Chapter 1

Morality, Tolerance, and Law

What rights do we have and how do we know that we have them? As the idea of universal human rights gains momentum in the post–cold war era, interest in this question has intensified both for citizens who would claim them and jurists who would define them. Central issues of public policy hinge openly on questions of rights and morality. Should the government subsidize stem cell research, permit same sex marriage, or intervene in foreign countries to promote democracy? None of these issues can be resolved without reference to some idea of rights or why we have them. Indeed, these questions insinuate themselves into public discourse with great intensity. For example, there is the perception, if not the reality, that the electorates' attitudes about values played a nontrivial role in the most recent presidential election. Yet far from providing common ground, the introduction of values into our rights discourse appears to highlight, if not intensify, divisions over the moral foundations of American constitutionalism. One need look no further than debates over gay marriage or the rights of people in persistent vegetative states to live or die for evidence of these divisions. Anyone attempting to divine the moral foundation of rights clearly has his work cut out for him. Yet it is a process worth pursuing. Determining the correct repository of law affects what people can say and whether they can practice their faith, love who they please, or even die when they choose. Everyone has a stake in knowing the boundaries of his or her autonomy.

In this book, I attempt to identify those boundaries. While the focus of my concern is the nature, source, and authority of those rights within the United States, much of my discussion will address conceptual aspects of law, obligation, and morality that could apply in

many different contexts. I examine American law because it is the jurisdiction I know best. I do not, however, aim to offer a comprehensive doctrinal account of American constitutionalism. Anyone looking for a case-by-case analysis of the corpus of constitutional law explaining why *Bakke* was rightly or wrongly decided will be disappointed. While I do consider some of these doctrines in the latter part of the book, it is only to illustrate my larger purpose—that is, to offer an alternative way to think about the moral content of legal interpretation and the role of morality in understanding our legal rights.

Described in its most ambitious terms, this book seeks to show the moral momentum of American law, and indeed why law must have such momentum, whatever direction it might take. To elucidate this claim, I locate and describe what I take to be the moral foundations of law in America. In doing this I make three important claims. The first is that tolerance, not equality, is the sovereign virtue of law. The process of constitutional adjudication raises certain issues about the meaning and justification of force in a community that parallels the attempt by political theorists to define the meaning and parameters of tolerance. Both are methods to accommodate differences that, considered together, help explain the breadth and purpose of a rule, and hence how to treat others. This is true in liberal and illiberal communities alike. I argue, however, that attempting to understand what the law is—the general goal of constitutional theory—is related to the question of what form of tolerance, if any, a community embraces.

My second claim is that autonomy in American law is valued not to preserve neutrality between different ways of life, but rather, because it is part of the community's understanding of well-being. The decision of a community to pursue liberal, instead of conservative or progressive, ends is not neutral and treats people equally only in terms of principles that are themselves contested. Hence, the justification for using the law to promote personal autonomy must derive from a more fundamental idea of human excellence. I argue that the principles of liberalism that justify force in America emerge from a perfectionist political morality that sees personal autonomy as an element of human excellence that it is the purpose of the law to protect and promote.

My third claim is that this liberal idea of well-being emerges not from public reason or political consensus but rather from the intersubjective understandings in the community that liberal tolerance is

the correct way to relate to one another. The latter meanings differ from consensus in that, like grammar, they constitute a practice and do not belong to any one person. This means that the content of this political morality is found in constitutive meanings extant across the community, not just in legal precedent or posited law. This will require that a judge examine more than simply past state action or legal precedent; he or she must look to all the social phenomena that constitute the understandings of what is the meaning and scope of law that ought to be in that community.

