

DWORKIN'S ACCOUNT OF ASSOCIATIVE OBLIGATIONS: NEW CLOTHES FOR AN OLD THEORY?

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In this article the author assesses Ronald Dworkin's attempt to produce an account of political obligation which avoids the problems encountered by theories founded on atomistic models of society yet retains the primacy of the individual in liberal thought. Her position is that Dworkin's philosophy relies upon an untenable distinction between the private and public spheres which allows him to reconcile the injustice of particular group practices with the existence of obligations generated by the group's character as a "true community". She argues that the legitimacy of these associative obligations is derived from subjectively felt moral constraints, rather than any objective requirements of justice, and thus the difference between the individual's ethical notions and rights and duties generated by society disappears. Ms Berns concludes that in its place one finds a Hobbesian account of the legitimacy of the law which fails to reconstruct adequately liberalism's insistence upon individual equality within structural inequality.

INTRODUCTION

The origin and nature of political obligations, such as the obligation to obey the law, has long been a contentious and hotly debated issue among political philosophers. Within the liberal tradition generally, the genesis of such obligations has most often been sought in contract. Dworkin's account of obligations apparently marks a radical shift, one which attempts to disassociate liberalism from the contractual paradigm characteristic both of early social contract theory and of the work of recent theorists such as Rawls. Dworkin argues that philosophers have erred in seeking to derive an account of political legitimacy from conceptions such as justice.¹ He suggests that justice is too universal in its aims and ambitions to account for the specificity

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1. R Dworkin *Law's Empire* (Cambridge: Harvard University Press, 1986) 193.

of obligations and their attachment to particular local communities. It cannot, according to Dworkin, explain why a citizen of Britain has an obligation to British institutions which is different in character from any duty to support just institutions more generally. Likewise, the argument from fair play as developed by Rawls² allows too much. According to Dworkin, it presupposes that obligations can be incurred merely by the receipt of benefits, whether sought or not, and leaves the term “benefits” fatally ambiguous.³ Dworkin wishes to avoid all forms of contractarianism, both those characteristic of classic political liberalism and the contemporary variants being developed by theorists such as Rawls and Nozick, and to offer in their place an account which emphasizes social practices as practices and which endeavours to accommodate our ordinary intuitive sense that the nature and scope of our political obligations cannot be understood apart from the communities in which they figure. He wishes to provide a new, and hopefully firmer, foundation for political liberalism generally, one which retains its traditional emphasis upon the rights of the individual while at the same time deflecting contemporary communitarian criticism. In particular, Dworkin deflects the persistent suggestion that liberalism depends upon an atomistic conception of the individual and an account of the individual quite apart from his or her place in our social communities of belief and practice. Seen in this light, his is an ambitious undertaking indeed, one which, if it succeeds, resolves the conflict between the individual and community which has bedevilled liberal theory at least since Rousseau.

2. J Rawls *A Theory of Justice* (Oxford: Clarendon Press, 1972) 113, 110:

There are several characteristic features of obligations which distinguish them from other moral requirements. For one thing, they arise as a result of our voluntary acts; these acts may be the giving of express or tacit understandings, such as promises and agreements, but they need not be, as in the case of accepting benefits. Further, the content of obligations is always defined by an institution or practice the rules of which specify what it is that one is required to do. And finally, obligations are normally owed to definite individuals, namely, those who are cooperating together to maintain the arrangement in question.

3. Dworkin *supra* n 1, 193-195.

OBLIGATIONS AS THE OUTCOME OF SOCIAL PRACTICES

Dworkin's account, however, is unique in a number of respects. It emphasizes neither voluntariness, consent, nor the making of promises, but social practices taken simply as practices. He wishes to derive an account of obligations generally from:

[T]he special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors. Most people think that they have associative obligations just by belonging to groups defined by social practice, which is not necessarily a matter of choice or consent, but that they can lose these obligations if other members of the group do not extend them the benefits of belonging to the group ... [T]he history of social practice defines the communal groups to which we belong and the obligations that attach to these. It defines what a family or a neighborhood or a professional colleague is, and what one member of these groups or holder of these titles owes to another.⁴

At first glance, Dworkin's account appears profoundly conservative, reactionary even, with its emphasis upon social practices taken as practices. This concern is reinforced by his explicit acknowledgment that what he terms associative or communal obligations are more conventionally known as *obligations of role*.⁵ Particularly with respect to women this seems less than a promising beginning, given that they have been so constrained by their concrete social roles as to have been denied individuality. Even a cursory glance at many of our concrete social practices emphasizes the extent to which these practices are grounded, not upon equality and mutual respect, but upon relationships of domination and subordination, upon social hierarchies in which individuals are profoundly constrained by their social roles and the obligations associated with them. Dworkin, however, seeks to deflect at least some of the force of this criticism by his emphasis upon the interpretive attitude. Thus he suggests that the "raw data" of our actual practices, past and present, are not conclusive of an argument about the obligations associated with those practices.⁶ Rather, the interpretive attitude requires that we assume that a concrete practice such a family "serves some interest or purpose or enforces some principle ... that can be stated independently of just describing the rules that make up the practice".⁷ We must embark upon a theoretical evaluation of the practice itself in order to determine what integrity requires,

4. Ibid, 196.

5. Ibid, 195-196.

6. Ibid, 197.

7. Ibid, 47.

applied to that concrete practice. We must attempt to ascertain the interests served by the practice, impose meaning upon the rules involved in it, and, on the basis of the interpretive attitude, seek to restructure it in terms of that meaning and thereby generate an ideal account of the practice.

As Dworkin himself recognizes, the associative obligations which he suggests arise within social groups of varying sorts, and the conception of the "community personified" which nourishes and supports them, owe much to Rousseau's curious and provocative conception of the general will.⁸ Like Rousseau, he recognizes that if the concept of the "community personified" is to be a meaningful idea, providing the foundation for our political obligations, it cannot be confined to political community as such. Rather, Dworkin wishes to use the "associative obligations" which he suggests arise within families and other biological and social groups as the foundation for his claim that certain sorts of political communities generate similar associative obligations. He argues that these obligations arise through social practice provided four conditions are met: the members must regard the group's obligations as holding uniquely within the group; they must accept that these responsibilities bind member to member (that is, apply between themselves rather than to the group as a whole); they must perceive these responsibilities as linked to a concern for the well-being of each of the members; and finally, the members must believe that the practices of the group show equal concern for all members.⁹ Such groups he characterizes as "fraternal",¹⁰ and notes with respect to them that groups which meet these standards qualify as "true communities" rather than simply "bare communities".

Dworkin argues that certain social practices generate obligations which arise, neither from consent nor as a consequence of accepting benefits and thus incurring an obligation to respond in kind, but as a natural consequence of the relationships which prevail within them. Where the collective practices of the group meet the criteria outlined above, it is proper to speak of the members as having obligations between themselves. These obligations are an integral part of the relationships which constitute the group. Archetypical among such associations are families. Several features of this model are significant. First, the critical element in Dworkin's account is the concern of each member for the well-being of other members of the community.

8. R Dworkin "Equality, Democracy, and Constitution: We the People in Court" (1990) 28 Alberta LR 225, 330.

9. *Id supra* n 1, 199-200.

10. He, or his research assistant, does acknowledge in a footnote that the term fraternal is unfortunate, being etymologically masculine: *Ibid*, 437.

Secondly, he emphasizes that not only must the members show concern for the well being of other members, but they must also believe that the practices of the group demonstrate equal concern for the welfare of each individual member. The exclusive emphasis upon equal concern marks what I believe to be a significant departure from his earlier connection between equal concern and equal respect,¹¹ both in the context of associative obligations and in the context of the responsibility of government generally.¹² His account links the concrete practices of social groups with the group's beliefs concerning whether these practices are predicated upon equality of concern. For obligations to arise, the members of the group must have both genuine concern for the well being of their fellow group members as individuals and sincerely believe that their social practices show equal concern.

