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OBLIGATIONS BEYOND MORALITY: A CRITIQUE OF RONALD DWORKIN'S VIEW ON LEGAL NORMATIVITY

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ABSTRACT: In this essay, I will draw from moral philosopher Bernard Williams to criticise the claim made by Ronald Dworkin that legal obligations are a particular kind of moral obligation. In Section 2, I will explain Dworkin's argument in favour of legal obligations as moral obligations. This starts with a picture of the "moral community" and relies heavily on Dworkins' interpretive method. In Section 3, I will criticise Dworkin's theory for its reliance on unwarranted claims about practical reasoning and the powers of morality. I will adopt a more constructive tone in 4, as I will outline an alternative view that recognises the richness of the point of view of concrete agents. The gist of the criticism developed in the essay is that Dworkin endorses an overly moralized view on obligations. This view ignores that people can genuinely feel obligated by demands that are not moral.

KEYWORDS: Bernard Williams; Ronald Dworkin; Legal obligations.

OBRIGAÇÕES ALÉM DA MORALIDADE: UMA CRÍTICA DA VISÃO DE RONALD DWORKIN SOBRE A NORMATIVIDADE DO DIREITO

RESUMO: Neste artigo irei me basear no filósofo moral Bernard Williams para criticar a afirmação feita por Ronald Dworkin de que obrigações jurídicas são um tipo particular de obrigações morais. Na Seção 2 irei explicar o argumento de Dworkin em favor de obrigações jurídicas como sendo morais. O ponto de partida será a tese da "comunidade moral" e depende fortemente do método interpretativo de Dworkin. Na Seção 3 irei criticar a teoria de Dworkin por se fundamentar em teses questionáveis sobre razão prática e sobre os poderes da moralidade. Vou adotar um tom mais construtivo em 4, quando apresentarei uma visão alternativa que reconhece a riqueza do ponto de vista de agentes concretos. O cerne da crítica desenvolvida neste artigo é de que Dworkin endossa uma visão excessivamente moralizada sobre obrigações, uma visão que acaba ignorando o fato de pessoas se sentirem genuinamente obrigadas por demandas que não são morais.

PALAVRAS-CHAVE: Bernard Williams; Ronald Dworkin; obrigações jurídicas.

1. Introduction

In this essay, I will deploy a series of resources from moral philosopher Bernard Williams to discuss the claim made by Ronald Dworkin that legal obligations are, at the end of the day, a particular kind of moral obligation. I am sceptical about Dworkin's claim. To borrow a term from Roger Shiner, when it comes to the normativity of obligations, Dworkin's proposal ends up being *external*, and by that, I mean that it grounds normativity in something external to the agent that engages in practical deliberation about what she ought to do. In doing so, the proposal ends up being an insufficient or distorted account of normativity[1]. Dworkin's view is not enough to explain how the law can provide reasons for action for agents (I will refer to the law's capacity to provide such reasons as its reason-giving character). To make my point, I will rely on resources developed by Williams, notably from his discussion on the limits of morality and practical reason. The main point I want to call attention to in this essay is that Dworkin fails to capture important elements in his account and that there is more to the story of legal normativity than what he tells us. Metaphorically speaking, we could say that Dworkin sees the phenomenon of normativity trough lenses that only capture black and white, and not the whole spectrum of colours that pervade our practical reasoning.

This is what I intend to do in this essay. In Section 2, I will explain in reasonable detail Dworkin's argument in favour of legal obligations as moral obligations. This starts with a picture of the "moral community" and relies heavily on Dworkins' interpretive method. Sections 3 and 4 are the heart of the essay. In Section 3, I will criticise Dworkin's theory for its excessive reliance on unwarranted claims about practical reasoning and the powers of morality. I will adopt a slightly more constructive tone in 4, as I will outline an alternative view that recognises the richness of the point of view of concrete agents and engage with the reasons that motivated the reductivism of Dworkin's account. The claim I will make is that many reasons are not easily reduced to the moral and that those might play a role in the reason-giving character of the law. A brief conclusion follows.

The gist of the criticism developed in the essay is that Dworkin endorses an overly moralised view on obligations, a view that ignores that people can genuinely feel obligated by demands that are not moral. My point is that Dworkin's account leaves out something important and that if we only have his account, then we will have a

1 I am borrowing the term from Shiner (2010), although I am here using the term in a slightly different way.

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distorted view of legal normativity and obligations in general. Dworkin's account does not pay attention to the dispositions, attachments, and projects that individuals have and that they perceive as being potentially in conflict with moral obligations. To borrow a famous expression by Bernard Williams, Dworkin's account is "one thought too many" when it comes to the reason-giving character of the law[2], that is, the Dworkinian account presses on the idea that there must be some ultimate moral reason underlying the reason-giving character of the law[3].

A cautionary note is important here. I will talk rather loosely about obligations and reasons. I can do so because obligations are reasons for action themselves[4]; obligations figure in our practical reasoning as reasons to do or not to do something[5]. Some of the arguments I will put forward could be made in terms of *prima facie* obligations and real obligations, or in terms of *pro tanto* reasons and conclusive reasons, and so on. More notably, perhaps, is Raz's view. Joseph Raz refers to obligations as what he calls "protected reasons", the combination of a directive to do or not to do something with a second-order exclusionary reason not to act based on other reasons (RAZ, 2009a, p. 233-237)[6]. For the purposes of my discussion, we can be agnostic about Raz's proposal. Obligations can be protected reasons or be very weighty first-order reasons or anything in such vicinity. What matters is that there are different kinds of reasons and that some of those reasons present themselves as particularly stringent in a way that they might count as what we ordinarily refer to as obligations. I am *not* in the business of presenting a tight conceptual analysis of the concept of obligation. Rather, I am interested in the phenomenology of obligations, that is, how they appear and make sense for those that first-personally engage with them.