Inquiry into the nature, source, and moral authority of law was stuck in an intellectual cul-de-sac until H. L. A. Hart, Ronald Dworkin and John Rawls resuscitated legal theory by clarifying the essential characteristics of a legal obligation. While their differences are far from settled, this book will find its most congenial reception among those who believe that Dworkin's argument won the day. His idea of legal integrity, that law must incorporate a coherent justification of the state's coercive power in order to generate any obligation, legal or otherwise, is the starting point of my book. Nevertheless, many embarrassing questions remain unanswered by Dworkin's model. Perhaps the most awkward is why no constitutional theory from Robert Bork's or Antonin Scalia's originalism to Mark Tushnet's postmodernism, or even Dworkin's own rights theory, seem to justify or fit with the way judges actually decide cases. This book examines two lines of American jurisprudence relating to free speech and privacy to illustrate this awkward situation. I then offer a new interpretive model of law justified by a political theory of tolerance, or the ability to put up with differences.

Although I stand on the shoulders of Rawls and Dworkin, my theory challenges several core elements of law as integrity and political liberalism. First, I argue that tolerance, not equality, is law's sovereign virtue. My interest is not whether law would be better in some normative sense if it advanced (or impeded) some idea of tolerance. Rather, it is whether the interpretation of law is conceptually related to tolerance in any form. Whether one thinks any form of tolerance is intrinsically good, I aim to show why the process of interpretation that so vexes constitutional theorists draws on similar questions about the meaning and parameters of tolerance.

My second challenge concerns the interpretive foundation of justice. I contend that an interpretive idea of law, what Dworkin calls

"law as integrity," requires an interpretive idea of justice, what I call "justice as integrity." This idea requires the justification of force to be interpreted from the common meanings in a community that defines its appropriate ends. Even liberal societies that support autonomy and toleration do so, I argue, because of shared perceptions of human nature that see these values as a part of human excellence. These shared meanings are not the conventions that Dworkin refutes, but rather the intersubjective meanings that belong to no one and, hence, are not the product of agreement or negotiation.

My third core challenge is to the ideas of liberal neutrality. I show why judges interpreting these shared meanings in America may support personal autonomy not to be neutral between different ways of life, but because autonomy is seen to be part of the community's shared idea of the good life. An interpretive idea of justice distresses some liberals because they fear that a morality derived from shared social meanings precludes anyone from understanding, let alone criticizing, a different community's practices. This might force us to accept all sorts of atrocities as simply another conception of justice. It might also make our own conception of justice hopelessly subjective and indeterminate. I will take up this issue and attempt to show that interpretations of justice can produce correct answers that are as objectively true as a description of the world as it really is, and indeed as anything can be. Moreover, I show why deriving justice from shared meanings does not prevent anyone from understanding or judging the moral practices of any community.

My next step is to apply my model to the law regulating offensive speech and obscenity and the right to silence, contraception, abortion, and sexual orientation. I then attempt to show why liberal neutrality cannot be the moral foundation of American law. There are too many examples where the law takes decidedly nonneutral moral positions about the way people ought to live their lives. Using justice as integrity, I attempt to show that American law embraces the liberal value of autonomy not in the name of equality or neutrality but rather in the name of community. The liberalism that justifies law in America does not derive from moral individualism but rather from a perfectionist understanding that autonomy makes up some part of human excellence. The law implements this idea of the good life by promoting institutions that enable personal autonomy.

American law has not always promoted this value for everyone equally. Through slavery, sexism, and the regulation of private

behavior, we see how American law gradually expanded the ideas of *who* is capable of rational discourse and *what* activities incorporate the exercise of reasoned autonomy. We also see how the law imposes this autonomous capacity on individuals as the price of citizenship, even if they belong to groups that deny the value of reason or autonomy.

The expansion of rights in America, I argue, can be traced to the root norm of tolerance. Along with the perfectionist commitment toward autonomy, tolerance requires that everyone capable of autonomous reason be entitled to participate in those institutions that promote it. By institutions I mean anything from the U.S. Army and the Boy Scouts to social practices such as friendship or marriage. By integrating these different elements of law, morality, and interpretation, I hope to explain why we have the law that we do. While I depart considerably from Dworkin's political and epistemological idea of justice, I do think his legal and constitutional theory best explains how to understand the scope and existence of our rights. This book is not principally about Dworkin, and my purpose is not to improve his theory. Ultimately, however, I suggest that my model makes his overall theory of integrity more viable.