The language used suggests that it is the actual beliefs of the participants in the practice which are initially dispositive of the legitimacy or otherwise of the obligations perceived. Given that contemporary pluralist societies are comprised of numerous smaller associations, some voluntary, others wholly unchosen, and given that not all the voices within those groups are equally likely to be heard and listened to, are we entitled to critically appraise the beliefs of the participants and declare that some associations are incapable of generating obligations, or must we accept the sincere beliefs of the participants, or at least the beliefs of those participants whose voices are heard? The language used suggests that it is the beliefs of the participants in the practice which are critical in evaluating the legitimacy of the obligations asserted and that these beliefs are open to critical evaluation from outside the practice itself. Thus he notes that "[e]ven genuine communities that meet the several conditions just described may be unjust or promote injustice"¹³ either with respect to the members of the group or with respect to non-members. Should this occur, and should the defective features be compatible with the practice as a whole, a further question arises. Are the injustices so fundamental that the unjust obligations created by the practice are cancelled, or do they continue to subsist despite the injustice wrought? The fact that unjust obligations may continue to subsist emphasizes the need for attention to our

11. *Id Taking Rights Seriously* (London: Duckworth, 1981) 180-183, 272-278.

12. I believe this alteration to be extremely significant, and as I shall argue subsequently, reflects the extent to which associative obligations are conceptualized to belong to the domain of ethics or the good, rather than the domain of morality or the right. I shall argue further that the distinction which Dworkin desires to make is ultimately untenable. See text accompanying nn 49-52 *infra*.

13. Dworkin *supra* n 1, 202.

concrete social practices when constructing an account of distributive justice. Family structures and the inequalities implicit in existing structures can neither be deleted from the theoretical agenda nor dismissed as individual or social preferences. We do not and cannot lead compartmentalized lives. The private and public are interwoven and interdependent. The structure of our private lives, including the obligations by which we are bound, is inseparable from our public equality or lack thereof, and recognition of this fact becomes critical when so much theoretical weight is placed upon our social practices and the obligations believed to be generated by them.

RECONCILING EQUALITY AND HIERARCHY: THE ROLE OF PERSONIFICATION

The postulated coexistence of political and economic equality and hierarchical structures must be explained because, as abstract and autonomous citizens, equality before the law is a precondition for the legitimacy of the rule of law. Furthermore, as economic actors whose morally irrelevant differences ought to be mitigated by the social welfare state, each stands for one and no more than one. Dworkin seeks, through the development of his conception of associative obligations, to reconcile fraternity and hierarchy, commenting that while fraternal associations must be conceptually egalitarian:

[T]hey may be structured, even hierarchical, in the way a family is, but the structure and hierarchy must reflect the group's assumption that its roles and rules are equally in the interests of all, that no one's life is more important than anyone else's. Armies may be fraternal organizations if that condition is met. But caste systems that count some members as inherently less worthy than others are not fraternal and yield no communal responsibilities.¹⁴

14. Ibid, 200-201. But perhaps one must ask here if we *can* imagine a caste system in which all the participants sincerely believed (or assumed) that the roles and rules prescribed thereby were equally in the interests of all, in which the group believed that its practices did, in fact, show equal concern. Walzer suggested we might, and was savagely criticized by Dworkin for doing so. See M Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983) 26-28, 312-315 and R Dworkin *A Matter of Principle* (Cambridge: Harvard University Press, 1985) 217. What Walzer in fact asked us to do was to “[a]ssume now that the Indian villagers really do accept the doctrines that support the caste system”: *ibid*, 314 (emphasis added). He then explored what might follow from that assumption. Given that assumption, while in Dworkin's terms a caste system would not be just, that is, its conception of equal concern might be defective in some way, it need not follow that a community organized upon that basis was not a genuine community with shared conception of equal concern, at least if Dworkin is prepared to extend the same logic to a caste system as he does to a patriarchal family: Dworkin *supra* n 1, 202-206. Why should it make a difference that the shared assumptions in a caste system are in practice attended by differential entitlements while the shared

There is a muddle here about the voices within the army, just as there is a muddle about the voices within the family.¹⁵ The phrase "the group's assumption" conceals everything we need to know about the ways in which that assumption came into being, the voice or voices which established the roles and rules involved, the specific and historically constructed ideologies which played a part in their creation, and the voice or voices which make that assumption present to us. To assume, on an individual level, *is to take as given*, thus obviating the necessity for critical analysis. What does it, can it, then mean to be told that a group *assumes* that its roles and rules are equally in the interests of all? What is involved in what Dworkin acknowledges to be a personification?¹⁶

The concept of the personification of a social group is a critical structural element in Dworkin's account of the nature of political obligations and his argument for law as integrity. For Dworkin, integrity is a shorthand reference to the complex idea of law as a coherent and consistent set of principles which functions as an integrated whole. This conception of the nature of law, he argues, demands personification in that it supposes that

the community as a whole can be committed to principles of fairness or justice or procedural due process in some way analogous to the way particular people can be committed to convictions or ideals or projects....¹⁷

assumptions in a patriarchal family appear only to be superficially attended by differential levels of protection and by paternalism which appears appropriate when applied to women and girls but inappropriate when applied to men and boys? In our society the overall entitlements of women (and girls) remain less than equal precisely because of their familial roles and the economic inequalities attendant upon those roles. Would it make a difference if Dworkin had, instead, imagined a family in which boys and young men were subject to stringent parental constraint upon the basis that due to the predisposition of young men to violent behaviour special protection was required until they were sufficiently mature to control their violent impulses? While, so far as I know, no existing families are organized upon this basis, there is at least some empirical evidence to support the argument that men and boys are more likely to resort to violent behaviour and therefore such constraints, in our culture, might well appear wholly reasonable and grounded in empirical evidence. Given the social sanctions against violent behaviour, such constraints might reasonably be supposed to demonstrate equal concern.

15. See MacKinnon's comment that the different voice perceived by Gilligan is simply the voice of the oppressed, and her further comment that oppression has the capacity to silence the oppressed: C A MacKinnon *Feminism Unmodified Discourses on Life and Law* (Cambridge, Harvard University Press, 1987) 39.
16. Dworkin discusses the conception of personification upon which he relies in some detail in Dworkin *supra* n 1, 167-175.
17. *Ibid.*, 167. Note the profound similarity between Dworkin's conception of personification and Rousseau's conception of the general will.

He insists that the community is not an independent metaphysical entity, but that insofar as it “exists”, it exists as a function of the practices of thought and language characteristic of the group. He argues that personification expresses the responsibility of the group and of our sense that the group itself must be taken seriously as a moral agent. This remains:

... a personification not a discovery, because we recognize that the community has no independent metaphysical existence, that it is itself a creature of the practices of thought and language in which it figures.¹⁸

The examples given involve corporate responsibility and the responsibilities of political officials. We think it proper to speak of corporate responsibility for torts or crimes, not as a shorthand way of summing up the responsibilities of individual employees, shareholders or managers, but as part of a form of reasoning which commences with considering the responsibility of the corporation as a whole and only subsequently considers the degree to which that responsibility devolves on individual actors. Personification provides us with a vantage point from which to consider the responsibility of group members.

Similarly, Dworkin argues that our political convictions assume that the community has principles of its own to which it may be faithful or unfaithful. In a complex argument he suggests that when a community has betrayed its principles, as Germany did during the Nazi era, whilst contemporary Germans are not to blame for the Nazi era, they nonetheless may have special responsibilities today because the Nazis were also German. The concept of personification explains our intuitions in this regard. In a similar vein, we conventionally speak of the responsibilities of government towards its citizens, arguing that, as citizens, we have a right that the government protect us against assault or provide adequate medical care for all. Dworkin suggests that arguments concerning the existence of such responsibilities precede consideration of how they might be institutionally met. Our belief that the government personified has such obligations provides the foundation upon which beliefs concerning the particular duties of political officials depend. With respect to political officials, he comments that the majority of people:

think they have a special and complex responsibility of impartiality among the members of the community and a partiality toward them in dealing with strangers. That is quite different from the responsibility each of us accepts as an individual. We each claim a personal point of view, ambitions and attachments of our own we are at liberty to pursue, free from the claims of others to equal attention, concern and resource. We

18. *Ibid*, 171.

insist on an area of personal moral sovereignty within which each of us may prefer the interests of family and friends and devote himself to projects that are selfish, however grand.¹⁹

Personification explains the perception that individuals, as members of particular communities or associations, have obligations towards their fellow members which are inexplicable on a purely individual level. The concept of the community personified emphasizes the identity of the social group as a moral actor.