2 In this essay, I will be discussing mostly Dworkin. However, it does not seem unfair to say that many legal theorists, positivists and anti-positivists alike, are somehow committed to the claim that if there is normativity in law, this must be moral normativity. This claim arises naturally from the idea that morality is supreme in our practical reason, and as we will see, I will take issue with both the claim and its originating idea. Good examples of authors committed to those claims (it should be noted that such commitment can take different forms) are Scott Hershovitz, John Finnis, and Stephen Perry. According to Hershovitz, "legal obligations just are moral obligations generated by legal practice" (2015, p. 1192). Finnis, in turn, claims that "the concretized rule is (morally as well as legally) normative because such normativity is (presumptively and defeasibly) entailed by the (moral) principle that the common good (...) requires that authoritative institutions take action (...)" (2016, sec.1.5). Perry claims that at the end of the day, "Legal normativity is moral normativity, and the law's claim to authority is a moral claim". (2006, p. 1173-1174). My discussion in this essay cannot be applied without further development to those other authors.

3 Although, as Stephen Bero suggested to me, maybe the best accusation would be to say that, in fact, the Dworkinian model presupposes "one thought too few".

4 Later I will say something about obligations that are not reason-giving. Those will be called formal obligations and are not proper obligations for the agent.

5 I am indebted to Kenneth Ehrenberg for calling my attention to the point that obligations are a kind of reasons for action.

6 The idea of obligations as protected reasons is pervasive in Raz's work.

2. Legal obligations and moral obligations

To understand Dworkin's account, we must begin with his analysis of associative obligations. The starting point is Dworkin's idea of a "bare community", that is, a community defined in historical, cultural, or geographical terms. The idea of a bare community captures the descriptive use of the term (DWORKIN, 1986, p. 201), and it is a necessary but far from sufficient condition for the existence of obligations among its members. The reason why this is so is clear enough: the existence of a bare community is a matter of fact, whereas obligations – moral, political, legal – are normative matters. To draw an obligation from a matter of fact would be a violation of Hume's principle, or so Dworkin argues (2011, p. 302-303). For a community to be able to create obligations for its members, it has to bear the right normative relation to them. When this relation is present, we get what Dworkin calls a "true community" (DWORKIN, 1986, p. 201), a *moral community*.

For Dworkin, this right normative relation is made up of four items. The first item claims that the community members recognise themselves as such and that such recognition entails duties and obligations among them. The second item adds that the members recognise those obligations as due to the individual members of the community, not to the community as such. The third item establishes that a moral community is geared toward the well-being of all its members. Finally, the last item claims that in doing so, the community treats all its members with an equal measure of concern. Such equal measure of concern, says Dworkin, is not incompatible with hierarchical structures or assigning different roles to people within that community. It makes rules out, however, the idea that some people's lives in the group have more (or less) worth than the lives of other members in it (DWORKIN, 1986, p. 199-201). This is how Dworkin summarises his view on the moral community: "The responsibilities a true community deploys are special and individualized and display a pervasive mutual concern that fits a plausible conception of equal concern" (DWORKIN, 1986, p. 201).

Why do those items enable a moral community to generate real, "associative" obligations for its members? When a community abides by the four requirements above, it has the right fit with what Dworkin calls principles of dignity, that peoples' lives have objective value and that every person is responsible for his or her life (DWORKIN, 2011, p. 203-204). The exegesis of Dworkin's view on dignity is not of importance here, but the general shape of his argument is. This is how his argument

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looks like: (I) peoples' lives have objective value, and people are responsible for the success of their lives; and (II) when a community helps people to foster their dignity, it can provide them with real obligations that can be traced back to their very dignity. There is a distinctly Kantian flavour to this argumentative line. The thought seems to be that if the community somehow diminishes the objective value of my life, then this community fails to provide me with real (moral) obligations. I might even think that I have an obligation; after all, it might be the case that I have been brought up in that community and internalised its values and ways, but this does not mean that they can *actually* demand anything from me. This can be clearly seen in excerpts like the following one, which will also be important later:

> Role conventions do not impose genuine associative obligations automatically: the conventions must satisfy independent ethical and moral tests. Sexist or racist practices, or those that define honor among murderers, drug dealers, or thieves, impose no genuine obligation on those they purport to oblige, no matter how thoroughly adherents seem to accept those obligations (...) once we realize that role practices impose genuine obligations only because – and therefore only when – they allow their members more effectively to meet their standing ethical and moral responsibilities, then we also realize that these practices cannot impose obligations when they act as obstacles rather than means to that goal. Social practices create genuine obligations only when they respect the two principles of dignity: only when they are consistent with an equal appreciation of the importance of all human lives and only when they do not license the kind of harm to others that is forbidden by that assumption (DWORKIN, 2011, p. 315).

How does this analysis of associative obligations[7] feeds back into Dworkin's account of how the law provides reasons for action? This is done through Dworkin's view on the methods of jurisprudence. Dworkin has famously argued, against what he took to be legal positivism, that the law is not an artefact that you can know via facts or institutional pedigree, but that it is an *interpretive concept*[8]. There is no such thing as nature or conceptual definition of the law, but rival interpretations that purport to present the law in "its best light" (DWORKIN, 1986, p. 47-90). We find out what the law is, says

7 There can be, of course, other accounts of associative obligations. In this essay, the term is used to refer only to Dworkin's account.

8 This claim is repeated by Dworkin in a number of texts. The *locus classicus* is (1986, chapters 01-03).

Dworkin, when we constructively interpret it. According to Dworkin, an interpretation is successful if it meets two dimensions.

