

Jurisprudence in *Justice for Hedgehogs*: Metaphysical, not Political

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1. *Introduction*

The beginning of Chapter 19 of *Justice For Hedgehogs* is both familiar and surprising in its form. It is familiar because Dworkin identifies an orthodox position in his field of expertise, he describes it in his inimitable way, and he tells us he will be unseating this position in the ensuing pages. It is surprising because he concedes that he was one of the wrongheaded thinkers who accepted the orthodox position, one of those whom he will be proceeding to unseat. I think this intellectual mea culpa is not common in Dworkin's writing. And it is, strikingly, about what is surely regarded as a pillar of his achievement and his reputation as a great thinker. Let's begin by examining it.

The orthodox position – which he calls the “orthodox picture” is this:

“Law” and “morals” describe different collections of norms. The differences are deep and important. Law belongs to a particular community. Morality does not: it consists of a set of standards or norms that have imperative force for everyone. Law is, at least for the most part, made by human beings through contingent decisions and practices of different sorts. . . . (400)

Moving into what is now familiar as the debate between positivists and their adversaries, Dworkin identifies what he calls “[t]he classic jurisprudential question” – “How are these two different collections of norms related or connected?” Then he articulates two only slightly less general versions of it: “How far do our legal rights and obligations depend, as things stand, on what morality requires?” and “Can an immoral rule really be part of the law?” Continuing with shinningly clear depictions of the debate, he writes:

Positivism declares the complete independence of the two systems. What the law is depends only on historical matters of fact: it depends on what the community in question, as a matter of practice, accepts as the law. . . .

Interpretivism, on the other hand, denies that law and morals are wholly independent systems. It argues that law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules. . . .

It treats the concept of law as an interpretive concept. (401-02)

So far, vintage Dworkin. But now for the surprising part:

Forgive a paragraph of autobiography. When more than forty years ago I first tried to defend interpretivism, I defended it within this orthodox two-systems picture. So I said what I have just said: that the law includes not just enacted rules, or rules with pedigree, but justifying principles as well. I soon came to think, however, that the two-systems picture of the problem was itself flawed, and I began to approach the issue through a very different picture. I did not fully appreciate the nature of that picture, however, or how different it is from the orthodox model, until later when I began to consider the larger issues of this book. (402)

Now we could argue about whether this is really an intellectual *mea culpa*. One could say that he is not conceding or announcing that he was wrong and asking to be pardoned for having led his readers astray at first by not eliminating the core of what was wrong in the analytical jurisprudence. One could say that he is only asking forgiveness for this literary wrongdoing – this self-reflective indulgence in what is otherwise a highly scholarly book. Likewise, one could note that the only two footnotes in this passage are both to a very early essay – now called “The Model of Rules 2” – which was published in 1972, suggesting that he saw this flaw just after writing *The Model of Rules 1*, and very near the inception of this illustrious career. And one could say that when he refers to the “later” time when he began to consider the larger issues of this book, he is not referring to the years just prior to the submission of the manuscript in 2009, but to when he began thinking about these issues in 1960s. Then one would say that everything from *Hard Cases* on through *Law’s Empire* and all the rest had always been the right picture.

I am not buying this interpretation of the passage, at least not all of it and not yet. Let’s look at what Dworkin says about the difference between Positivism and Interpretivism as seen from *within* the Orthodox picture:

Positivism and interpretivism are both theories about the correct use of the doctrinal concept [of law]. Positivism has traditionally treated that concept as criterial: it has aimed to identify the tests of pedigree that lawyers or at least legal officials share for identifying true propositions of doctrinal law. Interpretivism treats the doctrinal concept as interpretive: it treats lawyers’ claims about what the law holds or requires on some matter as conclusions of an interpretive argument, even though most of the interpretive work is almost always hidden. (402)

This, is, of course, an elegant and accurate description of the central contention of *Law's Empire*, and it is supposed to represent what Dworkin thought when he was still at least somewhat in the grip of the Orthodox picture. And so I conclude that Dworkin is here announcing that there was a basic flaw in his jurisprudential outlook all the way through at least *Law's Empire*, and probably until he began working in earnest on *Justice for Hedgehogs*.