The concept of personification in Dworkin's theory is complex and significant. It grounds his account of associative obligations. As he recognizes, the associative obligations he postulates as the basis of political community depend upon "a history of events and acts that *attract* obligations"²⁰ rather than upon any discrete act of deliberate contractual commitment. Indeed, Dworkin is at some pains to emphasize that the reciprocity involved in associative relationships is profoundly abstract, that any endeavour to concretize the sort of reciprocity required would make friendship:

... possible only between people who shared a detailed conception of friendship and would become automatically more contractual and deliberative than it is, more a matter of people checking in advance to see whether their conceptions matched well enough to allow them to be friends ... [F]riends or family or neighbours need not agree in detail about the responsibilities attached to these forms of organization.²¹

Obligations are the outcome of a relationship, not a condition precedent. They are by nature diffuse and ambiguous, embedded in the concrete history of the group and defined through its practices. Their nature and extent may well be controversial even within families or among friends but, according to Dworkin, what is sought is that interpretation which makes a given practice the best it is capable of being.²² Interpretation occurs on three distinctive levels: the pre-interpretive level, where what is required is consensual communal identification of the particular practice; the interpretive level, which consists of a general justification for pursuing the practice in question; and the post-interpretive level, in which the interpreter "adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts as the interpretative stage".²³

19. Ibid, 174.

20. Ibid, 197.

21. Ibid, 198-199.

22. Ibid, 45-86.

23. Ibid, 66.

THE GROUP'S ASSUMPTION AND THE INTERNAL POINT OF VIEW

When Dworkin tells us that an essential determinant of the capacity of a social practice such as the family or political community to generate obligations is the *group's assumption* that its roles and rules are equally in the interests of all those within the group, he is relying upon personification to make real the idea that a social practice is capable of generating assumptions which belong to the practice as a whole and not to any individual member as individual. There are so many questions one might wish to ask here. Do our practices of family or indeed of community qualify in the sense his account requires? Does it matter that, for example, many of the voices within the family have gone unheard, or that others may have been profoundly distorted or silenced? Does it even matter that the group's assumption may ultimately be nothing more or less than the assumptions of those who have traditionally²⁴ been entitled to exercise power, whether within the family, the army, or within the wider community, and who believe their power in this regard to be both legitimate and genuinely to manifest equal concern for the interests of all? If we have learned anything at all from the history of our varied and various communities, we ought to have learned the degree to which oppression historically has been both justified and ultimately legitimated by beliefs remarkably similar to those which Dworkin suggests are necessary and sufficient to generate associative obligations.²⁵ It is neither new nor unusual for oppression to masquerade as concern, even equal concern. Doctrines such as inequality of bargaining power, unconscionability and unjust enrichment have come to matter profoundly in contract law and these doctrines emphasize that even in a relationship where bargaining ostensibly occurs at arm's length we cannot *assume* that authentic mutual consent exists. Are we somehow *less* entitled to question the assumptions underlying foundational practices such as family? Surely authentic mutuality and equality are still more critical within foundational and pervasive social practices such as family. What is concealed by Dworkin's diffuse, non-specific and wholly abstract conception of associative obligations?

24. I refer here, not only to our social practices of family, but also to our legal practices of family.

25. Compare with Blackstone's comment: "Even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England": W Blackstone *Commentaries on the Laws of England*. A facsimile of the First Edition of 1765-1769 (Chicago: University of Chicago Press, 1979) Vol I, 433.

According to Dworkin, practices such as family need not be egalitarian in any readily accessible sense in order to generate obligations. In theory at least, family practices such as those characteristic of the "separate spheres" ideology characteristic of the Victorian era or those posited as ideal by Rousseau²⁶ would qualify. This is so, provided that the responsibilities involved were perceived as owed uniquely to family members, that they were owed between themselves rather than to the family as a whole, that the specific responsibilities identified flowed from a genuine concern for the well-being of each individual member, and finally that the concern was extended equally to each individual, whatever his or her specific role within the family. The assumptions emerge from the complex interaction between the historical development of a particular practice and a critical interpretation of that practice.

Dworkin emphasizes that to interpret the requirements of a particular practice, the interpreter must "join the practice he proposes to understand...."²⁷ It follows that in order to properly interpret our culture's practices, whether of family or of political community, it is necessary to enter into one or more of the roles the practice makes available. This step is essential if we are to determine what the practice actually requires as seen in the best light and ascertain the degree of "fit" required between the present features of the practice and the justification offered for the practice itself. Even this, Dworkin acknowledges, may ultimately be insufficient, for although we have thus established the integrity or otherwise of the practice, we have not answered the quite separate question of whether or not the practice is just. Dworkin acknowledges that even authentic fraternal associations may be unjust:

[T]here is no guarantee ... that the interpretive attitude will always justify reading some apparently unjust feature of an associative institution out of it. We may have to concede that unjust dominion lies at the heart of some culture's practices of family....²⁸

When dealing with complex and hierarchically structured practices, the sorts of practices which are characteristic of associative communities of the type Dworkin describes, to become a participant necessarily means to

26. J J Rousseau *Emile* (trans B Foxley) (London: J M Dent & Sons, 1911). Rousseau's educational project may quite plausibly be interpreted as a sustained and coherent attempt to generate just such shared assumptions, and indeed, his account of the "ideal family" conforms to Dworkin's criteria in almost every detail.

27. Dworkin supra n 1, 64. More generally see *Id* supra n 14, 119, 139-141.

28. *Id* supra n 1, 203.

participate in its structure, to enter into one of the roles it makes available, together with the emotional and structural assumptions defining the role. We are not dealing with an exercise of the kind Dworkin uses as a model of literary interpretation, that is, one in which it is (barely) possible to consider the participants simply as abstract individuals interpreting a text which is in critical ways independent of their identity as interpreters, but with complex and hierarchically structured practices organized around distinct social roles, social roles in which each one of us participates to some degree. If our critic fails to become a participant he or she will, according to Dworkin, be unable to provide an interpretation of the central conceptual features of the practice. If our critic becomes a participant, he or she can only do so through an *interpretation* of one of the roles associated with the practice, and within the framework provided by the *assumptions* governing the structure of that role. What our critic perceives upon resuming a position outside the practice itself, outside the associative community in which it features, cannot but be a function, at least in part, of the position adopted within the practice. It goes without saying, of course, that what our critic finds within the practice itself, and the particular form of participation available may be determined in part by who, in particular, he or she is. Within our culture (any culture?) to adopt the interpretative attitude towards practices as constitutive of our identity as those involved in family we must draw upon our own experiences of selfhood, of our identity as male or female, as (potential or actual) husbands or wives, mothers or fathers, daughters or sons, brothers or sisters. In seeking to imagine, to intuit enough of the significance of such practices to be a competent critic, we confront an immediate barrier. Do we, can we, understand enough of what it is to be other than what we are, to become competent interpreters?²⁹ These difficulties become crucial at the point at which, in

29. The fact or mystery of femininity has become a significant, almost mainstream, problematic in criticism. See, for example, S Cavell *Themes out of School. Effects and Causes* (San Francisco: North Point Press, 1984) 94-95. He alludes to the demand for explicitness inherent in the social contract, and comments that the "consent to be governed must express the desire to be governed, governed by consent, hence to participate in the city. To express desire inexplicitly is an act of seduction, hence one that exists only in a medium of prohibition and conspiracy. It may be that human sexual life will continue to require this medium and its struggles for the foreseeable future, say for as long as our politics does not create a more perfect public medium, unfailingly intelligible, reciprocal, and nourishing. Without this, we will continue to interpret privacy as inexplicitness, and on this ground the private will continue to look like the natural enemy of the political...." Later he comments upon the fact that Bergman has been credited with being the first modern filmmaker to confront and question the feminine in himself and asks if certain scenes in a filmic deconstruction of a Bergman film constitute an admission that we "do not know what a woman, in oneself or others, is". See 119-120. At 179, he identifies the Bergman

interpreting a practice such as family, we attempt to ascertain whether or not the group *actually assumes* its roles and rules are equally in the interests of each individual member. If, as seems likely, none of us, male or female, have any experience of selfhood or individual identity which is not gendered, and equally likely, are not always fully conscious of the role played by gender in our interpretations, such difficulties become critical in the interpretation of any social practice whose internal structure relies upon gender as a major determinant.³⁰