Firstly, there is a dimension of "fit". The interpretation must duly account for what Dworkin refers to as the "paradigms" of the interpreted phenomenon (DWORKIN, 1986, p. 72-73). For instance, an interpretation of the genre of epic poetry would be a poor one if it ignored the roles played by honour, duty, and courage in the poems. Those traits are part of what defines that genre. Secondly, there is a dimension of "justification". It will often be the case that more than one interpretation succeeds in accounting for the paradigms of practice or concept. This calls for a more straightforwardly evaluative dimension in interpretation. In this second dimension, we search for the most compelling interpretation taking into account the purpose or point we see in whatever we are interpreting[9]. That is, we interpret something constructively when we attempt to present this something in "its best light", and with regard to a practice with stakes as important as the law, the "best light" means the most morally appealing way (taking into account the constraints of fit) (DWORKIN, 1986, chapter 02)[10]. When it comes to interpretive practices like law, agents develop an "interpretive attitude" made of two elements: the participants recognise some purpose or value in the practice and they also believe that such practice can be reformed in order to serve better this purpose or value (1986, p. 47). When the interpretive attitude is present, says Dworkin, "People now try to impose *meaning* on the institution – to see it in its best light – and then to restructure it in the light of that meaning" (1986, p. 47).

For Dworkin, legal theories "try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice" (1986, p. 90). The theory that delivers this for Dworkin is the idea of "law as integrity". At this point the analysis of the moral community connects with matters of legal normativity. For Dworkin, the interpretation that shows law in its best light, the law as integrity, establishes that the contents of the law are what a community of principle, that is a moral community, would have as its law[11]. This is the schematic narrative he tells us: in order to know what the law is, we must interpret it constructively; to interpret something constructively, we need to portray this something in its

9 The two dimensions of interpretation are discussed mostly in Dworkin (1986, chapter 2).
10 See also Ronald Dworkin (2011, part II).
11 This is somewhat simplified. The dimension of fit entails that there are constraints imposed by the concrete institutional history of a legal system.

best light; the law is shown in its best light when it is understood through the lens of integrity. Law as integrity, says Dworkin, guarantees "a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does" (1986, p. 96). For Dworkin, therefore, "what the law is" is the same as "what the law is in its best interpretation". He denies the classical distinction between finding the law and creating the law since, for him, those are merely two sides of the same coin (1986, p. 225).

This is the conclusion of the argument: If (1) the law in its best interpretation is the set of regulations that a community of principle, a moral community would adopt, and (2) only a moral community can provide an agent with real associative obligations, obligations that are accepted by the test of morality; then it follows that (3) *law in its best interpretation has the potential to provide subjects with moral obligations, because those would be the obligations demanded by a community of principle*[12]. This interpretation is supported by Dworkin's later writings. In *Justice for Hedgehogs*, he claims that the law is *part* of political morality (DWORKIN, 2011, p. 5). What Dworkin is *not* saying is that law will have moral force in every case. There can be cases in which the moral force of the law is not coextensive to the claims of the law, and in more extreme scenarios, the law can fail altogether to have moral force. In those situations, the law would not be reason-giving in the relevant sense (DWORKIN, 2011, p. 321-323). Dworkin's claim does mean that the reason-giving character of the law, however, is of moral nature. If there is anything capable of providing normativity to law, this must be morality.

Before moving, there are some clarifications that I believe are necessary. It might be suggested that my interpretation of Dworkin suffers from two flaws[13]. Firstly, I am missing Dworkin's own framing of the matter. In *Law's Empire*, Dworkin claims that judges need to justify the coercion exercised by the State and that in order to do so, they present constructive interpretations of the law. Being constructive interpretations, they are not only a matter of moral principles since those very principles must be embedded in law (the relationship between justification and fit). This seems correct, but I do not think that this causes any trouble for my coming arguments. What matters for me is that at the end of the day, the justification will be of moral nature, since only

12 Later I will introduce a distinction between moral obligations, strictly speaking, and obligations licensed by morality.

13 I am thankful to Veronica Rodriguez-Blanco for pressing the point of this paragraph and the next one, demanding further explanations.

when they are of moral nature will they be able to provide an agent with reasons for action in the Dworkinian model. For Dworkin, "law is a branch of political morality, which is itself a branch of a more general personal morality, which is, in turn, a branch of a yet more general theory of what it is to live well" (2011, p. 5).

Secondly, it might be suggested that Dworkin's account is supposed to capture the point of view of a judge, not of a citizen, and that, therefore, my criticisms regarding Dworkin's view on legal normativity might be misplaced. It is true that Dworkin's emphasis is on the judge, but I do not think that his account begins and ends with it. When talking about political obligation, Dworkin explicitly defends what he calls a "protestant attitude": "Political obligation (...) becomes a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme" (1986, p. 190; see also p. 413). If that is correct, everyone under the law must engage in constructive interpretation in its dealings with the law.

3. A kind of partial blindness

The claim I will advance in this section is that there are other sources of obligation beyond morality and that those might play a role in the reason-giving character of the law. To start my case, I would like to point out a strange consequence of a view like Dworkin's. Scott Hershovitz, in his discussion about presumptions and obligations, suggests that a person is under no moral obligation to love her child if the child turns out to be a "moral monster". Hershovitz intended to claim that we can understand the feeling of uneasiness that a mother in this situation would feel by appealing to presumptions in favour of certain obligations, in this case, a presumption that one ought to love one's child (but, in fact, there would be no such obligation, or so he says) (HERSHOVITZ, 2015, p. 1189-1192). It might be sensibly asked if the talk about a moral obligation to love is really the best way to explain the love parents nurture for their children. In the case of a wicked son, a mother can say 'Yes, he did awful things, but he is my son and God help me, for I cannot stop loving him'. What are we supposed to say to this mother? That she is irrational? That she should stop loving him because she has no obligation to do so, or since her son is a monster, that she has an obligation not to love him? The "righteous absurdity" (WILLIAMS, 1981a, p. 16) of those claims illustrates how love (and other projects and attachments) can be at odds with the demands made

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by moral obligations[14]. There are things that are reason-giving for individuals in ways that are not related to the notion of *moral* obligation, and that cannot be reduced to mere prudential worries.