In the following few pages, Dworkin offers an argument that I have not seen in prior work, and uses it to undermine any version of the orthodox picture. And he then begins the affirmative theoretical account of the chapter: “We have now scrapped the old picture of law and morality as two separate systems and then seeks or denies, fruitlessly, interconnections between them. We have replaced this with a one-system picture: we now treat law as part of political morality.” Let’s look together at the offering of a whole new, quite different system, following on the heels of a description of his most prominent jurisprudential work as infected by the flaws of the orthodox position. This is a rejection of an old view in favor of an apparently very different new one.

There are plenty of other reasons to treat Chapter 19 in this manner, but before I move any further, it makes sense to set forth the larger aims of this paper and the reasons for this admittedly heavy focus on the text early in the chapter. I think Dworkin’s rejection of a two-systems view for a one-systems view in *Justice For Hedgehogs* is emblematic of a larger feature of the book – his embrace of a kind of monism of value, rather than pluralism or dualism of value. The Hedgehog knows only one thing is Dworkin’s proud presentation of himself as a values monist, not a pluralist. The rejection of a two-worlds system is yet another example of this inspiration of monism – Monism, in this case, rather than the dualism of law being one thing and morality another.

I shall argue below that the two-systems view is better than the one system view, and that the Monism he apparently endorses here is not quite right. Yet, there is a different version of an orthodox position that I would offer and a different version of a critique of that position. There are, I will argue, several advantages to my view as a matter of intellectual history, as a matter of philosophical defensibility, and as a matter of political palatability. Another advantage, I shall suggest, is that it would have required no mea culpa, for I think this has long been the gist of

Dworkin's jurisprudential position and it provides the best interpretation for the position at which he ultimately arrives.

The flaw in what might be called the orthodox position, I maintain, does not lie in the view that there are two sets of norms. It lies in the view that there are two domains of discourse, one about each, and that the work of jurisprudence is to say whether these two domains of discourse are connected and if so, how. The correct view is that there is just one web of discourse and it includes both discourse about legal norms and discourse about moral norms. And it is all interpretive. I shall suggest that this is a form of holism, but the holism is not value holism as such, or other meanings of holism in popular culture that Dworkin would have loathed. It is the holism of W.V.O. Quine, Donald Davidson, and many of those who populated Dworkin's philosophical world and generated the Twentieth Century's rejection of Logical Empiricism. I have somewhat cheekily subtitled my paper "Metaphysical, not Political" and I will eventually say why I think the Dworkinian account I will develop is more important for judges than for metaphysicians. But I should say now that a more apt (if less catchy) title might have been "Dworkinian Jurisprudence: Holistic, not Monistic."

Part 2 of the paper sets forth, in general terms, Dworkin's principal argument against the Orthodox picture in Chapter 19, the one-system view he proposes in its place, and the implications for the field of jurisprudence said to derive from the one-system view. Part 2 ends by focusing closely on one piece of Dworkin's Chapter 19 argument, which he refers to as "the fatal flaw." In part 3, I offer a partial critique of Dworkin's Chapter 19 "fatal flaw" argument against the orthodox picture and I add to it several concerns I have about the one-system view he adopts in its place. In effect, I put forward an argument for maintaining the defense of Interpretivism from within what is, in very important respects, a two-system view.

Part 4 lays out the principal positive contention of the essay, which is that a certain kind of holism is the central core of Dworkin's view in jurisprudence, and that the holism is quite different from the sort of monism that Chapter 19 seems to advance. According to the holism of Chapter 19, statements about the law and statements about morality belong to the same general domain. It is not only that one kind of statement will quite naturally and unobjectionably go along with another. It is that statements about what is morally right or wrong or courageous may indeed be inferentially connected to statements about what the law is. Parts 5 and 6 note the

somewhat different implications these two approaches might have for important questions regarding the role of the judiciary, and indicate once again my reasons for favoring the holistic view over the monistic one. I conclude the paper by comparing the directionality of Dworkin's philosophical work to that of Rawls.