INTEGRITY AND JUSTICE OR INTERNAL AND EXTERNAL POINTS OF VIEW REVISITED

The demands of the critical role are heightened where the text to be interpreted touches that which is believed constitutive of our identity as individuals and is not merely peripheral to it. When reflecting upon Dworkin's acknowledgment that some culture's (our culture's?) practices of family might be unjust, we must reflect as well upon his acknowledgment that it may be that the injustice is "so severe and deep that these obligations are cancelled".³¹ He suggests that practices involving racial unity and discrimination provide examples where this is likely to be the case. But, he adds, this will not always be the case, and where it is not, dilemmas arise because "the unjust obligations the practice creates are not entirely erased".³² He then turns to the example of a family in which daughters, but not sons, have an obligation to defer to their father's wishes in the choice of a spouse. While I see no reason why practices involving racial unity and discrimination ought to be perceived as more profoundly unjust than family practices which deny some individuals the autonomy to which other individuals equally placed in all respects but the brute fact of biological sex are entitled, it is worth looking

film of *Persona* as signifying "a man's imagination of the imagination of women, or perhaps a man's compulsion to imagine the imagination of a woman". Finally, and I believe significantly, Cavell identifies the quality or possibility of being photogenic with the possibility of femininity in oneself, that is, with the willingness to become or the possibility of becoming an object to subjects other than oneself: 180-181.

30. Similar difficulties arise in the context of race or ethnicity, and I believe, to a greater or lesser extent under other circumstances. To the extent we adopt an internal point of view, the position of a participant in any given practice, our capacity to criticize that practice is itself muted. I should add that it seems to me reasonable to suggest that *assumptions* concerning gender and gender roles prefigure *all* of our current practices.

31. Dworkin *supra* n 1, 204.

32. *Ibid.*

at his example and attempting to understand why it was selected. Dworkin begins:

Does a daughter have an obligation to defer to her father's wishes in cultures that give parents power to choose spouses for daughters but not for sons? We ask first whether the four conditions are met that transform the bare institution of family, in the form this has taken there, into a true community, and that raises a nest of interpretive questions in which our convictions about justice will figure. Does the culture genuinely accept that women are as important as men? Does it see the special parental power over daughters as genuinely in the daughter's interest? If not, if the discriminatory treatment of daughters is grounded in some more general assumption that they are less worthy than sons, the association is not genuine, and [no distinct] associative responsibilities, of any character, arise from it....

But suppose the culture accepts the equality of sexes but in good faith thinks that equality of concern requires paternalistic protection for women in all aspects of family life, and that parental control over a daughter's marriage is consistent with the rest of the institution of family.³³

Under such circumstances, he argues, the obligations of community continue to exist, including the obligation of the daughter to defer to her father's wishes, although these obligations may be overridden by appeal to some other more general ground of rights.

The distinction at work in this argument, namely that between the situation where the injustice is so pervasive that the obligations which would otherwise follow are cancelled and the case where these obligations persist but may be overridden, appears to be linked to another distinction made by Dworkin. In acknowledging that even genuine communities may be unjust, he notes that communal obligations may be unjust in two very different ways. The injustice may be confined to the obligations pertaining within the group, as he apparently assumes is the case in the example above, or it may flow outwards to those who are not themselves members of the group. If the latter

33. Ibid, 204-205. The passage quoted in the text, I should note, emphasizes the critical significance of Dworkin's abandonment of "equal concern and respect" as determinative and his adoption of "equal concern". While it might be barely plausible to interpret such practices as sincerely manifesting equal concern, equal respect is quite clearly absent, at least if equal respect entails, as might be thought, respect for the actual or potential autonomy of the individual. Dworkin's apparently happy acceptance of paternalism in this example sits uneasily with his rejection of political paternalism. Might a political community which sincerely *assumed* that a prohibition of pornography or of homosexual conduct was compatible with equal concern for its members qualify as a "true community"? Why ought it make a difference that paternal authority is enforced by social pressures and (frequently severe) social sanctions for disobedience while political authority is enforced by state coercion? Is the real difference that, within the family, there is the (bare) possibility of an appeal to the wider community, while no such appeal exists within political community?

is the case, the unjust obligations must inevitably conflict with obligations arising out of our membership in other, wider, communities. Racially exclusionary beliefs implicit in the practices of some communities may, for example, conflict with obligations of neighbourhood or citizenship.³⁴ Similarly, family practices may be objectionable, not simply because of their paternalism, but because they require members to commit crimes to protect family honour or otherwise serve family interests in a way which denies the rights of others and subverts other obligations.

Again, many questions arise. Surely patriarchal practices of family, the kind of paternalism described, also flow outwards, and affect the attitudes and behaviours of all family members in the workplace, the community and in politics.³⁵ Why is it that Dworkin, in seeking to identify family practices sufficiently unjust to cancel obligations, finds it necessary to draw upon families whose members are compelled to commit crimes in the name of family honour? From what, precisely, has he averted his gaze? Can he possibly believe that, for example, a father who sincerely believes that equal concern requires paternalistic protection for girls and women in all areas of family life can or will confine those attitudes towards girls and women to the family setting? What of his relationship in the workplace with women as colleagues, possibly as superiors, but more likely as subordinates? How could he reconcile a sincere belief that girls and women require paternalistic protection in all aspects of family life with, for example, the loyalty and respect due a female superior in the workplace, or with the mutuality and equality due a female colleague, even with the encouragement and challenge essential if a female subordinate is to attain her full potential? More generally, what of his relationship with women as political equals? Attitudes and assumptions, including paternalistic attitudes and assumptions such as those described, are not localized phenomena. They do not vanish into a puff of smoke outside of the practice which generated them and in which they are believed to manifest a sincere conception of equal concern. Rather, they comprise an integral part of the conceptual framework through which we interpret the world around us and their gravitational force extends well beyond the concrete and specific practice in which they originated and in which Dworkin suggests they retain obligatory force despite their injustice.

34. Ibid, 202-203.

35. See, for example, C Cockburn "The Gendering of Jobs: Workplace Relations and the Reproduction of Sex Segregation" in S Walby (ed) *Gender Segregation at Work* (Stony Stratford: Open University Press, 1988) 29.

It seems likely that where the injustice is confined to a specific and isolated feature of the relationships within the practice, Dworkin would like to be able to argue that the responsibilities which arise are genuine provided his criteria are met, although the offensive obligation may be overridden by some more general principle. Where the injustice is global, where it not only affects the roles and relationships within the group, but subverts the capacity of group members to fulfil other obligations, such as those towards neighbours or colleagues or fellow citizens, the practice itself is unjustifiable and ought not to be tolerated. The subjectively perceived obligations of its members are cancelled, and the practice itself must either be altered or eradicated. As argued above, I do not believe that this distinction can ultimately be sustained. If the beliefs or assumptions in question are sufficiently deep-seated to become morally obligatory within our foundational practices, those same beliefs and assumptions govern our interpretations of the other roles we inhabit. They alter our understanding of those roles and of appropriate relationships to others within those other practices. If I am right in this, are we then to eradicate the family, or at least those families whose practices remain similar to these, as Rawls seemingly fears?³⁶ Are we to intervene directly and alter the offensive practices? Many practices similar to those Dworkin cites remain both conventional and accepted within a wide spectrum of contemporary families. What of families in which the family members sincerely believe that the husband is entitled to expect obedience and deference from his wife as well as his children, where the hierarchy involved is clear and explicit, even if such practices are, at the same time, sincerely believed to be compatible with equality of concern? Dworkin offers little in the way of direct guidance here. He seemingly assumes that family practices such as those described either will not interfere with the capacity of family members to fulfil other obligations or, perhaps, that the interpretive attitude will demonstrate that the practices concerned are inconsistent with the institution of family as a whole. The first assumption is, I think, simply wrong, the second profoundly difficult to sustain given our legal and social history and traditions. They seem all too consistent with our practices of family as they have evolved over the last several hundred years.³⁷ I would

36. Rawls *supra* n 2, 511-512. In noting the implicit conflict between the principle of fair equality of opportunity and the existence of families, Rawls notes that if this principle were given a certain primacy the family ought to be abolished. Seen in the context of his theory as a whole, however, he believes that individuals will be content with what they have and not concern themselves with what they might have had were their life chances truly equal: *ibid*, 530 ff.

