Ch. 3 Dworkin's New Philosophy

Introduction

One of the most promising attempts to answer the doctrinal question of international law is Ronald Dworkin's posthumously published "New Philosophy". At the core of the new philosophy is the idea that states' duties to comply with law flow from a a duty to improve the legitimacy of the state system. States can do this, Dworkin believes, by contributing to the mitigation of a specific set of problems that arise in that system. The new philosophy's attention to the problems that face the actual practice of law — what I will call *pathologies* — put it in a position to capture the concept of authority implicit in that practice. However, ambiguities in Dowrkin's presentation of the new philosophy open it up to multiple interpretations, some of which better justify the concept of authority in practice than others.

This chapter will be a typology of the possible interpretations of Dworkin's philosophy, with some attention paid to how well each interpretation reflects and justified the characteristics of authority implicit in practice. Because the first presentation of this view was only published very recently — those of us thinking about it have been working from lecture notes for years now — and because it no longer has a living representative, relatively little work has been done towards a disambiguation of the theory or an investigation into any one of the available interpretations. One exception, Matthias Kumm, has offered an interpretation of the new philosophy along familiar natural law lines of thought. While his interpretation of Dworkin is surely faithful, it is not necessarily the most charitable, especially if one is interested in justifying going practice. Drawing on on Dworkin's larger body of work, specifically his contributions in *Law's Empire*, I advance a more positivistic interpretation of the new philosophy that is both faithful to his words and illuminating for the current project. While it would be a stretch to say that the view I ultimately endorse in Ch. 4 is a version of the new philosophy, I will certainly draw heavily on what is said here.

States and the duty to be legitimate

Dworkin begins his presentation of the new philosophy with the following passage:

> "Most conventional international law treatises begin by describing the traditional subjects of international law. The world is divided, in the conventional story, into sovereign states, each of which is in principle immune from interference by other states. None of these states is permitted to impose rulers on any of the others, or to dictate its religion or laws or policies. The sovereign power of each of these states can be limited only by the voluntary acts of its own institutions."[1]

Simply, the world is "balkanized" into a decentralized "system" of states. These political bodies play a governance role in the lives of individuals. They act and are treated by subjects and by other states as if they were endowed with the right to use force and coercion to control the

[1] Dworkin 15-16

behavior of specific groups of people under their power, generally referred to as subjects or citizens. Dworkin continues:

> "In and after the seventeenth century, political philosophers, statesmen, religious leaders, and revolutionaries asked fresh questions about political power. The old assumption that hereditary monarchs have an absolute right to govern, at least in the temporal sphere, was gradually replaced by a starkly different assumption: that coercive political power is consistent with the dignity of citizens only if it can be justified not just in pedigree but in substance—in the way it is exercised—as well. Competing theories of legitimacy were constructed and debated; these finally settled into theories about the best conceptions of democracy and of the rights of individual citizens in a democracy. But all these theories were confined to arrangements within sovereign states. John Rawls offered his influential theory of justice as limited to the basic structure of an individual state, for example."[2]

These themes will be familiar to anyone who has studied political theory in the last century, but they are worth remembering. In simplest terms, states rule. They use coercive force to constrain and manage the lives of the individuals who live under them. But implicit in state rule is the assertion that this rule is not merely coercion, it is governance. In a recent article, Daniel Bodansky offers a helpful description of governance when he writes that "Although definitions vary, the essence of governance involves making decisions for a collective – decisions that not merely affect others indirectly, but are directed at them and are intended, in some way, to constrain their behavior."[3] Bodansky continues on, contrasting legitimate governance with mere compulsion because, unlike compulsion, legitimate governance "has a normative quality. A legitimate institution has a right to rule; it is 'morally justified in attempting to govern'". [4] By purporting to govern, in Bodansky's sense, states performatively assert the legitimacy of their claim to the right to rule. Furthermore, and still as a matter of description, states and their citizens generally recognize the legitimacy of each state's claim to these rights. Though legitimacy can be (and is) contested, states and other international actors generally respect these widely accepted norms. But the idea in Dworkin's and Bodanski's remarks is that while states may presume to have the right to rule, if they fail to meet certain normative criteria for legitimate rule, their presumption is false.