## 2. *Two-System Versus One-System Accounts*

Dworkin's putative demolition of the orthodox picture has two parts. He begins by arguing that once one accepts the two-system view, an impossible challenge arises for those wishing to address the question dividing positivists from interpretivists. That is the question of the relation between the legal norms and the moral norms. The challenge is to locate a "neutral standpoint" from which to answer the question. The two systems view is unable to meet this challenge, argues Dworkin, unless law turns out to be a criterial concept. But it is not; law is an interpretive concept.

The account of the place of law in the tree structure of value is lucid, compelling, and apparently in line with prior work. Law is a branch of political morality – a position that closely resembles *Law's Empire* and "Hard Cases." What in *Hard Cases* was a political justification provided by past political decisions and in *Law's Empire* was a reason sounding in integrity is unqualifiedly a reason of political morality in *Justice for Hedgehogs*, and political morality is itself part of morality. That is the sense in which law is a part of morality. And the reference to past political decisions and its moral relevance serves two critically important roles in this jurisprudential account, just as it has in earlier accounts. One is to explain the sense in which legislation, precedent, constitutions – what Raz might call "sources" – does indeed have a central role in determining what the law is. And a second is in explaining why what the law is and what it ought to be are often different matters. A past history can and often does alter what the legally correct decision is in such a way that it differs from what, absent the law, the court would correctly deem what "ought" to be done. As in work going back to *Taking Rights Seriously*, Dworkin's use of a family analogy is remarkably powerful.

Chapter 19 concludes by setting out an account of why the rejection of a two-systems view for a one-system view matters. Four issues are elegantly presented: the issue of whether the putative law of an evil legal system counts as law; the plausibility of the thesis that certain legal

rights exist notwithstanding their unenforceability; the question of whether legislative sovereignty should be regarded by judges as a factual matter or a matter open to normative debate; and the question of whether the values of the framers of the Constitution should block justices from integrating fresh moral decisionmaking into their determination of the scope and content of the Bill of Rights. There are interesting turns in some of these analyses, but for the most part Dworkin ends up where we would expect, or so it seems (more in this below). If anything, Dworkin is even more forthright than in the past in claiming that judges have moral reasons for not applying their power as courts: moral reasons not to hand slaveowners a win, even if one concedes they are right about the law; moral reasons (sounding in institutional design) to recognize a gap between constitutional rights and legal rights; moral reasons to question legislative sovereignty; and moral reasons not to acquiesce in outdated traditions in articulating the boundaries of fundamental constitutional rights. In the end, then – notwithstanding his capacity to recognize a gap between what the law is and what it ought to be – the one system view pushes further and more brazenly the Dworkinian agenda of telling judges that – qua judges – they commonly ought to decide a range of questions presented to them by doing what morality requires. That is because what the law requires is just what morality requires, so long as we see that the moral question is one that involves contextualization within the institutionalized setting that includes past political acts.

The Fugitive Slave case and the Second Amendment case will illustrate what I take to be the substantive change in Dworkin's view. In his arguments with Robert Cover decades ago, Dworkin maintained that the best understanding of the law would cut against the slaveowner; Cover took the view that a strained conception of the judicial role was the problem. Dworkin seems to have moved to Cover's side. He believes there is a powerful argument that it was the law, but a more powerful argument that *if it was the law, then morality requires the judge not to apply the law*. On the Second Amendment and the famous *Heller* case, Dworkin believes that it is ultimately a moral question whether the past acts and beliefs of the framers of the Second Amendment with respect to guns provide a sufficient reason of political morality now to interpret the Second Amendment as the Court did in *Heller*. He evidently thought the answer was no, and that reasons of political morality demand the conclusion that Justice Stevens reached, not that of Justice Scalia. Unlike Justice Stevens, however, Dworkin candidly regards this as a moral decision.

Although he thinks it is also a legal decision, it is not presented as the “right answer” to the legal question. It is presented as the right moral decision in the case, and Dworkin’s antagonist’s option of saying “yes, but is it the right legal decision?” is removed by virtue of the argument of the book and the demolition of the two systems view.