37. Compare with the comment from Blackstone cited in n 25.

suggest that his example is seriously flawed and that the attitudes and beliefs which foster unjust relationships within any particular practice will foster unjust relationships in others, however far removed they seem.

THE JUST STATE AND UNJUST PRACTICES

Even if we acknowledge that Dworkin's example is flawed, that family practices such as those described inevitably subvert the capacity of family members to honour other obligations, including those associated with occupational roles and political community, and that such families are ultimately bare communities, incapable of generating obligations, we have not resolved the fundamental problem. Where micro-communities within the state are fundamentally unjust and lack the capacity in Dworkin's terms to sustain legitimate obligations, we must identify the responsibility of the state towards the victims of injustice, given that they are, as citizens, entitled to equal concern. We must also consider the degree to which a state ought to tolerate significant and pervasive injustice within its sphere of authority. Deeming some practices simply incapable of generating obligations is insufficient. Just as one would think that a wide community which believes slavery is unjust would be compelled to intervene if smaller communities within it sought to practice a form of slavery, so too with family practices which subvert the real or potential autonomy of family members would one expect intervention. Placing the onus upon the victims of injustice to end that injustice is inadequate. All too often, the victims lack the capacity and ultimately the will to break the chains of their own oppression.

Dworkin does not address issues such as these. Indeed they appear to have escaped his notice. Rather, consistently with his overall project, that of developing a reasoned foundation for an account legitimating civil disobedience, he simply assumes that unjust practices and illegitimate obligations both can and will be challenged by their victims. Even given this, however, the passages discussed above are difficult for several reasons. First, remarkably for a modern theorist, Dworkin is suggesting that associative obligations operate in the same way in families, racial or ethnic communities and modern nation states, to the extent that they are called into being by a social practice sufficiently coherent to meet the requirements of what he terms "true community". Likewise he acknowledges that questions of justice arise within families as within wider communities, that no fundamental distinction exists. It makes no sense to characterize a feature of particular family structures as unjust unless justice is relevant within families as elsewhere. To that extent, he may be taken to acknowledge that the personal may be political. Equally,

like Rawls, he wishes to insist that his account of equality is a political account, to emphasize that our responsibilities as private individuals and as citizens are distinct. As he says subsequently:

[O]ur familiar convictions, which require government to treat people as equals in the scheme of property it designs but do not require people to treat others as equals in using whatever the scheme assigns them, assume a division of public and private responsibility. They suppose we have a duty in politics that does not carry over as any general duty of private life.³⁸

Our duty, as members of a political community, is to attempt to ensure that our government does in fact treat its citizens with equal concern. That obligation pertains to our lives as citizens, as members in good standing of a political community whose practices qualify it as a “true community”. Our obligations as private individuals are very different. They are, at least in part, defined by the social practices in which they arise and in which we participate. The question which remains both unasked and unanswered by Dworkin is simple and critical to egalitarian theory. Under what circumstances does “private” inequality become relevant to “political” equality? At what point is the equal concern owed to citizens subverted by communal tolerance and acceptance of private inequality? When, for example, does women’s pervasive inequality as “private wives”, together with the associative obligations defining the role of “wife and mother”, become sufficient to subvert or destroy their equality as “public persons”?

Dworkin has drawn upon an analysis of “private” obligations in constructing his account of the nature of political obligations. He has argued that specifically political obligations arise in precisely the same way as obligations within families, among friends, within workplaces and so on. Both the argument, and the distinction between unjust obligations which may be overridden by appeal to a wider principle and unjust obligations which are simply cancelled, while developed in the private context, are clearly intended to provide the structural elements essential for both a reasoned account of civil disobedience and an argument suggesting that some states are sufficiently unjust for there to be no political obligations. Of course, citizens may well continue to obey the law out of prudence, just as many wives have historically obeyed their husbands out of prudence.³⁹ Where the claims of conscience demand disobedience to a particular law out of obedience to a higher principle, it is proper to speak of overriding. The citizen remains bound by the other obligations of citizenship, and has something to regret. He

38. Dworkin *supra* n 1, 299.

39. Many wives, of course, continue to obey their husbands for precisely the same reason.

or she owes to the political community “an accounting, and perhaps an apology, and should in other ways strive to continue [his or] her standing as a member of the community [he or] she otherwise has a duty to honor”.⁴⁰

I would add, although I do not know if Dworkin would agree, that this obligation must not be interpreted as unilateral. Surely the demand for an accounting is bilateral. However localized and confined the particular injustice, its victim is also entitled to an accounting and perhaps an apology, particularly in light of the fact that the onus for challenging an unjust practice rests squarely upon the individual affected. Where the injustice is global, as many believe is the case with respect to the black community of South Africa, Dworkin may believe that it is improper to speak of obligations subsisting at all. Given that black South Africans have been excluded in almost every relevant sense from participation in that community, I imagine Dworkin might want to say that South Africa is merely a bare community and that neither white nor black South Africans have an obligation to obey the law.⁴¹ They may be obliged to do so, but that is very different. This very willingness to seek the nature of political obligation and legitimacy in the context of social life generally raises further questions concerning the legitimacy of political intervention in the private sphere. Dworkin reasons from the bottom up in offering an interpretive account of political obligation. Yet if it is appropriate to “reason up” or to argue that obligations arise in the same way within the state as within smaller, more local communities, I believe that we are also entitled to reason down. If we argue that the same tests apply to the family as to political community and that equality of concern is basic to both, a further question arises. We must ask to what extent the demands of equality as a principle of political organization mandate political intervention directed at mitigating or removing the injustices which persist in the smaller communities which comprise the nation state. To the extent that issues of justice and injustice arise within families, irrespective of whether such injustice is, in his terms, sufficient to erode the ground of obligation altogether, under what circumstances is the state either entitled or obliged to intervene, whether or not its intervention is sought, if it is truly dedicated to equal concern?⁴² On

40. Dworkin *supra* n 1, 205.

41. A great deal turns, of course, upon precisely how one defines the relevant community. I believe many white South Africans would argue that their community does not include Black Africans, just as the citizens of ancient Athens defined their community without reference to *metics*, slaves, and perhaps, women.

42. For a sustained argument that the state should itself be perceived as male and structured around principles of male advantage, see C A MacKinnon *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

Dworkin's arguments as they stand, intervention would appear to be mandated in the event of communities evincing racially or ethnically discriminatory practices, be these political communities or smaller, more "private" associations. Equally, discrimination upon the basis of gender has become part of the public agenda with respect to professional associations or clubs. In both cases state intervention is precipitated by the demands of those excluded and those seeking full membership within the community.

What of the family? Surely, in the example given, the point lies in the potential of the injustice to cripple the development of some members of the family, to narrow, perhaps to extinction, the sphere of autonomy to which a daughter might otherwise be entitled and to which she might otherwise subjectively perceive herself to be entitled. Where family practices take the form described by Dworkin, where does the onus lie? Can we meaningfully locate the onus for challenging the unjust practices upon those most profoundly affected by them, those who are already significantly disempowered, whether by age or by lack of resources or simply by a culture which denies them the capacity for autonomy even where this is putatively legitimated by a sincere conception of equal concern? Children, and very often women, bear little resemblance to the classic public sphere dissident whose conduct he seeks to legitimate, particularly within families of the sort described by Dworkin in developing his account of civil disobedience. The civil dissident is already, and in significant ways, empowered and frequently able to mobilize the support of others. Such individuals are both prepared and able to challenge the legitimacy of the forces of the state, to demand their right to be heard. Their capacity for critical judgement is developed, often fully, for without that capacity they could not meaningfully advance a claim based upon rights or higher principles. The same is less likely to be true of those most profoundly affected by injustices within the family, whose lives are distorted thereby. Within the family, if we hear anything at all we are more likely to hear a cry of pain than an open challenge to those responsible for that pain.