Dworkin takes this a step further. Not only does the state's claim to the right to rule depend on the satisfaction of certain as-yet-unspecified standards for legitimacy, he claims that states have a duty to be legitimate. In no uncertain terms, he writes "Coercive government (I include not just traditional 'sovereign' states but also any institution or organization claiming coercive authority) has a standing duty to improve its own legitimacy."[5] States, we might say, ought to be, or have a duty to be, or are obliged to be legitimate. Based on the absence of any justification for this claim, he apparently takes the reasons for this to be self-evident. Fortunately for Dworkin, it is a fairly agreeable point.

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[2] Dworkin 16
[3] Bodansky, p. 5
[4] Bodansky, p. 7, quoting Buchanan 2010, "The legitimacy of International Law"
[5] Dworkin 19

The Duty to Be Legitimate Implies the Duty to Mitigate

So states have a duty to be legitimate. More precisely, when states claim the right to rule, they have a duty to meet the criteria necessary to be the genuine bearers of their presumed right. But what must states do to meet fulfill that duty? Dworkin's answer is in the full quote that continues from the fragment above:

> "Coercive government … has a standing duty to improve its own legitimacy. Each traditional state therefore has a duty to pursue available means to mitigate the failures and risks of the sovereign-state system. That duty of mitigation provides the most general structural principle and interpretive background of international law."[6]

In order to be legitimate, states must do what they can to improve the legitimacy of the state system — the decentralized system of mostly autonomous political entities that generally defines the structure of modern global politics. He refers to this duty throughout the paper as the "duty to mitigate". But why does the justifiability of a claim's right to rule depend on the legitimacy of the state system? Dworkin offers answers to this question, but they are not clearly consistent. At one point, he writes

> "…the modern question—what justifies coercive political power?—arises not just within each of the sovereign states who are members of the Westphalian system but also about the system itself: that is, about each state's decision to respect the principles of that system. For those principles are not independent of but are actually part of the coercive system each of those states imposes on its citizens. It follows that the general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system. If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive government, then it has a political obligation to do what it can in that direction."[7]

But elsewhere, he writes:

> "But since each of those states derives its moral title to govern a particular territory from the arrangements that make up that international system, it therefore has the further, independent reason … for concern that the system on which its legitimacy depends in that more fundamental way is not itself illegitimate."

In the first quote, he seems to be claiming that states have the same duty *to their citizens* to make the state system legitimate, because international legal rules, like domestic legal rules, are a form of coercive governance and therefore must be held to moral standards of legitimacy. Focusing on this quote leads one to believe that Dworkin is assuming a theory of legitimacy based in the rights of citizens — an "endogenous" view of sovereignty. This is decidedly *not* the view that Dworkin encourages in the second quote. There, he claims that the legitimacy of the state

[6] Dworkin 19
[7] Dworkin 16-17

"depends" on the legitimacy of the state system as if the state system itself were the source of states' rights — an "exogenous" view of sovereignty. These ideas receive no development further than these quotes, and whether they are identical, compatible, over-determining, or simply in conflict is left unsettled.

None of this answers our original question: What must states do to uphold and improve the legitimacy of the state system? Well, what could threaten the legitimacy of the state system in the first place? To answer, Dworkin offers a discussion of

> "the different ways in which individual states fail their responsibilities to their own citizens when they collectively accept the benefits and burdens of the pure unrestricted sovereignty that the Westphalian system gives them"[8]

Later, he makes this further helpful remark:

> "These are all ways in which the unchecked state sovereignty system impairs or threatens the legitimacy of the individual states that make up the system. But since each of those states derives its moral title to govern a particular territory from the arrangements that make up that international system, it therefore has the further, independent reason…for concern that the system on which its legitimacy depends in that more fundamental way is not itself illegitimate."[9]

What Dworkin proposes in these comments is that there is a specific class of morally salient problems, specific to the "unchecked state sovereignty system", that threaten the legitimacy of that system and so the legitimacy of states. In a growing body of literature, these problems are variably referred to as "standard threats" by Charles Beitz, "justice-sensitive negative externalities" by Matthias Kumm, and "pathologies" by Aaron James.[10]

What are pathologies? Dworkin gives very little guidance on this question, but does offer four helpful examples of the kinds of problems he has in mind. To paraphrase, these pathologies are as follows:

1) Because states in the modern Westphalian state system are allowed a great amount of autonomy in deciding the structure of domestic governance, citizens of states are exposed to the risk of tyranny and oppression by their own government.
2) Because states in the modern Westphalian system are permitted to autonomously govern themselves, these permissions serve as institutional barriers to justified intervention and aid when people in foreign countries are in need.
3) Because political power is decentralized in the Westphalian system, otherwise autonomous states must coordinate with one another to address cross-border issues. But such collective action can be difficult in prisoner's dilemma and stag-hunt type situations.
4) Because sates in the modern Westphalian system are allowed autonomy in determining the structure of domestic politics, citizens are at risk of not being afforded their right to political representation.

[8] Dworkin 17
[9] Dworkin 19
[10] Beitz, Kumm, James

Certainly these are not the only pathologies of the state system, but are a sampling of paradigmatic examples. But states, concerned to do their duty to uphold and improve the legitimacy of the state system, will need to know how to find others. To do that, we will need to provide a more general account of pathologies.

Bad Luck, Bad Apples, and Pathologies

If nothing else, pathologies are risks and harms that agents are forced to bear while living under the state system. We can roughly divide risks and burdens, or hardships, within the state system into three categories: Bad luck, bad apples, and pathologies. While these three categories are almost certainly not exhaustive, they will be helpful explicating the kinds of problems that really pose a threat to the legitimacy of the state system.

Bad luck hardships are the costs and risks to which agents are exposed that are not caused by human activity. The harsh but regular seasonal weather that washes away a farmer's crops is an example of a bad luck hardship, as are being struck by lightning and state-wide water shortages in desert countries. While an agent may experience any of these hardships while living within the state system, it would be a mistake to think that these count against its legitimacy. Not only are natural accidents and acts of God problems for any political order, they cannot be causally linked, however indirectly, to the state system itself. These kinds of problems, therefore, do not ground reasonable objections against the legitimate of the state system.

Bad apple hardships are costs and risks imposed on agents by other agents who abuse or otherwise misuse power. These costs and risks are not necessary or inherent problems with any social practice per se, though they frequently occur within a social context. Instead, they are examples of individuals taking advantage of an otherwise functional system, or making particular and irresponsible decisions within that system. An injury caused by a drunk driver is a bad apple hardship, where the driver has failed to fulfill his obligation to drive safely. In the modern geopolitical context, tyrannical leaders and rogue states are likely the clearest examples of bad apples, and the risks and harms they impose on agents the clearest examples of bad apple hardships. These bad apples ignore or knowingly violate the obligations of responsible statecraft. Some plausible examples are the deaths during the 2013-14 Maidan protests in Ukraine and the misappropriation of funds during Berlusconi's administration, which are caused less by the structure of the state system, and more by the objectionable individual decisions that agents make within that system.

Pathologies, like those listed by Dworkin, are evident and foreseeable burdens and risks imposed on agents by the social practice, not because of bad luck or callous rulers, but because of the very structure of practice itself. Institutionalized racism in standardized tests in public schools is an example of a pathology of the California education system. Exams, designed to fairly assess a student's comprehension of the subject matter relative to her peers, unfairly skew scores in favor of English-speaking white students by using examples and language that those students are more familiar with than their non-white ESL peers, though those examples and words are arbitrarily chosen with respect to the subject itself. Because these tests are linked to college acceptance, and so to financial success, these exams perpetuate racialized social stratification, which is a reasonably objectionable and wrong. It would be a mistake, I think, to assume that the designers of the exams, or the teachers who give them, are themselves actively trying to insert racial biases into standardized tests. This need not be the case. Rather, the

perpetuation of racialized social strata might just be an unintended byproduct of this style of assessment, and of linking these assessments so strongly with personal success. It is, in a word, a pathology of current forms of standardized testing.

What are the pathologies of the state system?

With this better understanding of pathologies in hand, we are in a better position not only to understand Dworkin's list, but also to contribute to it. Unsurprisingly, the state system is prone to a number of internal pathologies. Many are the direct consequences of decentralized global governance in the post-war and modern eras. Others are indirect, but no less implicit in such a governance regime. I here identify a few pathologies, though there are almost certainly more.