A key point of Chapter 19, glossed over above, is entitled “The Fatal Flaw.” Dworkin claims that any examination of the connections between law and morality conducted from within the legal system will be viciously circular, and he contends that a parallel problem exists if the examination is conducted from within morality.

There is a flaw in the two-systems picture. Once we take law and morality to be separate systems of norms, there is no neutral standpoint from which the connections between the two supposedly separate systems can be adjudicated. . . .

Suppose we treat the question as legal we look to legal material – constitutions, statutes, judicial decisions, customary practices, and the rest—and we ask: What does the correct reading of all that material declare the relationship between law and morality to be? We cannot answer that question without a theory in hand about how to read legal material, and we can’t have such a theory until we have already decided what role morality plays in fixing the content of law. . . .

If we turn to morality for our answer, we beg the question in the opposite direction. We can say: Would it be good for justice if morality played the part in legal analysis that interpretivism claims it does? Or is it actually better for the moral tone of a community if law and morals are kept separate as the positivists insist? But . . . [if] law and morals are two separate systems, it begs the question to suppose that the best theory of what law is depends on such moral issues.

The two-systems picture therefore faces an apparently insoluble problem: it poses a question that cannot be answered other than by assuming an answer from the start. . . . (402-03)

### *3. Problems with the Fatal Flaw Argument*

Preliminarily, it is worth noting that even if one accepted the disjunctive circularity argument above, it is far from clear that this would count as a refutation of the two-system position. All it would show is that if we accept the two-system position we will not be able to answer the question “whether positivism or interpretivism or otherwise better account of how the two systems relate”. That would not show that the two-systems account is false, just that it is limited. This might seem like a quibble on my part, but I do not think it is. After all, it is

plausible that an enormous number of judges, lawyers, legal scholars, and philosophers think exactly that: that the two-systems picture is about right, and that the relation between the two is an intractable question. Indeed, H.L.A. Hart arguably moved in this direction in the Postscript. Let us move on to the main argument.

The principal problem in Dworkin's "fatal flaw" argument relates, ironically, to his legal epistemology. The legal-domain critique contends that one cannot identify the law and its various parts "without a theory in hand of how to read legal material" and we cannot do this without taking a position on what role morality plays in fixing the content of the law. But he does not defend the claim that one needs a theory of how to read legal material in order to identify what the law is. One does not need a theory of butterflies in order to identify a butterfly. One does not need a theory of justice in order to know that slavery is unjust or a theory of cruelty to identify cat-burning as an instance of cruelty to animals. Lawyers, in particular, do indeed appear able to identify many things as part of the law and not others, and they appear to do so without having a theory in hand.<sup>1</sup>

The argument I am presenting cuts deeper than it may first seem. This is for at least three reasons. First, many of Dworkin's most important writings – including *The Model of Rules* and any number of important articles in the *New York Review of Books* – importantly proceed from within legal argumentation, and from a comfortable and justifiable claim to be making true statements about the law's identity and content on relatively uncontroversial points. That is indeed the way the famous discussion of *Riggs v. Palmer* and innumerable other cases works. It is true that in many of these cases, as in *Law's Empire*, there is ultimately an embrace of a more robust justification that

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<sup>1</sup> A natural response to this critique would be to look over at the supposedly circular moral-perspective version and to see whether that was unsound too. If so, then the debate might switch into a standoff regarding which perspective one begins with. The problem is that I do not think the analysis is parallel in the two domains. Consider claim that "*the best theory of what law is*" depends on which theory's view of the role of morality in interpretation would lead to better results for the community. This is indeed a theoretical claim and a contentious one at that. There is no particular basis for supposing that anyone has a base-level knowledge of the truth of this claim. More generally, the decision to call "law" that which it is felicitous or advantageous to call "law" is a conspicuous appendage to the practice of laypersons, lawyers, and judges.



then fortifies the contention that this is law. But what Dworkin actually says in the passage is about the “identification” of the law.