We have seen earlier that for Dworkin "practices impose genuine obligations only because – and therefore only when – they allow their members more effectively to meet their standing ethical and moral responsibilities" (2011, p. 315)[15]. The problem for Dworkin and others that endorse similar views is that their claims presuppose the *supremacy of morality*[16], the idea that morality can override any other kinds of considerations an agent might have, but this cannot be taken for granted. For instance, we can easily conceive cases in which an agent will feel obligated to engage in immoral acts because of a promise, that is, cases in which we realise that "immoral promises" can generate reasons for action.

Consider the following example I am borrowing from Sophocles' *Women of Trakhis*. By the end of the play, Herakles is agonising to death due to poisoning. He makes Hyllos, his son, promise to help him die – something that Hyllos does by carrying Herakles to the place he wants to die and by instructing others to build the funeral pyre (he cannot build the pyre or set it on fire himself, as that would be an unforgivable crime according to Ancient Greek *mores*). Herakles, however, demands a second promise from his son. He commands Hyllos to marry Iole. Iole was meant to be Herakles' new wife, and they had already slept together. Herakles' narcissism makes him believe that only his own blood, Hyllos, could take such a woman as his wife, but the younger man sees this demand as "blasphemy". After a short exchange of words, Hyllos ultimately agrees to his father's demands. So, Herakles makes two "immoral" demands. Hyllos manages to fulfil the first one without engaging in what would be blasphemy

14 To be fair, Hershovitz claims that "The upshot is that I construe my role as a parent to impose moral obligations that I do not, strictly speaking, have. But there are overwhelming moral reasons to do so, and we are all better off for it". (2015, p. 1191). This means that he recognises that we do not think about the limits of our moral obligations all the time, but he still construes parental love in terms of obligation.

15 Hershovitz follows this by saying that "A promise to murder cannot generate an obligation to murder" and that in believing that it can is "one of the many ways in which mobsters are morally misguided" (2015, p. 1180).

16 A clarificatory remark: by "morality" I am roughly referring to what Bernard Williams calls the "morality system". The morality system is a creation of modern moral philosophy, and among its claims we have the idea that moral considerations are of supreme importance and that moral obligations, in their supreme importance, cannot demand mutually exclusive actions from the agents, that is, there is always a morally right answer to moral dilemmas. For Williams, the morality system emerges as a piece of good philosophical news about the unfairness of the world. The promise of the morality system is that, at the end of the day, existence can be fair because morality is accessible to everyone. Both utilitarianism and Kantianism are members of the morality system, but the same cannot be said of virtue ethics. See Williams (2011, chapter 10).

to the eyes of the Greeks, but the second one cannot be dodged. His final words on this matter are: "Can the gods condemn me if I do this out of loyalty to my father?" (SOPHOCLES, 2011, lines 1143-1278). I believe that the wording Hyllos uses is revealing: he is not saying that marrying Iole is the right thing to do, but that the gods would be in no position to recriminate him as he was a loyal son. There is a conflict between the demands of morality and family, and Hyllos believes that familial duty trumps *mores* in this case[17].

There are different philosophical claims underlying the discussion and examples in the last couple of paragraphs. We need to disentangle those claims and make their relation to the problems of legal normativity and obligations clearer. There are at least three different claims:

(1) nonmoral features, like projects and commitments, can be reason-giving for agents.
(2) there can be nonmoral obligations that stand in competition with moral ones in our practical reasoning.
(3) there is no reason why legal obligations must necessarily be moral obligations since we have recognised the possibility of other genuine, nonmoral obligations.

Those claims are distinguishable but share some relation of dependency, for someone can in principle accept (1) and refuse (2) and (3), but the acceptance of (2) entails (3) unless the person presents a further argument for its denial. In addition to that, if one accepts (2) she is also committed to (1), and if she accepts (3) she is automatically committed to (1) and (2) as well.

I do not think there is any need for the Dworkinian to deny (1). It is a truism that people can have reasons for actions that are not moral in nature. The trouble starts at (2). Dworkin seems to believe that the only real obligations are moral in nature, that is the reason why ultimately in his view immoral law is not reason-giving. This is a

17 An anonymous reviewer has suggested that maybe the case of Hyllos illustrates something a bit different, namely, a conflict between two moralities. This is a fair point. Later I will address it, albeit indirectly, in my discussion of the Dworkinian attempts to refine to the idea of moral obligation, but the gist of the claim is this: if we were to accept the possibility of a conflict of moral obligations, we would end up trivialising the notion of the moral and it would fail to do to the work it was supposed to do.

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denial of (2), which in means that every time some nonmoral consideration clashes with a moral obligation, this nonmoral consideration should yield to the moral obligation. Now, why should we take that for granted? If people can have a myriad of reasons for action, why presuppose that the moral ones must always triumph in deliberation? People can act for nonmoral reasons to the detriment of moral ones, and this does not entail that the agent is being irrational in doing so (think about the case of Hyllos, or about the choices made by many other characters in literature). The idea I want to develop and that I am borrowing from Williams' work is the following: *the claim that morality overrides everything else is one made within morality itself, and the standpoint of morality itself does not need to coincide with the standpoint of the agent deliberating about what she ought to do*[18].

