

I have conceded that real moral principles can be referred to in legal enactments and thereby be incorporated into the law, though I have also alluded to the risks of doing so. I shall return to this possibility momentarily.

What I want to consider first is whether there are moral concepts that can exist apart from being part of morality as it actually is. For example, suppose, as I have argued elsewhere (see note above), that there really is no defensible principle of freedom of expression. Is there nonetheless an objective “concept” of freedom of expression to which a user of this term could be referring? Or suppose the normative idea of equality is “empty” (see, e.g., Westen, “The Empty Idea of Equality”). Is there nonetheless an objective “concept” of “equal protection”?

Of course, even if there are no objective moral concepts other than those picked out by correct moral theory, we can refer to incorrect moral theories. I may not believe utilitarianism is correct as a moral theory, but I can refer to it and apply it. What is important, however, is that I can do these things based on the criteria that I and others use to define utilitarianism. Apart from the criteria that define it, utilitarianism as a false moral theory has no other legal rules and decisions that were morally sound or to follow unsound legal rules and decisions only when doing so is warranted according to correct moral principles —in other words, follow moral principles.

If legal principles cannot be created directly by enactment, perhaps they can be created indirectly. Indeed, indirect creation is precisely the account given by Ronald Dworkin, whose description of legal principles I am employing. For Dworkin, legal principles are not enacted as such. Rather, they arise out of those legal rules and judicial decisions that are directly enacted.

Legal principles —again, legal norms that lack canonical form and have the dimension of weight —are those principles and their weights that “fit” (would justify) a sufficient number of legal rules and decisions and that have a sufficient degree of moral acceptability. Put differently, legal principles are those principles that are the most morally acceptable of the principles that are at or above the requisite threshold of fit.

On Dworkin’s account, legal principles may turn out to be less than morally ideal. That is, legal principles will not be moral principles. For legal principles, unlike moral principles, are constrained by the requirement that they fit the legal rules and decisions, at least to a certain degree. That is why Dworkinian legal principles are not just moral principles consulted by judges. (Dworkin’s argument for legal principles, which relies on the notion of fit, both synchronic and diachronic, actually implies that legislatures and constitutional authors, no less than judges, should be bound by legal principles.)

Over a decade ago, Ken Kress and I wrote an article attacking Dworkin’s account of legal principles. The article was long and complex, and I shall give only a very abbreviated version of it here. The nub of the argument, however, was that (1) the moral acceptability axis would dictate whatever threshold of “fit” correct moral principles will satisfy and thus make legal principles identical to moral ones, and (2) Dworkinian legal principles, if not identical to moral principles, would be quite unattractive norms by which to be governed.

With respect to the first point, suppose a jurisdiction has a number of legal rules and judicial decisions on the books that are morally infelicitous or even iniquitous. Moral principles would tell us