Second, and more generally, Dworkin is clearly an anti-foundationalist about legal epistemology, and it has been part of the power of his work that he takes seriously that lawyers and judges do know a great deal about what the law is and are able to identify it.

Third, and most importantly, it is plainly part of Dworkin’s *moral* epistemology that he is an anti-foundationalist and he counts all of us as knowing a great deal. He does not regard ordinary people, who lack a moral theory, as lacking the ability to identify just or unjust acts, right or wrong conduct, and so on. This is of course a critical part of his critique of moral skepticism. The point is doubly important. It is important because it appears at least equally plausible that lawyers are able to identify many things that are law and not law without having a theory. And it is important as a more theoretical level, because the concept of cruelty and moral concepts generally are interpretive, just as legal concepts are. It does not follow from the fact that these concepts are meshed within our practices and language in this way that we need to have the theory to be able to identify instances of correct application of the concept.

This is a big point and not a little one, for it is indeed part of the argument of positivists from Austin through Hart and Raz that lawyers know that some things that really count as law are not morally sound and others are. Indeed, the preservation of such lawyerly common sense is one of Raz’s principle defenses for the sources thesis. It thus seems to follow that there are two systems after all.

There is another apparent shortcoming in the “fatal flaw” argument, and its recognition will allow us to move forward in a more constructive fashion. The problem is right at the beginning, in the statement that “[o]nce we take law and morality to be separate systems of norms, there is no neutral standpoint from which the connections between the two supposedly separate systems can be adjudicated.” The claim that there are two separate systems of norms is not itself a claim that there are two different standpoints. Nor is it the claim that there are two separate domains of justificatory assertions – one consisting of assertions about law and legal rights and duties, and the other consisting of assertions about morality and moral rights and duties. By the time Dworkin is running the disjunctive circularity argument, he is proceeding as if the two-systems view by definition asserts that there are two separate domains of assertion. That is not, in

fact, how he defined the “orthodox picture” or “the two-systems view,” and two domains of assertions does not follow from two sets of norms.

#### 4. *Semantic Holism*

It may seem that I am being ungenerous to Dworkin by nitpicking, by insisting on distinguishing the “two-domains-of-assertion” view from the “two-systems of norms” view. After all, Holmes famously embraced both of these views in *The Path of the Law*, and there is a good argument that Hart did too. Indeed, one might say that Dworkin would have been well advised to include both of these “two-systems” attributes into his definition of the “orthodox picture.”

Aside from the fact that I view rigorous critique as a way of honoring Dworkin, who was better at it than anyone I have ever known, my point here is actually constructive. I think that Dworkin himself has never fallen for the “two-domains-of-assertion” type of view, and indeed that it was always central to his critique of positivism that the two domains of discourse view is untenable. As to a “two-domains-of-assertion” view, I don’t believe any *mea culpa* would have been necessary or even tenable. The insistence on one domain of discourse was clearly part of “The Model of Rules.” The point was that assertions about rights and duties are part and parcel of legal justifications themselves. Principle-expressive assertions – such as “No man shall profit from his own wrong” – were plainly part of the domain of justificatory assertions. While it may have been possible to see the discussion of *Riggs v. Palmer* in a different light – as focused on *the reference* to a moral norm from within a legal argument, that is not the most natural reading of Dworkin’s discussion of the case. In any event, it is plainly not a plausible way to see his use of *Henningsen*. There, the point is that assertions of various principles were part of the justification, and these were not references to things in the law or the precedent as such. Dworkin all along has advanced a “one domain of assertions” view.