This sounds cryptic but is quite intuitive, as we can see in the following classic discussion by Williams. A ship is sinking, and there is no way for the lifeguard to save everyone. He might save a couple of children, but if he does so, his own beloved wife will perish, and vice-versa. Now, morality tells you that you should do what is morally right, so a utilitarianist would tell you to do whatever action maximises welfare, and a Kantian would tell you to do as told by the categorical imperative. Notice that either take, the utilitarian or the Kantian might recommend either action, saving the children or the wife. The point is that either way morality tells you to do something because that is the morally right thing to do, but this is not the way most people think about it, nor the way that most people think that they should think about it[19]. Consider for a moment what it would mean for the lifeguard to save his wife because that was his moral duty. There is something off if that was the reason he saved her; there is something almost inhuman in saving your wife from death because that was your moral duty. Consider also what that would mean for the wife. Presumably, what she would like to hear is that she was saved because she was his wife and that he loved her[20]. This is how Williams himself presents this matter regarding the ambitions of morality[21]:

18 As I read him, this is one of the main points Bernard Williams stresses time and time again in his work.

19 As Williams puts this, regarding utilitarianism, "The first question for philosophy is not "do you agree with utilitarianism's answer?" but "do you agree with utilitarianism's way of looking at the question?"". Williams (1973, p. 78). See too John Deigh (1996).

20 See the general discussion in Williams (1981a). See also Williams (2011, chapter 10). I am actually making some slight editions on the example, influenced by Harry Frankfurt's reading of it in *The Reasons of Love* (2004). For a somewhat critical take on Williams and an attempt to reconcile Kantian ethics with the idea of personal love, see J.D. Velleman (1999).

21 For an excellent discussion of the "one thought too many" argument, see Nicholas Smyth (2018).

> But something more ambitious than this is usually intended, essentially involving the idea that moral principle can legitimate his [the lifeguard's] preference, yielding the conclusion that in situations of this kind it is at least all right (morally permissible) to save one's wife. (...) But this construction provides the agent with one thought too many: it might have been hoped by some (for instance, his wife) that his motivating thought, fully spelled out, would be the thought that it was his wife, not that it was his wife and that in situations of this kind it is permissible to save one's life (WILLIAMS, 1981a, p. 18).

If the preceding thoughts are roughly right, then there is no reason to assume the supremacy of moral considerations without further argument. At this point, someone sympathetic to Dworkin's view has two possible moves.

The first path would be to draw resources from the position Williams calls "reasons externalism" about practical reasons. Williams distinguishes between two views on practical reason. The first one – the view he endorses – he calls *internalism*. According to reasons internalism, all reasons for action are dependent on the motivations that concrete agents have (WILLIAMS, 1981b). To be more precise, reasons must somehow come from the agents' "subjective motivational sets", which are made by desires, projects, values, motivations (1981b, p. 105). That is, for internalism, a reason will be a reason for action only insofar as it is connected to the subjective motivational set of the agent (1981b, p. 102). *Reasons externalism*, on the other hand, holds that there can be reasons for action that are independent of what the concrete agents care or think. An externalist can hold that in a case like the one of the lifeguard, there might be reasons for action even if the agents involved fail to perceive them. Externalism stands as opposed to reasons internalism, in that externalism claims that reasons for action are independent of what Williams calls the subjective motivational sets of individuals.

An externalist can say in the same breath that there are reasons for action that apply to a given case, and that such reasons are independent of the motivations of the agents involved. It is controversial if Dworkin himself would embrace externalism. In *Justice for Hedgehogs,* Dworkin claims that a person has a reason to do something "if (but only if) doing that would be *good* for him" (2011, p. 50), and being good here is something independent of whatever motivations the agent might have. At the same time, Dworkin is sceptical about traditional forms of moral realism and emphasises the role of conviction in interpretation. That being said, let us suppose that a Dworkinian

embraces externalism. If moral reasons are external reasons, then perhaps the supremacy of morality can be vindicated? Not quite.

There are two reasons why this is so. Firstly, let us grant that there are reasons for action independent of whatever motivations agents have. From that alone, we cannot infer that moral reasons are external reasons of that sort; that is, the existence of external reasons is not in itself an argument to the sense that moral reasons are external reasons. For the sake of argument, let us grant that moral reasons are external reasons. By itself, this does not vindicate morality's power over other reasons, either external or internal, because there is still a need for an argument grounding the purported weight of moral reasons in comparison to other reasons, an argument explaining how those external moral reasons enter into one's deliberation[22]. In a nutshell, there is a need for two further arguments, one claiming that moral reasons are external, and another one establishing the weight of those reasons.

There is a second, and to my mind more important, reason why externalism is not enough to deliver what a Dworkinian needs. Think about what it would mean for a reason to be at the same time external and a reason *for action*. External reasons are independent of the motivations of concrete agents, so they can exist even if an agent is not motivated to follow them. The important question is this: if the agent is not motivated to follow a given reason in any sense, how can this reason be a reason for action *for* her?[23] Such a reason is not connected to the agent, it does not ring a bell for her. If that is the case, she will not act for that reason. An insightful quote from Williams encapsulates this: "If something can be a reason for action, then it could be someone's reason for acting on a particular occasion, and it would then figure in the explanation of that action" (1981b, p. 106). To put it bluntly, even if something like platonic moral realism were true, and there were moral facts, those moral facts would not be able to be reasons for action for a concrete agent unless such agent cared about those facts in the first place. The crucial issue, it seems to me, is not that there are no external reasons, but that even if they do exist, they cannot be reasons for action because they cannot explain individual action.

22 If such an argument is possible is a controversial matter that I cannot address here.

23 This is a bit of a simplification. Reasons internalism is compatible with the idea that agents might come to realise that they do have a given reason for action. For this to happen, however, this reason must be somehow connected to the individual's motivational set. The point is: there is no need for internal reasons to be immediately evident to the agent. E.g., only after an exercise of deliberation the agent realises that she has a reason to do X.