Another difficulty emerges too. Where Dworkin argues that some practices are so unjust that the obligations which might otherwise arise are cancelled (as in his "Mafia example"), I believe he moves much too quickly and thereby eludes a very real and significant problem, one intimately concerned with the parameters of the relevant community. The real question is not, as Dworkin theorizes, whether obligations within unjust families continue to subsist, even in attenuated form. The real question is whether, as a matter of social practice, they are conventionally believed to do so, and

indeed, the same is likely to be true in political communities such as South Africa, or for that matter, ancient Athens. Even within Dworkin's "Mafia example", obligations surely exist between parents and children, perhaps between spouses or even siblings, and some of these may reflect a meaningful conception of equal concern; they may even be just. Likewise, even in a slave community such as ancient Athens, which on Dworkin's account must be so unjust as to generate no obligations whatsoever, it is not unreasonable to suppose that among the community of *citizens*,⁴³ certain *just* obligations exist and retain their moral force. Dworkin offers only one example of a family so seriously unjust as to generate no obligations, that is, one in which the family compels its members to participate in criminal acts against outsiders.⁴⁴ Yet this example advances us no further. It does not even present a "hard case". The hard cases involve injustices already pervasive in Western society: spousal abuse (both physical and psychological), child sexual abuse, patriarchal families, instances where the injustice arises because of the type of community created among family members. If such families are bare communities, families by convention or merely by the rule book as Dworkin's account suggest, contemporary statistics on domestic violence suggest that an astonishing number of families cannot be called true communities. Even within abusive families, at least some family members often perceive themselves as obligated to one another as do wider social institutions, including governmental authorities. Despite a profoundly abusive marriage, a mother may perceive herself as having an obligation to her children, to cite but one example. Indeed, her obligation to her children may induce her to remain with a violent and abusive spouse, because she cannot survive on her own and also because she may believe that her children need a father. Are we to say she has no obligation to her children? Her interpretation may be profoundly deficient, but her obligation is real. In a case such as this, how are we to identify the relevant community? Who among us has that authority, given that our social practices suggest that the community does in fact consist of the husband, the wife and the children of the marriage? Given the suggestion implicit in our social practices that the nuclear family is the relevant community, can we simply redefine that particular community to include only the mother and her children? What of the obligations of the father towards his children, even towards his wife? Are we to say that *all* the obligations within such a family are cancelled, or do we argue instead that all

43. The community of citizens, in practice, excluded slaves, *metics*, and women.

44. Dworkin *supra* n 1, 205.

family members are in theory bound by those obligations inherent in the practice *in its ideal form*? Can we suggest that these “ideal theory obligations” persist and may be enforced even if they are not acknowledged by those within the practice itself?

The consequences which attend these very different interpretations, both for family members and for the role of the political community seem to me to be very different. On the first account, while undeniably, the political community would be obliged to act in order to dissolve the family, its responsibility would not go beyond this. On the second account, one might quite reasonably assume that the political community would be obligated to act, to enforce, so far as might be reasonable, some of the obligations inherent in our ideal theory conception of the family as social practice, and to compensate, so far as might be possible, those family members who have become the victims of injustice. On this second interpretation, a further difficulty arises as well. Within a pluralist culture such as our own which has an incredible range of family forms and practices, to the extent that it becomes essential to have recourse to an ideal theory account, it also becomes illegitimate to suggest that the obligations being recognized are in any meaningful sense generated from within the practice itself. Rather, those obligations are drawn from an ideal theory interpretation justifying the practice in the context of the wider community, one which may be widely removed from the actual practices of any given subculture.

The question ultimately becomes, given the fact that issues of justice arise within families as elsewhere, to what extent and for what reasons should the state and its authorities be prepared to turn a blind eye towards injustice where it exists? These questions become difficult because, with respect to the family, outsiders are unlikely to be involved unless and until the family has been defined as “marginal”, and “marginal”, I must emphasize, is not necessarily the same as “unjust”. Here, demands for inclusion, for membership, tend to be attenuated.⁴⁵ Equally, of course, the mere fact that family members authentically believe in unjust practices, and indeed, the fact that they may well perceive such practices to be an authentic manifestation of equal concern among themselves, does not alter the fundamental injustice of at least some aspects of the practice. In Dworkin’s terms, just as he is disposed to argue that slavery might be unjust, irrespective of whether “people think it unjust, or have conventions according to which it is unjust, or anything of

45. Where a daughter has broken free and married a man of her own choice he may demand the same acceptance from her family as she enjoys from his.

the sort, but just because slavery is unjust",⁴⁶ one may argue that patriarchal practices within families are, for the same reasons, unjust; that this represents a "moral fact", which exists irrespective of whether or not they are thought to be unjust. Family structures pose particular problems, not because the injustice within them is in any way remarkable or unique, but because our cultural practices identify them as private, and this privacy shields them against intervention so long as and to the degree that they outwardly conform to the ideal of the middle class, male-headed nuclear family. Indeed, the shadow of family privacy may go a long way towards explaining why Dworkin fails to perceive the very real parallels between caste systems, slavery and the patriarchal practices he describes.

Yet even given Dworkin's remarkable willingness to acknowledge family relationships, at least briefly, and his suggestion that the genesis of obligations within family relationships (and indeed, within other micro-communities) is analogous to the genesis of political obligations, his treatment of the family is deficient. First, it appears more a marriage of necessity than an indication of his willingness to come to grips with the interaction of family structures with other social, economic and political structures. Indeed, his approach treats practices such as family as discrete and localized and much of the injustice within it as self-contained and limited. Secondly, his acknowledgment that questions of justice may arise with respect to relationships within the family, and not simply in the context of its relationship with outsiders, ought to have led him to reconsider the nature and function of the prevailing public/private distinction. Simply arguing that different obligations are generated by different social practices, and that their force is, under normal circumstances, localized and confined to the practice in which they figure is insufficient. Thirdly, by his apparent acceptance of the liberal political equivalent of the separate spheres ideology, the assumption that family roles are discrete, private, unique to the family and in normal circumstances irrelevant to the wider political and economic context, he blinds himself to the ways in which these mediate the participation of the individual in other realms. The very discreteness of the injustice in his example is illustrative. In such a culture, at least with respect to the contemporary versions which I have encountered, it is not merely that women are perceived to require special protection in all aspects of family life. The same assumptions which mandate special protection within the family also

46. See Dworkin *A Matter of Principle* supra n 14, 138.

alter the character of the participation of all family members in education, in economic life, and in the social life of the wider community. They affect freedom of movement, independence, the whole range of options available. They also - and inevitably - affect attitudes towards others, whether within the home or within civil society. A culture in which the sole restriction applied to the choice of marital partner would be a strange culture indeed. Social practices are rarely, if ever, so discrete and compartmentalized. If obligations within the family are governed by principles which differ in no material way from those governing obligations within political society, if our lives are cut from whole cloth and not fragmented into discrete and compartmentalized spheres, then family structures and relationships ought to be present in every aspect of his account of the demands of equality, whether in terms of resources, in terms of liberty, or in terms of politics. Admittedly, his way is much simpler, yields a more economical account, but its economy is purchased at the cost of its blindness to many of the very real injustices which remain normative within many of our communities. I should add, of course, that this cost attends any effort at compartmentalization, that we live our lives as a whole, not as inhabitants of discrete and localized social practices. Whatever our role in any practice in which we participate, that role becomes a part of our lives, and its shadow mediates our participation in other practices.

THE MORAL STATUS OF ASSOCIATIVE OBLIGATIONS

Even if we turn our gaze from Dworkin's paradigm case for associative obligations - the obligations conventionally associated with family membership - and focus upon other "social groups",⁴⁷ many questions remain. Given that Dworkin has explicitly denied that such obligations are in any way contractual, and indeed, has insisted that any attempt to define them concretely vitiates the entire conception, it becomes essential to question the theoretical nature of these obligations, their public status and ultimately the degree to which they may be enforced by the state. In *Law's Empire* it initially appeared that such obligations were a core element in Dworkin's notion of a community of principle, that they were, in some sense, morally foundational, a matter of principle. Certainly this appeared to be the case when he discussed the responsibilities of political officials such as judges. In his more recent work, however, it has become apparent that this description may not be entirely appropriate. In the context of Dworkin's theory as a whole, a

47. Dworkin *supra* n 8, 337. More recent examples include an orchestra and a football team.

substantial question arises as to the "nature" and the "force" of these obligations. While I hesitate to use the terms subjective and objective, it is difficult to find substitutes which are adequate to convey the precise distinction which needs to be made. The problem is this: do our associative obligations, given a community sufficiently just to generate obligations, constitute an *external constraint* upon the conduct of the individuals within the practice, and therefore one which possesses obligatory force irrespective of the beliefs of any individual participant in the practice, or is the force of such obligations merely an internal constraint, one which ultimately binds the individual only to the extent he or she acknowledges those obligations as morally binding? The former position is strongly suggested by Dworkin's comment that "[i]f the conditions are met, people in the bare community have the obligations of a true community whether or not they want them...."⁴⁸ The latter becomes plausible, even compelling, however, when we consider the role which obligations play in Dworkin's background theory of justice and equality of resources. It is to this further complication that we now turn.