Risk of Domestic Tyranny: Because states have the right to pass and enforce laws internally, and other states are prohibited from interfering, individuals are left unprotected from domestic inequality, oppression, persecution, ethnic cleansing, genocide, and any number of other horrible things a government can do to its own citizens. Individuals are not protected against the tyranny of their own state.

Environmental Coordination Problems: Because states are granted exclusive control of a territory, many of the environmental problems with which we are currently faced demand coordination across borders. However, such large scale and costly cooperation is hard-won, slowly adopted, and easily undermined in a system of sovereign states at the potential risk of global ruin. Importantly, this is not simply the product of a few bad apples – a selfishly obdurate developed state or an insatiable developing state with an appetite for coal, say – but a consequence of any attempt to get any group of complex but otherwise autonomous bodies to do the same thing in a coordinated way at personal cost.

Economic Coordination Problems: Similarly, as domestic economies are increasingly exposed to international markets, maintained economic stability has become a matter of coordinating domestic policy. Because economic decision-making and governance is decentralized, states are effectively stuck with the problem of other minds and the need to coordinate with those others nevertheless.

Risk of Unfair Distribution: Because states control fiscal and economic policies, and because different policy regimes can have wildly different consequences, the state system is consistent with severe socio-economic inequality between states.

Reduced Security Assurance: Because states are mostly independent of one another, they are not always, or ever, certain about one another's military capabilities and ambitions. The system provides no assurance, in whatever form, that states will not aggress against one another. A state is only as safe as its own diplomats and military can keep it, and this uncertainty can lead to mutually undesired escalation and vast overinvestment in security.

Exploitation Risk: Similarly, the state system does not protect weak and poor states from exploitation by strong and wealthy states. A small state, whose citizens' livelihoods depend on trade with a stronger state, is at the mercy of the stronger for fair terms and compliance.

Lack of Representation: Finally, by granting states the right to exclude external governance regimes, the state system reduces the political power of many people, now categorized as "non-citizens" or "aliens", whose lives are deeply effected by a country's policies. American presidential elections, for example, have vast implications for the lives of

individuals around the world, but the American president is only elected by and so accountable to the American citizenry.

I list these few as plausible examples of pathologies of the state system. Note that none is merely a matter of bad luck or the ill will of a bad apple. These morally salient risks and harms are evident, soluble by available means, and emerge as unfortunate byproducts of the state system even when that system is working precisely as it is supposed to under conditions of impeccable luck and perfect compliance.[11]

Pathologies are the moral problems that plague the state system and undermine its legitimacy. Only when these pathologies have been addressed can the state system be rightly called legitimate, and only in the context of a legitimate state system can states justifiably claim that their exercise of power is more than mere coercion, and is true governance. So the state obligation to improve its own legitimacy implies an obligation to improve the legitimacy of the state system, and that, in turn, implies an obligation to address or "mitigate" the pathologies of the state system. Thus Dworkin refers to this as the "duty of mitigation".[12]

So far, the view seems clear enough, but at least one question strikes me as unresolved. Why do pathologies undermine the legitimacy of the state system? For some, as it seems to have been for Dworkin, the answer may seem self-evident: most likely something to do with the violation of the basic rights of persons. But as we saw in the cases of bad apples, not all rights violations can be appropriately laid at the door of the state system. There is something special about *these* problems and their relationship to the state system that makes them so detrimental to its legitimacy. Dworkin himself does not interrogate these points, but I believe that by doing so we might be able to get some guidance about the nature of state obligation to comply with the law. But that would be getting ahead of ourselves, so I will merely highlight this point when it arises, and remind my reader of it when we are in a better position to understand the significance of this puzzle.

International Law, Compliance, and the Principle of Salience

If what Dworkin has said is correct, then states have a duty to address the pathologies of the state system. What remains to be shown, then, is how this duty translates into a duty to comply with the law. He writes,

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[11] In conversation, Nicholas Onuf once tried to sum up my conception of pathology as a sort of dysfunction, when, to paraphrase his words, "institutional constraints make the mutual satisfaction of interests impossible." He was correct to invoke the idea of function, but the matter, I think, is more complicated than he made it seem. First, it seems to me to be a mistake to think that the function of the state system is the mutual satisfaction of state interests. As we have seen, I take the function of the state system to be the realization of more specific values (peace, prosperity, and pluralism). Second, I am hesitant to adopt the language of dysfunction, which, to my mind, invokes the idea of a system that breaks down. A dysfunctional car does not run. But the idea of pathology is not so dramatic, and includes references to optimality as well as mere function. A pathological system may be one that merely imposes unnecessary risks, without being wholly dysfunctional. This is one of the important points about pathologies: they count as meaningful objections to a practice because they can be the products of otherwise perfect functioning.