The “one domain of assertions” view could be dubbed “semantic holism in jurisprudence” or “semantic holism”; I shall call it “holism” for short. In various other places I have suggested that Dworkin’s jurisprudential work of the 1960s through the 1980s should be seen in the light of several other developments in the philosophy of language and epistemology more generally. In particular, I have argued that Dworkin’s Model of Rules 2 critique of Hart was analogous to Quine’s “Two Dogmas of Empiricism” critique of Carnap, and that *Law’s Empire* was of a piece

with the kind of coherentism about truth and knowledge that Donald Davidson was advancing in the 1970s and 1980s. However odd this may sound to some ears, it is more than plausible as a matter of intellectual history. After all, Dworkin's undergraduate philosophical education at Harvard occurred at the time that the great triumvirate of Morton White, Nelson Goodman, and Willard van Orman Quine were the core of Harvard's philosophy department, and it was the three of them together that fashioned the semantic holist critique of the analytic synthetic distinction. White – who was led by Vietnam era campus politics to leave his post as chair of Harvard's philosophy department and move to Princeton – was actually Dworkin's undergraduate thesis advisor. Dworkin's philosophy teachers were the leaders of semantic holism in analytic philosophy. And, needless to say, Donald Davidson – following Quine – was arguably the leading figure in the philosophy of language at Oxford for much of the time Dworkin was there, and especially much of the time he was writing *Law's Empire*.

There are three main arguments for such semantic holism in jurisprudence in Dworkin's work prior to *Justice for Hedgehogs*. The first is the most straightforward; it is that, from within the practice of talking about law and within the discourse of adjudication, there is demonstrably a great deal of reason-giving that is admittedly moral; there is no way to present the phenomena of law without distorting it greatly unless one accepts a holistic idea, and in fact doctrines central to there being law at all demonstrably cross this line. The second is the one I regard as closest to the critique of the analytic/synthetic distinction. It is that the whole two-domains of assertion view relies upon treating certain assertions – in language, meaning statements, and in law rule-of-recognition assertions – as fundamentally conventional in a way that insulates them from disconfirmation. Yet that cannot be so given that confirmation happens whole-package by whole-package and they are part of the package. In law, that means that there may indeed be reasons for rejecting rule of recognition statements, and it turns out that some of those may indeed be normative. The third, which relies upon the same holistic picture as the second, is that reason-giving happens package by package, and at the level of package by package, normative considerations are both part of each package and central to the enterprise of deciding between packages on the basis of reasons. I believe that third is perhaps the deepest and the most continuous; it is arguably the core of *Hard Cases*, it is plainly the core of *Law's Empire*, and it

strikes me as central to the arc of *Justice for Hedgehogs*. Of course, Dworkin does not really call this semantic holism and it was probably prudent of him not to do so.

If we were to redefine the orthodox position to be the two-domains of discourse view, a version of the disjunctive circularity argument would work. For it would indeed be circular for a proponent of this view to insist that any examination of the putative separation of law and morality would have to be argued for in legal discourse that excluded moral discourse. And even then, I do not believe it would succeed.

### 5. *Problems with Monism*

I am left with three concerns, however. The first is that Dworkin's language is clear and his aspirations are even clearer: even assuming, as I believe we must, that he was a semantic holist in my sense when he wrote *Justice For Hedgehogs*, the rejection of the two-systems view is deliberate and clear, and its target is not a thesis about language or assertion but about value and norms. He is arguing for a kind of monism as opposed to dualism about norms, and I do not think the argument he has offered is sound, if directed to that version of the orthodox position.

The second problem is that I believe that if one is a semantic holist and one is serious about legal discourse, Dworkin's norm monism is difficult, and perhaps impossible, to sustain. As Raz, Hart, and many others have pointed out, the broad domain of legal discourse, even if it does include moral discourse, also includes much that supports separation in large and small ways. What was a strength of Dworkin's account from *Taking Rights Seriously* and *Law's Empire* turns into a vulnerability when pushed too far. Dworkin's effort to capture the difference between what the law is and what the law ought to be by reference to history and precedent is beautifully illustrated by his family example, but it is far from clear whether this really captures how lawyers and judges understand why positive law often fails to yield the same answer as morality to what people's legal rights are.