The distinction which I have just attempted to draw between the external authority of our associative obligations and their internal or subjective force is in fact intimately related to another distinction which is conventional in liberal theory, that between the right and the good. Propositions such as "slavery is wrong" typify those which Dworkin argues are in some sense morally binding or obligatory irrespective of the beliefs or practices of any given community. Such propositions belong to the domain of the right and have something akin to objective force. Their moral force transcends all social practices and is wholly independent of any particular practice. Intervention, including intervention by the state, becomes morally mandatory irrespective of the beliefs of the participants in such a practice. Associative obligations, even those characteristic of political community, and even where the group sincerely assumes that its role and rules are equally in the interests of all, are very different. They are local and discrete, seemingly lacking the capacity to extend beyond the concrete practice which has given rise to them. They are integral to the practice but lack the sort of compelling moral force which legitimates intervention by outsiders. Indeed, it now seems likely that Dworkin regards associative obligations as pertaining to the domain of ethics rather than that of morality.⁴⁹ Put another way, associative

48. Dworkin *supra* n 1, 201.

49. In a recent article, Dworkin distinguishes between ethics and morality, arguing that ethics includes convictions about which kinds of lives are good or bad for people to lead while morality includes principles about how people should treat other people: R Dworkin "Liberal Community" (1989) 77 Cal L Rev 479, 479, n 1.

obligations appear to be characteristic of the domain of the good rather than of the right, and this in turn clarifies why so much turns upon the sincere beliefs of the group. Such obligations form a substantial and significant part of the sorts of life many individuals find appropriate for themselves.

What Dworkin is attempting to emphasize by the distinction he now draws between ethics and morality is the notion of a collective unit of moral responsibility which does not, at the same time, become a collective unit of moral judgement.⁵⁰ This enables him to escape the critical difficulty posed by Rousseau's account of the general will, the collapse into a collective so total and so profound it threatened to eradicate altogether any moral space for the individual. To this end, he argues, for example, that while members of an orchestra share in collective responsibility for its musical performance they are none the less expected to maintain their own individual critical stance when evaluating the success or failure of its performance.⁵¹ They are required to oscillate between an internal and an external point of view, sharing in the responsibilities generated by the internal point of view for the performance of the orchestra but obliged to evaluate its performance from an external point of view. In this way Dworkin endeavours to highlight the moral responsibility and the autonomy of the individual, and he emphasizes the overriding importance of the capacity for critical judgement. In political community in particular, "the collective life cannot include moulding the judgements of individual members as distinct from what they do".⁵²

Yet this in turn focuses attention upon what I believe to be a fundamental difficulty with his account of associative obligations generally. While his recent examples of the community personified, examples ranging from political community to an orchestra or a football team, may quite plausibly be interpreted as emphasizing the distinction between collective responsibility and individual judgement upon which the coherence of his account depends, his earlier development of the conception of associative obligations, and in particular, his use of the paradigm case of family, seemingly denies at least in part the coherence of that distinction and raises further problems. While it may indeed be true that many groups do rely upon the distinction between collective responsibility and individual judgement in their collective life, this is not necessarily true, at least in our culture, of practices such as family. Indeed, it may reasonably be argued that a significant part of the importance of family in our culture lies in the degree to which

50. Dworkin *supra* n 8, 336.

51. *Ibid.*

52. Dworkin *supra* n 8, 340.

it is expected (even morally required) to mould the *judgement* of family members as well as their actions. The capacity for critical judgement emphasized in Dworkin's recent work⁵³ demands the capacity to adopt an external point of view, to distance oneself from any social practice in which one participates and to evaluate it critically and dispassionately from the point of view of an outsider. Just as Dworkin has consistently argued that to interpret any given practice adequately one must join the practice one seeks to interpret, he now additionally argues that in order to criticize any given practice one must distance oneself from it, sustaining an outsider's point of view. Interpretation demands an internal point of view whilst criticism requires an external point of view.⁵⁴ Yet this makes his original discussion of associative obligations and of true community even more problematical. Dworkin's own example of a patriarchal family in which the principle of equal concern demanded a sort of moral dominion over daughters which was relaxed over sons emphasizes the degree to which many communities, however genuine, seek to monopolize both judgement and action. The sort of dominion to which he alludes, as his own example emphasizes, is deliberately designed to foreclose the development of the capacity for critical judgement in what he himself terms elsewhere a significant aspect of an agent's personal life.⁵⁵ While it may not always prove successful, that is its purpose and its role. If his account of associative obligations did not depend for whatever intuitive plausibility it possesses upon his insistence that "[p]olitical association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation"⁵⁶ this might be relatively unproblematical. Given that his account of political legitimacy, and his account of law as integrity, quite fundamentally depend upon his insistence that the origin of

53. R Dworkin "What is Equality? Part 3: The Place of Liberty" (1987) 73 Iowa L Rev 1.
54. One might ask where it is one is to stand if one is to criticize a social practice. On what is this criticism ultimately grounded? What is the foundation of those "moral facts" which exist wholly independently of the beliefs of any given community?
55. Dworkin supra n 53, 7. Dworkin explicitly refers to freedom of choice in family arrangements. He seems unable to recognize that, in a family such as he has described, her freedom of choice in family arrangements is as fundamentally compromised as it would be if that freedom were proscribed by law. It is not, I believe, morally tenable to locate the onus for eradicating oppression upon those who are oppressed. Rousseau, in particular, recognized this, indeed noted that "if ... there are slaves by nature, it is because there were once slaves against nature". While he failed to extend this perception to women, indeed sought to eradicate their capacity for autonomy and individuality altogether, his initial understanding was, I believe, wholly correct: J J Rousseau *The Essential Rousseau* (trans L Bair) (New York: Mentor, 1974) 10.
56. Dworkin supra n 1, 206.

our political obligations lies in our social practices rather than in any act of contractual commitment, the problem is, I believe, far more pervasive.

The key to understanding Dworkin's account of associative obligations lies in understanding the moral stature or nature of the obligations he posits. Their intimate connection with social practices, with forms of relationship that for many individuals play a central role in their own beliefs concerning an appropriate life for themselves offers significant insights. Indeed, even the term "obligation" is itself fraught with difficulty and ambiguity. I believe it to be significant that in his recent arguments for equality of resources as the best account of political equality he explicitly argues that what he terms "felt moral constraints"⁵⁷ belong to the personality of the individual rather than to his or her circumstances. Given that he also suggests that what he characterizes as "the familiar moral conviction many people have, that they ought to obey legal constraints"⁵⁸ also belongs to the personality of those individuals, and is prepared to *assume* that "legal constraints, so far as they belong to circumstances, are to be viewed ... as threats putting up the cost of the actions they forbid"⁵⁹ it becomes essential to try to understand quite precisely the nature of the associative obligations of which he speaks. In developing his own preferred account of equality, equality of resources, Dworkin emphasizes the distinction between inequalities which arise from the preferences or choices of particular individuals (such as choices in work, leisure and consumption) and inequalities which arise from the circumstances of those individuals (including wealth, social position, talents and handicaps and unjust legal constraints such as a prohibition upon homosexual acts). While a government morally dedicated to equality ought to strive, so far as is possible, to eliminate or mitigate inequalities which arise from circumstances, those inequalities which follow from individual choices are irrelevant to equality as it is understood by equality of resources. According to Dworkin:

Equality of resources assumes a fundamental distinction between a person, understood to include features of personality like convictions, ambitions, tastes, and preferences, and that person's circumstances, which include the resources, talents, and capacities he commands.... [E]quality of resources aims to make circumstances rather than overall welfare equal, and is in that way different from equality of welfare.⁶⁰

57. Dworkin *supra* n 53, 19, n 21.

58. *Ibid.*

59. *Ibid.*

60. *Ibid.*, 18-19 (footnote omitted).