[12] Dworkin 19

> "That duty of mitigation provides the most general structural principle and interpretive background of international law. But as it stands, it is not sufficiently determinative. In many circumstances, a number of very different regimes of international law would each serve to improve the legitimacy of the international system, were it enacted and enforced, and states may reasonably disagree about which would be best."[13]

Even with the duty of mitigation in hand, we are stuck with a puzzle about the obligation to comply with the law. He seems to take it for granted that some legal system or other will be the best or perhaps only way for states to address the pathologies of the state system. But even granting that the satisfactory resolution of pathologies demands a legal system, Dworkin worries that multiple versions of a given international legal system will be equally well suited to the task. Given that international law can be informally legislated, as in the cases of customary and administrative law, so that we cannot depend on a crystal clear and procedural secondary rule of recognition, how are we to know which version of international law is *the* law?

Dworkin's answer is what he calls the "Principle of Salience":

> "If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole."[14]

The basic idea of salience is that if, within a population or society, there is an identifiable and predominant set of rules governing social interactions, participants have a prima facie duty to follow those rules too. But Dworkin's view is more than just, "When in Rome, do as the Roman's do." His "proviso" conjoins the relativistic idea of salience and the normatively rich principle of mitigation. States have a prima facie duty to comply with going international legal practice, but only *really* have such a duty if that legal practice mitigates the pathologies of the state system.

Four Ambiguities

There are at least four moments of ambiguity in Dworkin's presentation of the new philosophy, which I formulate into four unanswered questions. First, why do states have a duty to be legitimate? Maybe we can accept the conditional claim that if states want to be the genuine bearers of the right to rule, then they have a duty to be legitimate. It is something else altogether to say that states ought to be legitimate full stop. But this is important, because it is only by explaining why states ought to be legitimate that we can answer the tyrannical rogue state who simply does not care whether it has a right to rule so long as it has the power to do so.

[13] Dworkin 19
[14] Dworkin 19

Second, does the legitimacy of the state depend on the legitimacy of the state system, on domestic legitimating procedures, or both? Traditionally, domestic procedures like democratic elections have been assumed to suffice for state legitimacy. Dworkin's remarks appear to contradict that assumption, or at least to open a door to a more exogenous account of sovereignty. Given the rise of constructivism in international relations theory in recent decades, such a move away from endogeny would be welcome by many, but his apparent hesitation makes it unclear where the new philosophy stands on this question.

Third, why does the emergence of pathologies, and not the other problems of common concern in international politics like bad luck and bad apples, undermine the legitimacy of the state system. This is most instructively divided into two questions. One asks, since pathologies are almost certainly a moral problem for any social institution, what precisely is it about them that undermines legitimacy rather than, say, the general moral goodness of that system? The second asks, what is it about pathologies specifically, rather than all the other kinds of moral problems of common concern like bad apples and bad luck, that undermine the legitimacy of the state system? What is special about them? Without an answer, Dworkin's focus on pathologies seems arbitrary at best.

Fourth and finally, why is compliance with law the best or only way to address pathologies? Even if we grant that states have a duty to be legitimate, and that this duty can only be satisfied by fulfilling a duty to mitigate, why does *that* duty imply that states ought to follow the law? Dworkin's answer is that law is salient, but this seems to punt on the doctrinal question, or to reduce it back to a sociological question, which Dworkin clearly does not want to do.