Understanding the moral foundations of American constitutionalism requires one to consider the points at which legal, constitutional, and political theory converge. Legal theory purports to explain what is the thing we call law; constitutional theory aims to identify the sources of authority for our law; and political theory hopes to tell us whether obedience to that law is justified. In response to the first statement, I will argue that the best understanding of law is one in which insiders, that is to say judges and other officials, feel compelled to justify their coercive powers.

I do not argue that rules must *actually* be justified according to some correct moral ideal in order to be law. Those interpreting the law, however, must *believe* it to be legitimate. The constitutional theory of adjudication will necessarily include some justification of force and the trajectory of interpretation that will be affected by whatever idea of legitimacy judges do identify as the moral basis of law. In this respect, my legal theory will be compatible with the rights theory of Lon Fuller as well as the inclusive legal positivism of Jules Coleman and H. L. A. Hart. Inclusive legal positivism requires only that those officials interpreting the law sincerely believe that the law is justified, not that it actually be justified according to some correct morality. Rights theorists such as Dworkin believe that the law must actually be

justified. This is an important difference, but in practice, Dworkin's idiosyncratic idea of law's moral force reduces the differences between them for the purposes of my argument.

My constitutional theory distinguishes my legal theory from natural law by looking for the source of law's morality and meaning in the intersubjective or constitutive meanings of a community. These meanings are distinct from explicit conventions in the sense that they go deeper than conscious agreements about the proper way to behave, like conventions of courtesy. These intersubjective beliefs are the deeper meanings that help constitute a person's understanding of the world, and hence make shared conventions possible. Without shared constitutive meanings about what democracy means, it would be impossible, for example, to disagree about whether the Supreme Court should have permitted Florida to conduct a recount of the votes in the 2000 presidential election or the parents of Terry Shiavo to reinsert her feeding tube. Without those shared meanings, no one would understand what the other side was talking about.

It is important not to mistake constitutive meanings for some sort of junior or inferior form of conventions that are simply weaker because they are subconscious, implicit, or inferred from different social practices. While it is true that conventions are the product of conscious agreements, this does not make them more real or less ambiguous than constitutive meanings. The corpus of contract law is a testament to the potential ambiguity of explicit agreements. One can disobey a convention, as when I use my salad fork to eat my entrée or drive on the left-hand side of the road. To fail to follow a constitutive meaning, however, is to fail to do the thing the meaning constitutes, not simply to disobey it. If I speak in German or English, it would be incorrect to say that I am violating the rules of the French language. I am simply not speaking French at all. While the French government can legislate conventions about which side of the road to travel on, and even the legal consequences of speaking English, it cannot legislate the constitutive meanings of the French language, notwithstanding the attempts of the French Academy to do so. This is because constitutive meanings belong to everyone who understands the meanings that constitute French and not to any single person or institution. Those meanings can evolve, but only if those who share the meanings understand them to do so, not simply because some authority wills it. Despite its foundation in constitutive understandings,

the French language not only exists but it can be clearly identified. This view of the constitutive source of law's justification forms the basis for this book's title. Like Dworkin, I believe that the moral principles justifying law must be coherent and that the principles themselves derive from the way our community *actually* justifies law. Unlike Dworkin, however, I reject the notion that we can draw some sort of artificial line between law's institutional morality and the deeper conceptions of justice on which it is based.