These two problems come together, in my view, in a third, found in the final paragraphs of Chapter 19. There, we are told that both the majority and the dissent in the *Heller* case were wrong for utilizing the history of the Second Amendment to support their respective views of gun rights; morality, not history, should have led the decision. Similarly, Dworkin chides both sides of the *Rasul* case regarding the writ of habeas corpus for thinking that the key question was whether

history and precedent left room for a pro-civil-rights interpretation. He summarizes the chapter by stating “We must therefore do our best, *within the constraints of interpretation*, to make our country’s fundamental law what our sense of justice would approve, not because we must sometimes compromise law with morality, but because *that is exactly what the law, properly understood, itself requires.*”

My concern is with the two phrases I have italicized above. By using the phrase- “within the constraints of interpretation,” Dworkin appears to be trying to capture the entire divergence of regular morality from law by noting that interpretation places some constraints on the result that may be reached. *Legal interpretation* constrains what content judges may legitimately give to the law, but if those constraints can be satisfied, then judges may declare that to be the law. Where it is permissible (relative to interpretive norms) to read the law to be isomorphic with morality, then that is what judges ought to do. Yet Dworkin says something apparently stronger in the last few words “not because we must sometimes compromise law with morality, but because that is what the law, properly understood, *itself requires.*” Here, it is not that constraints permit making the law what it morally ought to be, it is that the law “itself” requires it.

But in what sense *does* the law “itself” require it? What warrants the insertion of the word “itself”? What is it in the law that requires this interpretation? At least if it were past political acts, one could understand in what sense the law was requiring it. But here, in the Second Amendment case, for example, the past political acts do not demand a rejection of the argument put forward – moral reasons support that decision – and the past political acts do not undercut it. I fear that the values monism Dworkin creates does not warrant the conclusion that the law itself requires these decisions.

The view at the end of Chapter 19 looks, for all the world, like a brilliant combination of what is misleadingly called “realism” in two different areas. It is moral realism in that Dworkin plainly contends there is truth, objectivity, and knowledge available in morality, including on the questions of political morality that in one form or another make their way to our top courts. And it appears not too different from the legal realism of mid-Twentieth Century American legal thought – a view that Dworkin spent so much of his amazing intellectual firepower combatting. Let us be realistic, said Dworkin’s antagonists, judges are not applying the law but making it what their sense of justice tells them morality requires, so long as it fits within the constraints that

everyone knows need to be checked off. Dworkin seems, in embracing values monism, to be arguing that there is no difference in the nature of things between law and morality, and therefore finding nothing objectionable in what he once railed against as legal realism. Because I do not think his argument works, I fear he has ended up in a spot that for so many decades he successfully rejected.

#### 6. *Holism and Institutional Role*

On my view, Holism in law solves all three of the problems that concerned me with Monism. First, as indicated, there are three powerful Dworkinian arguments for it, and none of them suffers from the defects I indicated. Second, holism can accommodate in a more open and comprehensive manner the recognition of a wide variety of cases in which the law says one thing and morality another, as well as a variety of statements about different attributes of each. In this, Dworkin's own understanding of the relevance of political acts in law is extraordinarily illuminating, and allows to understand the normativity of law even in cases where the divergence from morality is significant. Third, Dworkin's Holism allowed for an explanation of how law required the morally sound answer – how law itself did so. In this sense, it goes past the “constraint” view that is associated with legal realism.

I continue to think that *Brown v. Bd. Of Educ.* and the debates that surrounded it played a formative role in Dworkin's interpretivist project. The Supreme Court's decision in *Brown* was famously contested by Dworkin's legal mentor, Judge Learned Hand. And the availability of moral considerations in application of the law was famously contested by Dworkin's jurisprudential mentor, H.L.A. Hart. Hand thought desegregation was just but that there were problems of institutional competence associated with moralizing from the bench. Dworkin thought both the text of the Equal Protection Clause and the history of ratification could only be properly interpreted as demanding equality, and demanding equality in a manner that segregation unquestionably failed to provide. In this sense, the law plainly did require the morally correct ruling. And it is because the law itself required it that there was no plausible argument of institutional competence against *Brown*; indeed, the institutional role of the Court in applying the law *required* the exercise of the Court's power. This is the central claim of *Constitutional Cases*.