Natural Law and the New Philosophy

Disambiguating the new philosophy can only be done by answering these questions, but each can be answered in multiple ways which leads to an array of new philosophies. Since the initial circulation of the new philosophy (at least c. 2010), perhaps the most helpful contribution to this process in the literature has been Matthias Kumm's essay "Constitutionalism and the Cosmopolitan State". Here, Kumm offers us an account of not just one but two different disambiguations of the duty to be legitimate. Very much in the same vein as Dworkin, Kumm writes:

> "One of the core purposes of international law is to create and define the conditions under which a sovereign state's claim to legitimate authority is justified. States have a standing duty to help create and sustain such conditions and an international legal system that is equipped to fulfill that function."[15]

But Kumm immediately distinguishes his own view from Dworkin's in an attached footnote when he writes:

> "But whereas Dworkin's account appears to be focused on the ways in which sovereigns are structurally incapable of adequately securing the rights and public

[15] Kumm, 8

> goods for their respective citizens, the argument here grounds cosmopolitan obligations in the fulfillment of duties of justice towards outsiders."[16]

According to Kumm, Dworkin ought to be interpreted as saying that states have an obligation to improve their own legitimacy because only by doing so will individual persons be afforded their basic rights and needs. This seems like a fair interpretation, given Dworkin's explicit concern with the treatment of individuals by their governments in statements like the following:

> "A coercive government is of course illegitimate if it violates the basic human rights of its own citizens. Any state, even one that has so far been just and benign, therefore improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny."[17]

If Kumm is correct, as seems to be sustained by Dworkin's words, Dworkin's view is that individuals are the bearers of a set of natural rights, largely akin to the list we find in the UDHR or the American Bill of Rights. These rights ground correlative duties for the state. Among these duties, or perhaps taking these duties as a whole, is the state duty to be legitimate.

Kumm himself adopts a different, but closely related view about the duty to be legitimate, though it too is ultimately grounded in natural rights. Kumm agrees that pathologies – what he calls justice sensitive negative externalities – are indeed the target of international law's corrective function. But unlike Dworkin, Kumm argues that states have an obligation to comply with international law to solve these problems, rather than solve them independently, because

> "Given the fact of reasonable disagreement between states about how those externalities should be taken into account, any claim by one state to be able to resolve these issues authoritatively and unilaterally amounts to a form of domination."[18]

Rather than the human rights enjoyed by individual persons, Kumm grounds the state's obligation to comply with international law in other states' rights not to be dominated. Kumm offers little argumentation in favor of his claim that states have a standing right against domination, apparently taking the view to be self-evident. For example, he writes:

> "An imperial policy of domination and expansion subverting the political and territorial independence of neighbours is obviously not justified, even when such

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[16] Kumm 8n12

[17] Dworkin 17. The following quote is also helpful: "People around the world believe they have—and they do have—a moral responsibility to help to protect people in other nations from war crimes, genocide, and other violations of human rights. Their government falls short of its duty to help them acquit their moral responsibilities when it accedes to definitions of sovereignty that prevent it from intervening to prevent such crimes or to ameliorate their disastrous effects." (Dworkin 17-18).

[18] Kumm 9

> a policy enjoys widespread democratic support in the aggressor state and that state has a well-structured national constitutional system."[19]

None of this is to say that Kumm's point is not an intuitive one. There does indeed seem to be something wrong with forms of international domination. One of the great virtues of the modern state system is its institutionalized respect for pluralism and diversity. Political power, as we said at the very beginning and as Kumm emphasizes himself, is decentralized. It is distributed in the form of the right to rule to semi-autonomous political bodies associated with a territory and its people, and these bodies are allowed to exercise that right as they will. And as we see, this decentralization has produced cultural diversity, even if the scope of that diversity is bounded by international law. Domination is the antithesis of this blossoming, so we can understand where Kumm is coming from.

More important for current purposes, Kumm's analysis provides us with a second version of the new philosophy, and one that is strictly international. Setting aside whatever rights citizens may bear, and perhaps even the duty to be legitimate, Kumm suggests that states themselves are the bearers of the right not to be dominated. This right, like Dworkin's human rights, correlates with a state's duty of mitigation, since states that are forced to bear the burdens caused by the pathologies of the state system are being dominated either by the state system itself or by the states that are benefitting from it.

Kumm's account also helpfully answers the question why mitigation of pathologies — here pathologies of domination — can only be done through compliance with international law. Kumm argues that when single states take it upon themselves to solve problems of common concern that impact the whole system, such unilateral action itself is a form of domination. It perpetuates the original problems. Only a multilateral regulatory regime like international law could address pathologies without itself being a form of domination, and international law is the only such multilateral regulatory regime currently available. Effectively, compliance with international law is not just the only salient means, it is the *only* means for the mitigation of pathologies.