Judges can interpret justice with integrity in the same way they approach legal integrity, although justice includes sources beyond law itself. This entails looking beyond past official justifications of force, such as precedent and legislation, to interpret the wider social meanings that animate how officials come to understand what they should be doing with legal integrity in the first place. Indeed, without looking to these wider meanings, we cannot understand why legal integrity is attractive. The sense of fairness integrity represents cannot come from legal integrity itself or the moral principle would be completely circular. Judges look to this wider context when interpreting moral principles anyway because it is part of speaking a language. Words only have reference relative to other words, which are in turn related to common understandings about those words. In the same way, institutional moral principles are themselves embedded in a wider set of "noninstitutional" moral and social principles.

Liberal thinkers are slow to embrace justice as integrity because of their concern about ethical relativism. This is a legitimate concern, albeit one that can be addressed. Moreover, to the extent this is really a concern, I will show why legal integrity suffers whatever fate awaits justice as integrity. Dworkin's unconventional idea of what legal morality is, and the equality that he says is our moral integrity, actually reduces, in the end, to nothing more than the social facts that Hart thought were the basis of law, with or without any moral content. Paradoxically, Dworkin puts the fusion of law and morality at the center of his legal theory and then offers a normatively thin idea of morality. This causes his justification for law to lapse into the relativism that motivated his critique of positivism. His idea of morality makes his theory of adjudication, like those of the strict originalists and the critical legalists, rest on an what looks like a skeptical idea of morality. The very idea of a "Dworkinian moral skepticism" seems oxymoronic, yet an examination of his process-based response to the

defects of utilitarianism suggests that his notion of institutional morality rests on a normatively empty foundation.

Paradoxically, it is Dworkin's fear of ethical relativism that leads him to such a constricted idea of morality. This fear is itself rooted in logical positivism, which is an odd epistemology for anyone to hold while advocating institutional morality or legal integrity. Those elements of his legal and constitutional theory rest more on a hermeneutic conception of identity and social institutions. Yet he eschews that foundation for his moral theory even though his concept of law purports to connect law and morality. Attempting to fuse two such metaphysically distinct phenomena causes all sorts of difficulties.

A second reason for using such a constricted morality in such a morally expansive theory of adjudication rests in his idea of equality as law's sovereign; this is really a vision of neutrality as law's animating principle. I take issue with this idea in two important ways. First, I argue that neutrality, as a liberal idea of justice, is not only unobtainable but not worth obtaining. Liberalism rests too heavily on an idea that it need not take positions about the proper ends of life. While it is true that a liberal government will seek to protect personal autonomy as much as possible, this goal is not motivated by neutrality between different ideas of the good life, but rather on the principle that autonomy is part of the good life and advances human excellence and well-being.

Liberalism cannot be neutral about itself, but it must be, so long as it owes its ultimate justification to neutrality. So I attempt to ground the liberalism that Dworkin says justifies our law in the perfectionist principle that personal autonomy is part of the idea of human excellence. Because leading an autonomous life is part of human flourishing, perfectionism stands for the principle that the government ought, so far as possible, to legislate for the conditions that make this state of well-being possible. Perfectionist liberalism differs from political liberalism, and other defenses of liberalism based on moral individualism, in the sense that it recognizes the need for social practices and institutions to achieve the conditions in which autonomy is possible. Hence, it will differ from other defenses of liberalism in recognizing an explicit place for positive rights and obligations to preserve those meanings. So for example, perfectionist liberalism will take a more aggressive position regarding the power of government to inculcate the value of tolerance through public education as part of the requirements of citizenship, even while protect-

ing the right of many groups to be intolerant. This idea of liberalism reconciles the American commitment to what are often perceived as inconsistent traditions of conservative communitarian practices and liberal tolerance for difference.

The structure of my argument is as follows. In chapter 2, I consider three models of constitutional rights adjudication. These models will very roughly correspond to originalism, feminist/critical legalism, and Dworkin's model of rights interpretation. The first two models will be ideal types. I am interested in identifying the broad principles on which these models are based, not in a comprehensive account of each theorist professing either approach. Moreover, I will begin with the admission that I find both of these approaches to be inferior to Dworkin's model of law and interpretation. So I will give much less attention to these approaches than a full-fledged account or defense of them deserves. Although readers sympathetic to these models will undoubtedly believe that I am giving them short shrift, I hope they will keep in mind that the purpose of this book is not to convince them to take Dworkin's idea of rights seriously. Anyone not already convinced of this is unlikely to be persuaded by anything I have to say.