Let us go back to the case of the lifeguard. What would it mean for him to act for an external reason? When the boat is sinking, and water is getting into the lungs of those he must save, he needs to decide, and his decision will be informed by his motivations, commitments, attachments, values, and dispositions. He has no access, in his deliberation, to reasons that are external to the person he came to be in his life. Notice that this is true even if there are objective (i.e., moral realism) moral reasons. Suppose that there are such reasons. An agent will only act for them if she can see those reasons as reasons for action *for her*. Unless such objective reasons speak to her, they will not put her on the track of action. They will be reasons similar to the advice we sometimes get from our grandmothers: we can grasp what they mean, but we just do not care about the values they care about, so their advice fails to get a hold on us (think about grandmotherly advice regarding sexual *mores*)[24]. The conclusion, to put it summarily, is that reasons externalism cannot vindicate the denial of (2), that 'there can be nonmoral obligations that stand in competition with moral ones in our practical reasoning'. Nonmoral obligations seem to be as important to life as their moral counterparts.

The second path for the denial of (2) would be to refine the idea of a moral obligation, which in turn can be done in two different ways. Firstly, there could be refinement in the "moral" qualifier. This is the strategy that seems more congenial to Dworkin's general methodology. The idea is that if we understand morality in a broader way that comprises not only ideals of moral duty or utilitarian considerations of welfare, then we could recast the conflict between a moral obligation with a nonmoral one as a conflict between two moral obligations, therefore treating the whole dilemma as moral.

This argument would look like this: 'morality is itself an interpretive concept, and our best interpretation of morality – the interpretation that best fits and justifies its practices – is one in which all the richness of human experience is captured. Morality, properly understood, is not just about a narrow group of duties defined by abstract value, but also involves duties that arise from many sources we come across in our lives'. I believe that this kind of argument can be made, but the price one pays in doing so is that the qualifier "moral" loses its distinctiveness. If I can recast every conflict of obligations that the agent perceives as a conflict between moral obligations, what the word "moral" is doing? Someone in this track could maintain her denial of (2), but at the cost of triviality, since morality would be so broad a domain that would not

24 See the discussion in Catherine Wilson (2018).

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correspond to what is usually understood by it. Pursuing this strategy would reduce the disagreement about the nature of obligations to a verbal quibble.

Secondly, someone could attempt refinement on the idea of "obligation". Dworkin mentions that the idea of an obligation entails "some special responsibility of role or status" (2011, p. 182), but (as far as I know) he does not add much to the definition of an obligation besides that. I think it is fair to say that an obligation for Dworkin is tantamount to a very weighty reason to do something (or not). It is the kind of reason to which we would attach an "you ought to" or "you must" statement. In any case, a more accurate reading of Dworkin would insist not that every real obligation must be a moral obligation, but in a weaker claim, that every real obligation must be acceptable by the appropriate moral tests. Besides being a more accurate reading of Dworkin's claims, this reading means the existence of two kinds of obligations: those that are themselves moral obligations *required* by morality and those that are nonmoral obligations *licensed* by morality. Still, that will not do the trick.

To see why this is so, think about how the conflict between a moral obligation and a nonmoral obligation licensed by morality could actually take place. If *there is* conflict, then this nonmoral obligation would not be licensed by morality, to begin with, it would not pass the tests imposed by morality (unless, that is, we assume that morality can present agents with mutually exclusive demands, but this would be a denial of the maxim that ought implies can). However, suppose that it is possible to maintain both claims, that there is conflict, and that the obligation is licensed by morality. Even if this situation were possible, it would not exhaust the possibilities of conflict between obligations. The whole discussion up to this point was meant to emphasise that people do experience obligations that might run *against* morality. The introduction of a more nuanced view on moral obligations is a welcome refinement but does not explain all that there is. The Dworkinian denial of (2) remains hard to sustain.

This is what we have: to deny (2), someone defending the Dworkinian view must insist that obligations are necessarily dependent on morality. Since this flies in the face of the phenomenology of obligations, we have explored some alternatives a Dworkinian could adopt. She could insist that at the end of the day, what really counts is morality, but as we have seen, even if reasons externalism were true, it would not be enough to ground morality's empire. Alternatively, she could refine the notion of moral obligations, but both attempts fail. If we try to widen the notion of the moral, then we end up trivialising the notion. If, on the other hand, we try to refine the notion of obligation,

we make just a little progress because that is not enough to account for the cases of conflict agents perceive. An important conclusion follows from this: if there is no way to deny (2), then one is also disposed to accept (3), namely, that there is no reason why legal obligations must necessarily be moral obligations.

4. Contours of an alternative view

Once we accept that there can be obligations – weighty reasons to do or not to do something – that are not moral in nature, we ought to revisit the Dworkinian claim that only a moral community can provide its members with genuine obligations. Once non-moral obligations have their existence recognised, there is no need for a community to be in the right normative relation to its members for it to provide obligations[25]. We can see this if we analyse Dworkin's discussion of an unequal society in *Law's Empire* in a bit more of detail. Dworkin discusses the case of a community in which daughters have no right to choose their husbands since this is taken as a prerogative of their fathers. According to Dworkin, this community can only provide real obligations to the daughters to abide by their fathers' wishes if and only if it bears the right normative relation to them. Obviously enough, that is not the case in many real-life sexist communities, and the conclusion Dworkin would draw regarding those is that they are not capable of generating proper obligations (DWORKIN, 1986, p. 204-206).

Now, think about what it means to be not a philosopher studying associative obligations, but *the daughter* in the example[26]. Given that you belong to that community's social world, their life forms inform your engagement in practical deliberation. Nothing blocks the possibility that you recognise a sort of obligation even when the right normative relation between you and the community is missing. You might have a sense of gratitude, or duty, towards your family. Those are things that might figure in your subjective motivational set, and they can ground reasons for action that are strong enough to count as obligations. Indeed, as Williams points out elsewhere, some of them can even have the form of practical necessities in which no other course

25 Which is not the same as saying that there are no moral obligations in the case of a moral community. This will become clearer later, in my discussion of Dworkin's method in more general terms.