Natural Law Versions of the New Philosophy and the Authority Characteristics

Both of these disambiguations of the new philosophy are decidedly natural law theories. They hold that the duty to comply with international law is ultimately a moral duty. One holds that states ought to comply with international law because failure to do so would violate the moral rights of human beings; the other because failure amounts to a form of domination that violates the moral rights of states. I have proposed that a view's capacity to justify legal rules with these characteristics can be used to adjudicate its merit relative to competing alternatives. We have already discussed state consent theory's capacity to do so. Do either of these versions of the new philosophy capture the characteristics of legal authority presumed in practice?

The simple answer is no. The more complicated answer is no too, but with reasons attached. Essentially, both of Kumm's interpretations of the new philosophy run afoul of at least the reason-giving condition and the content-independence condition.

The reason-giving condition claim that international law gives states directed reasons for action. The fact that an action would violate international law implies that states owe their

[19] Kumm 18

refraining from that action to one another. The fact that an action is legally required means that states owe their performance to the others. These two version of the new philosophy shine when it comes to explaining why international law is reason giving and why the realization that something is illegal can suffice to end good practical reasoning. For them, legal authority is a kind of moral authority. So long as we agree that agents have reason to be moral, the natural law theorist can explain why agents have reason to comply with law. Easy.

But Kumm cannot explain everything. Looking at practice, we find that when a state violates a treaty, they are presumed to be the appropriate object of accountability seeking behaviors — rebuke, sanction, etc. — by other states. When a state violates customary law, they are presumed accountable to the other participants in that custom, who, in the current context, are other states. Just as importantly, although states are presumed accountable to *some* agents, they are not presumed to be accountable to *all* agents. The citizens of Burundi cannot hold the United States accountable in any meaningful way for how it treats its citizens. *Burundi* might be able to by calling the US out on the floor of the UN for failure to meet its human rights obligations, but not its private citizens. States are presumed to owe their compliance to other states, and only to other states.

In light of this, three problems arise for Kumm's natural law versions of the new philosophy. First, they cannot explain why only states, and not private individuals, have a legal duty to respect human rights. Dworkin himself seem to think that the reason why these legal duties attach to states but not private individuals is that these duties improve state legitimacy by mitigating pathologies, but Kumm's interpretation transmutes that more complicated functional reading into a simple moral reading. Kumm's concerns about domination might avoid this, since the kinds of domination he is concerned about are political forms of conduct that private citizens are not able to engage in. Second, Kumm's natural law interpretations of new philosophy cannot explain why international legal duties are directional. Ultimately, these legal duties are moral duties, but moral duties are not traditionally understood to be directional. My moral duty to refrain from injuring humans is not owed to people. it is just something that is wrong to do, that I ought to refrain from doing, and on. Third, when natural moral duties *are* described as being owed, like some interpretations of kantianism, they are described as being owed to humanity or to God.[20]

Content-independence grounds an even more difficult objection to Kumm's interpretations of the new philosophy. Practice presumes that international law has authority over states and that, all things equal, states ought to comply with international law, even when an individual legal rule is inconsistent with widely accepted moral truths. But Kumm cannot accommodate this. If a legal rule commands that a state violate human rights or engage in forms of domination over other states, perhaps because the original drafters of a treaty failed to anticipate certain the international analog of a trolley case, both of Kumm's interpretations of the new philosophy are forced to conclude that that state does not have a legal obligation to comply. But the presumption in practice is the opposite, as exemplified by strict continued compliance with NAFTA (which, at this point, is hard to see as anything *but* a form of domination).

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[20] One way around this objection would be to adopt a theory of human rights that did not treat them as natural rights in the tradition of Locke and Kant. Charles Beitz offers such a theory, where human rights are justified as associative obligations. Unlike natural duties, associative obligations *do* have the right sort of directionality and specificity as I discuss at greater length at the end of this chatter and in ch. 4. See Beitz, *The Idea of Human Rights.*

One way to avoid this objection available to Kumm is a version of rule utilitarianism. Isolated instances of domination of human rights violations, when demanded by law, are permissible because in general, compliance with international law will result in fewer human rights violations or acts of domination. I do not know whether Kumm himself would accept this route, though I suspect not. Philosophers concerned with the violation of natural rights tend not to be moved by considerations about aggregates, but consider any violations of rights problematic.