My argument is directed at those who might once have been sympathetic to some aspect of Dworkin's political or constitutional theory, but now find too many elements of it difficult to reconcile with their idea of liberalism or judicial practice. Although my definition of morality and its content are anathema to Dworkin, they actually make his project more viable. Nevertheless, the success of my project should not be judged on how well I defend Dworkin against so-called strict constructionists or postmodernist conceptions of law. The measure of success should rest on the degree to which I offer an attractive justification of law that could be understood to fit judicial practice. It would take a much different book to show that my theory actually does fit judicial practice. Such an argument would require an extensive doctinal analysis of major principles of law. My book is offered as a prolegomena to such an empirical study. Describing my theory of integrity leaves room to examine only two narrow lines of constitutional law very briefly. I engage in this admittedly limited exercise not to prove what judicial practice *really* is in America, as Hercules must do, but rather to illustrate how my theory would affect our understanding of what the law is. I believe that my explanation is more accurate and

comprehensive than Hercules's story of American law. For the time being, I offer the doctrinal discussion to illustrate how my theory would work in practice and affect our understanding of legal integrity.

After finding Dworkin's model preferable to the other two approaches, I take up in chapter 3 aspects of the elements of Dworkin's theories that are most problematic. In this chapter, I show why his political theory is not only unattractive but even fails to meet the fundamental requirements of his own account of law.

I will show that far from taking rights seriously, Dworkin's political theory makes even a prima facie obligation to obey the law difficult, if not impossible. In chapter 4, I consider the interpretive problems that cause his political and constitutional theory to take such awkward and ultimately untenable positions. In particular, I argue that his interpretive model has a far too constricted source for law's institutional morality that gives his conception of morality its postmodernist hue. I argue that the rather tortured foundation of morality Dworkin has developed derives from a noninterpretive idea of justice. In chapter 4, I also argue that an interpretive idea of justice, closer to Michael Walzer's model, would fit Dworkin's legal and political theory better than his own focus on precedent as a source of morality. I also show why his concerns about moral relativism are really rooted in a positivist idea of morality that cannot withstand otherwise flawed communitarian criticisms, or a postmodernist vision of morality that denies the possibility of any moral judgments.

In chapter 5, I consider several lines of free speech and privacy jurisprudence to show how well Dworkin's model, or the other two models raised in the first chapter, explain judicial practice. In this chapter, I show a strangely parallel, yet apparently incompatible, commitment to conservative communitarianism and moral individualism. Both of these ideas of justice claim universality and are incompatible in basic ways. Their dual presence must somehow be reconciled, or else legal realism would have to be given whatever credit it was due as the best description of judicial practice. I reconcile these two ideals by showing that American law promoted neither conservative communitarianism nor moral individualism. Rather, it promoted the conservation of social practices and institutions that promoted personal autonomy not because it preserved neutrality, which it did not, but because the courts saw this autonomy as a basic element of human well-being.

In the sixth and final chapter, I seek to explain why American law converged on this idea of personal autonomy and liberal tolerance. I argue that it took this route because tolerance, not equality or neutrality, is the sovereign virtue. Indeed, I argue, that some idea of tolerance must be an aspect in any rule-governed system because tolerance makes possible the reason that is a requirement for applying rules in the first place. Tolerance promotes the idea of putting up with differences that one does not necessarily like. While liberalism promotes a certain form of tolerance, other political moralities practice different forms of tolerance that would make possible the accommodation of difference that makes reason, and hence the rule of law, possible. Without this element, reason would not be possible, and without reason, the application of rules to specific circumstances, that is to say the rule of law, would not be possible.