26 Veronica Rodriguez-Blanco deploys a similar strategy in her criticisms of Dworkin in V. Rodriguez-Blanco (2014). See also Rodriguez-Blanco (2016).

of action seems possible to you[27]. The case of Hyllos is illustrative: he gave his word to his father, but at the same time, he believes that what was being asked of him was morally abhorrent. The feeling of unease he has occurs precisely because he recognises the promise as binding on him, otherwise there would be no conflict.

When it comes to the law, I would like to suggest that there are at least two distinct relationships between the law and its subjects. Those can be marshalled together under what Joseph Raz has called an attitude of "respect for law"[28]. So, what are those relationships? Firstly, people can have a more specific sense of respect. In this sense, agents recognise the law as something that has value and this gives them a reason to recognise the reasons provided by law as reasons for action. This specific sense of respect can be motivated, in turn, by things like gratitude or a sense of duty. Raz illustrates this nicely with the case of a person who feels part of their community. One of the ways in which this person can express this sense of identification is through an attitude of respect towards the law, an attitude in turn manifested by certain actions from their part (i.e., compliance to legal rules) (RAZ, 2009b, p. 255-260). Raz explains this through the idea of "expressive reasons": "Expressive reasons are so called because the actions they require express the relationship or attitude involved" (2009b, p. 255). A satisfactory account of how law can provide reasons for action, I contend, must leave room for those relationships and attitudes.

Secondly, there is also a deeper sense of identification with the law, a sense that is related to notions of self-understanding. When an agent identifies herself with the law in this deeper sense, she sees the law as part of who she is, as part of her *character*. For an agent that has this kind of identification with the law, breaking it is something unthinkable, not in the sense that she cannot entertain the idea, but in the sense that this idea fails to have any hold on her. Valjean and Javert from *Les Misérables* nicely illustrate the difference between the two kinds of relationships with the law. Valjean can have a sense of respect for the law, he sees the law as something valuable and this provides him with reasons for action. There are, however, other overriding reasons for breaking the law that might have the final word in his practical deliberation. Javert's case is different, he identifies himself with the law in the sense that the law is part of who he is. For Javert, to break the law is tantamount to break with his own character.

27 See the discussion in Bernard Williams (1981c) and (1995b).

28 See, in general, Joseph Raz (1995) and (2009b). It should be noted, however, that Raz's elaboration of respect for law has a more moralised tone than my use of his idea.

The general point I am making is phenomenological: the agent does not understand herself as engaged only with moral reasons. An attempt to recast this agent within the frame of the Dworkinian model would cause this agent to have something like Williams' "one thought too many": where the agent sees only (or mainly) considerations of respect or character, the Dworkinian would insist that ultimately there are underlying moral reasons grounding the obligation. This does not mean that the kind of moral reasons Dworkin talks about never appear, only that they do not exhaust the possibilities of normativity[29]. Now, if we want to understand the reason-giving character of the law, we must understand what is entailed by the idea of respect. At this juncture, I have suggested that there is a more specific attitude of respect agents might have towards the law, an attitude based in things like gratitude or duty; and a deeper sense of identification with the law. Both forms of respect (broadly speaking) are not reducible to moral considerations.

A question that naturally emerges at this point is this: what could have motivated the limited understanding of obligations, and henceforth of the reason-giving character of law on the part of Dworkin and many others? I believe that there are two motivations behind this, and we must address those if the alternative view I am suggesting is to be appealing.

Firstly, there is a methodological motivation. The Dworkinian account was fundamentally concerned with the conditions that could *justify* the imposition of an obligation over an individual. This has the shape of an inquiry in normative political philosophy. Now, if all the account attempted to do were engage in normative political philosophy, then my criticism would be misguided from the start. Dworkin could claim that he is not describing anything but postulating how things ought to be. This, however, cannot be the case because Dworkin treats justification and description as essentially the same thing. Given Dworkin's interpretive methodology, we cannot describe a complex social practice like law without engaging in a justificatory enterprise. That was captured by the twin aspects of constructive interpretation, fit, and justification. Indeed, Dworkin himself refuses Hart's somewhat conciliatory proposal that they were engaged in different enterprises, namely, that Hart was trying to describe legal practices and that Dworkin was trying to justify them (2006)[30].

29 For a similar view, that there can be other grounds for obligations, see for instance, Tony Honoré (1981). Honoré's view on necessity is underdeveloped, but I think that is on to something correct.

30 For Hart's proposal, see H.L.A. Hart (1994, postscript).

This means that the status of the Dworkinian view as descriptive or normative is quite slippery as he offers his view in a way that deliberately conflates description and evaluation. I do not want to present an argument against Dworkin's conflation *per se*, but to emphasise that his strategy makes it untenable to hold his account as an *ideal* account of the reason-giving character of the law, that is, an account that can depart considerably from the concrete experience of agents. But then we get to my point. If we want to understand how anything can affect practical reasoning, we should take as our starting point the agent that deliberates. This is the reason why I suggested at the beginning of this section that we should adopt the daughter's standpoint and not the philosopher's.

This is connected to two points about the idea of justification. A first preliminary point is a corollary of the discussion so far. From the agent's perspective, moral considerations enjoy no priority by themselves because they must be connected to the motivational sets of the agents somehow if they are to have some bearing in action. An attempt to ground the reason-giving character of the law exclusively on morality, it seems, will not suffice. The second point is a consequence of the first. When we talk about justification, we must pay attention to whom our addressee is. To whom are we justifying the practice? For a justification to be recognised as such, it must make sense to the addressee, it must, that is, be connected to things that the addressee recognises as important. There can be no justification *for someone* that does not ring a bell for that person. But maybe we could understand justification as having a different audience, as being a justification of the practice not to the person that is being coerced, but to us, to the community already predisposed to accept it. In this second case, the justification has no relation to the first-personal practical deliberation of the person being coerced, but with our communal values (WILLIAMS, 2011, p. 30-33).

