group as a whole. Members must perceive their responsibilities to their fellow members as flowing from a general responsibility of concern for the well-being of other members of the group. Finally..they must suppose that their practices show equal concern for all members"<sup>67</sup>. The obligation to

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62 Ronald Dworkin *Law's Empire* extracted in Freeman Lloyd's *Introduction to Jurisprudence* at 1276.

63 *Ibid* at 1273.

64 *Supra* n.8 at 1274.

65 *Supra* n.54 at 47-48.

66 *Supra* n.54 at 44.

67 *Supra* n.54 at 47.

obey law is secured by virtue then, of our membership in a community of equals and no independent act of acceptance or acknowledgment is required<sup>68</sup>.

So, for Dworkin, law is not composed merely of rules but also “of principles, moral standards which are implicit in the institutions of the community and in its standards of political morality”<sup>69</sup>. But the existence of Dworkin’s community is far from self-evident. The community affirmed is particularly susceptible to critique from feminists and critical race scholars as it “excludes certain perspectives while privileging others and conferring upon them an unwarranted objectivity”<sup>70</sup>. It is a notion of community that creates an illusion of political consensus resting on an assumption of equal concern and respect. It is far from self-evident that an Aboriginal person would perceive themselves as a member of the institutional community except by virtue of the violent imposition of the dominant culture’s legal system. As Berns points out “Questions of membership, participation, standing and voice arise, which are obscured by terms like ‘our community’ and ‘we’”. Dworkin does not elaborate about “how a specifically ‘political morality’ differs from other sorts of moral standards, how we ought to respond when a clear conflict exists between what we are told are the ‘principles of political morality’ implicit in the traditions of our community and other sorts of standards and values”<sup>71</sup>.

Dworkin’s idea of morality distinguishes sharply between the principles of political morality inherent in our institutions and the moral sensibilities of particular judges. Although the judge’s own political convictions play a role in his or her interpretation of the rules and background principles, the institutional text ultimately constrains the possible interpretations. As Berns points out, the text and the interpreter remain distinct<sup>72</sup>. The fiction that the judge is disinterested allows the ideological function of law to remain hidden. Certain acceptable moral sensibilities are admitted to the category of (objective) political morality and rendered legitimate.

According to Dworkin judges may have recourse to arguments of political principle but arguments of political policy should be addressed to parliament. Maintaining the traditional liberal belief that the individual is the source of value, only the individual, or their elected representatives, may set goals or make policy. “The judge may look backwards to the history and traditions of the community for guidance, but not forward to appropriate social outcomes.”<sup>73</sup> This approach is inherently conservative, instructing “judges to perpetuate the existing ideology of law. The view of the law as a determinant sealed web implies insensitivity to societal change and a perpetuation of the status quo”<sup>74</sup>. Justice McHugh also criticises Dworkin for his absolute disregard of collective welfare, the judge being “confined

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68 *Supra* n.54 at 14.

69 *Supra* n.54 at 44.

70 *Supra* n.54 at 10.

71 *Supra* n.54 at 9.

72 *Supra* n.54 at 8.

73 *Supra* n.54 at 56.

74 The Hon Mr Justice McHugh *The Law-making Function of the Judicial Process — Part 1* (1988) 62 ALJ 15 at 29.

to solving questions of what rights people have”<sup>75</sup>.

Dworkin clearly believes that normative argument is inherent in legal reasoning therefore denying the positivist separation of law and morality. However, it is only institutional morality which is tangible to the law. Thus law is only reflexive to those values found in the history and traditions of the dominant culture. Minority values are silenced.

## Conclusion

Finnis, Kelsen and Dworkin take divergent views of the place of morality in law. However different their premises may be, it is apparent that each gives a conservative moral impulse to the legal sphere. Any discussion of law or morality must include a discussion of their development over time in a dynamic and often contradictory social terrain. Kelsen follows the “scientific” path, separating the inseparable with Kantian aplomb. However, in the end his project fails leaving us with a morality in servitude to those with the power to create and enforce law. Dworkin admits of a tension between law and certain sorts of morality, but seeks to keep such tensions in the past, failing to recognise that the future (moral visions and goals) also acts upon the situation, particularly in informing normative “rights”, “principles” and “policies”. For Finnis, although moral principles are considered the basis for law, their alleged self-evidence seems to deny consciousness itself of ongoing dialectical unfolding. Indeed for Finnis, even admitting of a “process of introspection”, the telos of moral unfolding seems to be embodied by himself, or his own social class, thus ending the matter and rendering law dangerously comprehensible without further reference to development.

Law, to the extent that it is anything but a system of popular control, is a development dependent on the previous development of morality in civil society. Law and morality can be unified only in a graded process of development where law is emergent from and in constant dialectical tension with the continuing development of morality. *Development* here, which must be conceived as a continuing process, is a product of ongoing introspection, constant exposure to social concerns (themselves always changing), trial and error and reasoned critique, not to mention changing political priorities. If law is treated as an abstraction, isolated from moral concerns, or if law is infused with a morality isolated from the people who breathe it, law becomes an inflexible internalised monolith and the exclusionary function of law remains unchallenged.

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75 *Ibid* at 30.