Against this background, it seems to me critical that Dworkin characterizes all “felt moral constraints”, (including the *obligation* some individuals believe they have to obey the law), as pertaining to the *personality* of the individual rather than his or her *circumstances*. If, as seems clear from the account above, associative obligations are irrelevant to equality, if the belief many people have that they have special and unique obligations simply by virtue of belonging to a family or, indeed, a political community, is nothing more than a feature of the “personality” of some individuals, one which is ultimately irrelevant to their political equality, it likewise becomes clear that Dworkin has shifted almost imperceptibly from the domain of what he now terms morality to the domain of ethics. This paradigm shift is emphasized in his recent work. He now argues explicitly that the criteria of what he terms a life which is good in the “critical sense”

cannot be defined acontextually, as if the same standards held for all people in all stages of history. Someone lives well when he responds appropriately to his circumstances. The ethical question is not how should human beings live, *but how should someone in my position live?*⁶¹

The concept of a position, in turn, becomes meaningless unless it is situated in a concrete social practice, a practice such as those within which Dworkin’s account of associative obligations was developed. Indeed, Dworkin identifies as central among our critical interests such things as friendship, having a close relationship with our children and success at work.⁶² It seems clear that our critical interests, so-called, are in turn inextricably linked to what Dworkin earlier termed “the community personified”. They are, in other words, precisely those features of our communal life which have the capacity to generate associative obligations.

Yet once we recognize that associative obligations, like critical interests, belong to the domain of the good, not of the right, further ambiguities emerge. Returning to our initial focus upon Dworkin’s paradigm case of associative obligations, that is, the family, it becomes essential to question whether the distinction which Dworkin wishes to draw between ethics and morality can be sustained. Particularly within such intimate associations such as the family, the distinction which Dworkin insists we must draw between “convictions about which kinds of lives are good or bad for a person to lead” and

61. Dworkin *supra* n 49, 503.

62. *Ibid*, 484-485.

“principles about how a person should treat other people” becomes irrational. Surely, using his own example of a patriarchal family in which paternalistic protection was required for girls and women in all aspects of family life, *no intelligible distinction* can be drawn between convictions about the kind of lives which are good or bad for individuals and principles about how people should treat other people. The kind of life prescribed by that family practice for girls and women, a life in which freedom of association is rigidly circumscribed, involves *both* a concrete and socially realized ideal of family life and specific principles concerning the different ways in which male and female persons ought to be treated. The two are inseparable, even indistinguishable. Our critical interests, in precisely Dworkin’s sense, are reciprocally related to the principles we hold regarding the ways in which people ought to treat others, and likewise, to our beliefs concerning appropriate ways for others to treat us. That, as well, is inherent in the very idea of community. If this were not the case we would not have much in the way of community to speak of and might well see ourselves as isolated individuals in a “state of nature” such as that described by early social contract theorists and relied upon by Dworkin in developing the theoretical framework of equality of resources.⁶³

A substantial part of the conceptual difficulty into which Dworkin’s account has led him is a direct consequence of the distinction he wishes to sustain between the integrity of a practice and its justice. Dworkin wishes to insist that any given social practice, including law, may possess sufficient integrity to generate obligations, even though in some foundational sense, it is not just. As he says:

A community of principle, ... can claim the authority of a genuine associative community and can therefore claim *moral legitimacy* - that its collective decisions are matters of obligation and not bare power - in the name of fraternity.⁶⁴

Given that this moral legitimacy itself apparently derives ultimately from “felt moral constraints” which, while subjectively binding, have no objective status beyond their role in specific practices, the moral legitimacy of which he speaks also remains subjective. At least in terms of his foundational theory of equality, equality of resources, the rule of law collapses into naked force or power. We are ultimately left with the curiously Hobbesian view that from

63. R Dworkin “What is Equality? Part 2: Equality of Resources” (1981) 10 Phil & Pub Aff 283.

64. Dworkin *supra* n 1, 214 (emphasis added).

the perspective of equality of resources “legal constraints ... are to be viewed ... as threats putting up the cost of the actions they forbid...”⁶⁵

While some of us may well believe that the obligations of community and government are morally binding, that we have an obligation to obey the law although this may be overridden in some circumstances, when it becomes essential to determine as a matter of justice whether or not our community has provided us with the equal share of resources to which Dworkin has argued we are morally entitled, our obligation to obey the law becomes nothing more than a threat putting up the costs of the actions it forbids and our other obligations become irrelevant. The mere fact, for example, that any individual woman may, given her position as wife and mother, believe that her obligations to her husband and children render employment and even active political participation untenable, becomes irrelevant to her equality as defined by equality of resources. If, one might add, upon dissolution of marriage, she is, in real terms, impoverished and dependant upon state provision, she remains nonetheless equal. Her concrete choices have severely depleted her bank account wealth, but the perceived moral constraints which led her to make those particular choices are simply features of her personality and irrelevant to her equality as understood by Dworkin's theory of justice. Perhaps all our obligations are no more than threats putting up the costs of the actions they forbid, and those who honour them are simply fools who cannot distinguish between those “threats” which have real coercive force because they are backed by the power of the state and those which are empty and devoid of real power and may safely be ignored.

CONCLUSION

Dworkin's attempt to provide a new liberal account of the nature and compelling force of political obligations is, even taken on its own terms, fundamentally flawed. While many of the individual elements of his attempt to ground all political and moral obligations in our social practices are intuitively appealing, his failure to examine the actual structure of such practices leads him into a number of serious errors. This is particularly critical in the context of his failure to address the role of hierarchies and power relationships in the generation and reinforcement of “collective assumptions”. The conception of the community personified, upon which his

65. Dworkin *supra* n 53, 19.

account of obligations depends, itself conceals the fact that communities are comprised of individuals whose assumptions may be very different from those emanating from the group as a whole and that the assumptions of the community as a whole must be profoundly coloured by the hierarchies and power relationships which prevail within it.

A second and related error arises out of Dworkin's failure to consider fully the implications of his own paradigm case, that of a patriarchal family. He apparently *assumes*, without supporting argumentation, that the attitudes and assumptions governing gender roles (and by extension all social roles) within families are local and discrete, and therefore irrelevant to the participation of family members in other practices. This assumption is far from innocuous; indeed, I believe it to be profoundly destructive. It is also theoretically critical for it sustains the distinction he wishes to draw between a "true community", one capable of generating obligations, and a bare community. If, as I have shown, it is untenable, his attempt to secure separate spheres for integrity and justice and to argue that even unjust practices may generate obligations collapses. While it is easy to understand the theoretical necessity for Dworkin's move, given that no contemporary community may be called just, it nevertheless leads him into further difficulties. In it may be found the seeds of his failure to analyse the responsibility of a just political community to the individual victims of unjust practices within communities which meet the demands of integrity, and his willingness to locate the onus for eradicating oppression upon the oppressed.

In his eagerness to defend the independence of integrity and justice Dworkin ultimately offers an account of the role of law in the context of his theory of justice which differs in no material particular from that of Hobbes. To the extent that legal constraints are relevant to our political equality, they are to be considered not as obligations, but simply as threats putting up the costs of the actions they forbid. If our moral obligations, including our obligation to obey the law, are irrelevant to our equality as political subjects, and our legal obligations, in particular, are of concern only because they put up the costs of the actions they forbid, the sorts of inequalities which arise because many of us honour those obligations also become irrelevant. Dworkin has not succeeded in offering an account which both refutes the suggestion that liberalism depends upon an atomistic conception of the individual and simultaneously secures the primacy and autonomy of the individual. True it is that his conception of law as integrity, in its reliance upon concepts such as the group's assumption and the community personified, gives greatly heightened emphasis to social practices and locates political and moral obligations

firmly within those practices. It does so at a price, and that price is very high indeed. Our obligations, and indeed, our moral life more generally are relegated to communities of belief and practice, regardless of the *justice* of those practices. Our obligations collapse into subjectively perceived constraints upon individual conduct and the costs incurred when we honour those obligations disappear from view. Obligations such as those to children or to parents, which all too frequently impose profound economic and social costs upon some individuals collapse into features of personality and become irrelevant to the circumstances of the individual. We may be oppressed by the obligations of role which govern our moral and social life, and yet, as atomistic individuals, we may still be deemed equal.