Hart's separationism – both in the Holmes Lecture and in *The Concept of Law* – seemed to provide an unfortunately apt jurisprudential theory to back up those who would problematize American judicial review like that of the Warren Court. This would work by insisting that the truth value of legal assertions turned on the relationship of putative norms to conventionally adopted secondary rules whose applicability turned on historical facts about various political actors. Moral reasoning would play no role in ascertaining these facts. The application of moral reasons to adduce a judicial decision must, then, having been something other than application of the law.

By insisting that legal discourse itself contained moral assertions, by defending the cogency and status of such assertions, and by explaining their role in arriving at the best justified legal assertions (about what the law is), Dworkin simultaneously surmounted the concerns of his two great mentors. And in doing so, he defended not only the result of *Brown v. Bd of Education*, but the legitimacy of the Court deciding it. In my view, this extraordinarily important analysis was foretold, in part, by the semantic holists of his philosophical education and philosophical companions. I worry that value monism without holism simply cannot support this result, but once the holism is added, the monism is no longer needed.

### 7. *Concluding Thoughts*

My largest concern with monism is the one highlighting institutional competence. This turns, to some degree, on certain roughly epistemological assumptions that may be, strictly speaking, unnecessary. Dworkin is clearly tempted to infer from the statement that law is a form of morality that legal reasoning should be understood as constrained moral reasoning. I worry that history-constrained moral reasoning does not capture what judges and lawyers understand the law to be and – ironically – cannot safeguard the critical institutional role of courts.

Ironically, we can maintain some of Dworkin's monism, in principle, so long as we keep control over some of the epistemological problems. For it may well be that what makes legal statements true at some level is their being part of the best interpretation, but it may also be that the best interpretation will end up having an underlying connection to what it is morally right for courts to demand, in light of the background. If that were so, then the monism – the claim that legal rights are the rights that would be enforced by judges making the right decisions about

political morality in light of our prior political practices – might actually be true. This would not be an accident. It would be true for the reasons Dworkin has advanced. And it would constitute a form of value monism, just not one that would underwrite the set of practices Dworkin appears to recommend. Judges would not, however, be right to utilize this metaphysical insight about legal rights in ascertaining their content. More precisely, legal theorists would not be right to draw a methodology of moral inquiry from a metaphysics of value monism.

Finally, my title: “Jurisprudence in Justice for Hedgehogs: Metaphysical, not Political.” There is a sense in which Dworkin in *Justice for Hedgehogs* provides the ambitious philosophical view underlying everything. Looking backwards through it, it is a more robust and less philosophically modest presentation of ideas that go all the way back to *Law’s Empire* and *Taking Rights Seriously*. Had he written *Justice For Hedgehogs* first and *Taking Rights Seriously* last, he might have called it *Taking Rights Seriously: Political, not Metaphysical*. It is indeed about how to think about the role of medium-sized down to earth political moral reasoning from within the judicial position, and how to do it without worrying too much about metaphysics. My suggestion, of course, is that Dworkin, like Rawls, produced two bodies of work expressing a very similar idea – one that is overtly philosophically ambitious at the deepest level, and another that aims to capture the attention and allegiance of those who are anxious to avoid too much metaphysics. For Rawls, *A Theory of Justice* came earlier and “Justice as Fairness: Political, not Metaphysical” later. Unlike Rawls, Dworkin started with the down-to-earth and ended up with the more philosophically ambitious.

One wonders why the shift, given the extraordinary importance, as time has gone by, of forging consensus in practical life and the seeming need to demand less by way of philosophical buy-in rather than more. Part of the answer, I suspect, comes down to integrity in the non-technical use of that term; Dworkin really was a value monist and in this extraordinary book, he chose to tell us that and to explain why. What I earlier called Dworkin’s “mea culpa” was, in the end, not that. It was, as he said, a bit of autobiography.

One other thought. I, for one, have always deemed more moderate approaches to have the greater political promise than the more philosophically ambitious. But there is no figure in legal theory more gifted in his capacity to judge what American political life needs. Perhaps Dworkin



was prescient in 2011 when he published *Justice for Hedgehogs*. Perhaps he understood that in 21<sup>st</sup> century political thinking, moderation will not be enough.