This second kind of justification suffers pressure from two different directions. On the one hand, there is something off with the idea of a justification of coercion that needs no acceptance or at least some sort of recognition from the one being coerced. In general, we do not want wrongdoers to suffer merely, we want them to understand *that* they are being punished and *why* they are being punished (which should not be confused with the more ambitious claim that people want wrongdoers to *repent*)[31]. On the other hand, we can wonder about the possibility of a justification general enough

31 A point that can be inferred from Williams' more political texts, such as (2006).

to be accepted by the whole of a political community. It is probably the case that our contemporary communities are too pluralistic in terms of values for them to be able to accept a single justification for coercion. It might be that it does not matter how hard we try, our attempts at justification will always sound illegitimate to this or that sub-group in our communities[32]. This point is not new in political philosophy and has far-reaching consequences in jurisprudence as well. We can say that the first kind of pressure is internal to our idea of justification (in the sense that it is about the point of justification) whereas the second one is external (in the sense that it is about the context of justification). I have no way to develop either point here, but any account of justification of coercion must tackle those.

Let us now move to the second motivation underlying Dworkin's view, a motivation that is, I think, phenomenological. If it is true that from the standpoint of the phenomenology of obligations, we recognise obligations that are not moral, it is also true that we use the language of obligations towards (or against) people that do not recognise this or that obligation. To see this, think once more about the case of Hyllos. Let us suppose that after Herakles' death, Hyllos has second thoughts and decides not to marry Iole, given how repugnant that prospect is for him. In such situation, a former advisor to his father, let us say Philoctetes, could then confront him: 'you have made a promise, you have an obligation to fulfil it'. The same thing goes for law: we use the language of obligations (and of reasons more generally) against those that deny the existence of an obligation or reason to abide by the law.

It seems to me, however, that we need to distinguish between different senses of obligation and that the failure to do so is the cause of much confusion in our understanding of obligations. We can distinguish between the following senses of obligations. On the one hand, we have genuine, reason-giving, obligations; on the other, we have formal obligations. Genuine obligations are the ones that an agent can (at least potentially) recognise as binding on her because they are created by reasons for action she can (at least potentially) recognise as hers. They come in two flavours: they might be necessary obligations, that is, obligations entailed by necessities of character that present themselves as unavoidable to the agent, or they might be defeasible obligations, obligations an agent can recognise as impinging on her, but that can be overridden by other obligations. Formal obligations, in turn, are obligations that other people believe

32 See, in general, Bernard Williams (2005).

that she has but that do not bear on her reasons for action. She can, nonetheless, understand the speech of those pressing that obligation on her, and that is why she can talk the language of obligations with them. In the example, Philoctetes would believe that there is a genuine obligation, whereas Hyllos would only see a formal one. In their disagreement, what Philoctetes tries to do is to convince Hyllos that he was indeed under a genuine obligation. It is an attempt at recruitment: Philoctetes is trying to show Hyllos why he should be concerned about certain things, why he is in the wrong frame of mind, and so on[33].

We have seen, then, two motivations underlying Dworkin's moralised understanding of obligations, one methodological and one phenomenological. I believe that both motivations can be traced back to a single, more fundamental claim: the Dworkinian view has tried to find the origin of obligations in something *external* to the agents, and in doing so, it has lost track of the possibility of obligations that arise from elements *internal* to agents. The Dworkinian intends to provide a justification based on moral principles, and the concern she has is with the justification of obligations that an agent might refuse to accept. The Dworkinian is anxious to grasp some leverage that could be used to show to an agent why the obligations imposed are real and justified for her, even if she refuses to see that. Reasons for externalism and the supremacy of moral considerations appeared as naturals for this task.

Nonetheless, agents have reasons for action that are not tracked in morality, like attachments and commitments of a personal sort, and those elements must play a role in an account of the reason-giving character of the law. There can be reasons for action derived from a multitude of resources, like the two kinds of relationship (respect in a more specific sense and identification) I have adumbrated in this essay. An account of the reason-giving character of the law that focuses solely on the moral justification of obligation is bound to ignore or distort important parts of our practical engagement with the law. This is why Dworkin's account of legal normativity can be "one thought too many". The conclusion I want to draw here is that Dworkin (and others with similar views) can at best explain *some* aspects of the reason-giving character of the law. An alternative view that pays due account to the dispositions, attachments, and projects of agents would fare better because it would do justice to both ourselves and the law. However, such view was merely suggested in this essay.

33 I cannot develop this point here but see in general Bernard Williams (1995a).

5. Conclusions

In this essay, I have discussed in reasonable detail Dworkin's view of legal obligations as moral obligations. Dworkin's account fails not in the sense that it is wrong full-stop but in the sense that it either explains just one part of the reason-giving character of the law, or that it distorts the whole of it if it is taken as an exhaustive explanation. Underlying Dworkin's theory, there are many presuppositions of much modern moral philosophy, presuppositions as the supremacy of moral considerations over all other kinds of reasons an agent might have, the belief in the existence of only moral obligations (or of obligations that do not conflict with morality), and so on that are shared by many others. Once we start to have doubts about those presuppositions, we also start doubting Dworkin's central claims.

As I have suggested throughout this essay, Dworkin's theory is a kind of "one thought too many". There are reasons for action that are not well translated into morality, as agents have commitments, attachments, projects, and dispositions that cannot be reduced to moral considerations. The richness of concrete, real-life can very well play a role in the reason-giving character of the law. The seemingly paradoxical lesson from this discussion is, I think, that at the same time that we should, in our philosophical endeavours, be wary of the resources legated to us by much moral philosophy, we also should deepen our understanding of moral psychology if we want to make sense of how law can provide reasons for action. The paradox is only apparent because moral psychology does not need to be moralised. The same holds for our understanding of legal phenomena.

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