An Associative Obligation to Mitigate

There is another way to interpret Dworkin's new philosophy - one that is friendlier to the positivist in ways that make it better able to capture the characteristics of authority implicit in practice while also being (more) consistent with Dworkin's broader contributions to legal scholarship. We have assumed so far, following Kumm, that Dworkin's account of legal authority and the correlative obligation that states have to comply with law is ultimately based in a natural law conception of human rights. On such a view, humans are the bearers of certain moral protections that give others correlative duties including, importantly, the duty to mitigate. This dependence on moral truths like natural rights and duties is what gets Dworkin and Kumm in trouble with content-independence.

But in *Law's Empire*, perhaps his most definitive treatment of the normative case for compliance with the law, Dworkin offers an account of associative obligation as a ground for the authority of law. He describes associative obligations as

> "the 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. These common assumptions about associative responsibilities suggest that political obligation might be counted among them."[21]

The idea, it seems, is that there is a kind of obligation that agents can bear simply because they are members of a social group. For example, as a brother, I owe a certain amount of care and respect to my sister that I do not owe to strangers because of the familial relation that my sister and I share. The example of obligations between siblings is, I think, especially useful because they highlight the non-voluntariness of associative obligations. But it is important also to stress that the family and other so-called natural associations are not the only kinds that create associative obligations. We have obligations to our friends, our neighbors, and the parents of our children's classmates. And none of these are necessarily because we have consented to the (you can only choose your neighbors when *you* are the one moving) or because we have natural duties to be good neighbors (forcing people who live in rural areas to drive great lengths to lend a cup

[21] Dworkin, *LE*, 195-6

of sugar).[22] Rather, we bear these obligations because we find ourselves already related to others in these relevant ways, and that relation alone suffices to bind us to certain standards of conduct. So instead of interpreting Dworkin's new philosophy as being based either in a doctrine of human rights or of non-domination, we might think of it as an account of the associative obligations that states bear to one another on the basis of their common membership in a global community.

Not only is this interpretation of the new philosophy consistent with Dworkin's other writings, it resonates with his remarks within the posthumous paper as well. He insists that states are part of a state system, and specifies its balkanized and decentralized character. He emphasizes a certain set of problems, those produced by the kinds of relations that exist between states, as particularly harmful to legitimacy and therefore relevant to questions of international law. He tries to incorporate the beliefs and judgments of practitioners, the traditions and practices that the subjects of the law share. These details are difficult to place within a natural law style derivation of states' duties from human rights or from rights against domination, but they make sense within an account of associative obligations.

Here, then, is a sketch of the new philosophy as grounded in associative obligations: In our world, sovereignty is an institutionally defined right to rule. Domestic protective associations (i.e. pre-states, or nominal states, or state-like-things-prior-to-recognition) gain the sovereign right to rule only by being recognized as a state by other states. Together, these states populate the state system, a social practice that both distributes and legislates the terms of rule. This system is presumed to be good for many reasons but importantly because it promotes shared and widely acceptable goals including human dignity, prosperity, and security. But by pursuing these goals through such a decentralized system of governance, the system creates harmful side effects, the pathologies of the state system. Two basic mechanisms have emerged within the state system to address these pathologies. First, the state system has developed a number of mechanisms for creating norms general compliance with which would help mitigate these pathologies. Among these mechanisms are the sources of law specified in Article 38 of the UN Charter - treaties, custom, and so on. Second, the state system has - through these mechanisms - developed a number of regulatory norms presumed to bind states such that, absent special countervailing considerations, they ought to comply with those norms regardless of what they command. When states claim the right to rule - the rights of sovereignty institutionally specified by the state system - they become members of this pathological but presumptively justifiable practice, and as members, undertake an obligation to the other members to do their part in mitigating pathologies. And in the current world context, that obligation can only be discharged by complying with international law.

Such a view will demand much discussion, to which I turn now.

[22] Dworkin explicitly presents his account of associative obligations as an alternative both to tacit consent and to natural duties.