

JURISPRUDENCE FOR HEDGEHOGS

Jeremy Waldron¹

Abstract: The aims of this essay are, first, to present the jurisprudential position that Ronald Dworkin set out in his penultimate book, *Justice for Hedgehogs* (2011); and, secondly, to elaborate it a little further than Dworkin himself was able to. The position is a distinctive and interesting one. Although Professor Dworkin argued in all his earlier work that moral facts (about rights and justice) were among the truth conditions of legal propositions, now in *Justice for Hedgehogs* he argued that law is itself a branch of morality. This is a bolder and more radical claim and it requires some quite careful exposition to see how it might be made plausible.

1. Ronnie

Ronald Dworkin passed away on February 14, 2013. His death is a massive loss for legal philosophy (as well as for the law school at New York University and for the lives of those who loved and worked with him). He was one of our most imaginative and insightful non-positivist philosophers of law.²

I don't mean anti-positivist, as though Dworkin's primary achievement was to refute in detail the claims of particular theorists like H.L.A. Hart or Joseph Raz or Jules Coleman. He may have started that way in 1967, in 'The Model of Rules.' But what was most valuable in Dworkin's jurisprudence was the elaboration of a genuine *alternative* to legal positivism: a non-positivist theory that, to be sure, was articulated at various points by reference to existing players in the field,³ but which developed mostly under its own momentum.

I want to emphasize the point about the *development* of Dworkin's work. His legal philosophy was a work-in-progress for almost 50 years. The latest version of that work-in-progress happens to be non-positivist in a quite striking and original way and that is what I am going to discuss in this paper.

¹ University Professor, NYU Law School and Chichele Professor of Social and Political Theory, All Souls College, Oxford. An earlier version of this paper was presented on March 15, 2013 as the J.A. Corry Lecture at the Law School at Queen's University in Kingston, Ontario. I am grateful to Mark Greenberg and Leslie Green for discussion of that earlier version. My particular apologies to Professor Green for stealing 2/3 of the title of an article of his, 'Jurisprudence for Foxes,' 3 *Transnational Legal Theory* 3 (2012).

² I have appended to the end of this essay my remarks at a memorial service held for Professor Dworkin at St. John's Smith Square in London, on June 5, 2013. See p. 29, below.

³ See R Dworkin, *Law's Empire* (Harvard UP 1986) for Dworkin's reference to idealized opponents ('the conventionalist' in Ch. 4 and the 'pragmatist' in Ch. 5.)

2. The separation of law and morality

All his career, Ronald Dworkin challenged the thesis of the separation of law and morality. This was the thesis that one could find out what the law was in a given area without having to commit oneself to any view or make any judgment about what would be morally right and just in that area. All his career, Dworkin challenged the proposition that finding out what is morally right and just and finding out what the law was were two quite separate processes that had nothing to do with each other. He had argued for many years—decades really—“that we cannot understand legal argument and controversy except on the assumption that the truth conditions of propositions of law include moral considerations.”⁴

In a way, this is a familiar challenge. One well-known doctrine, hostile to the separation thesis, is the classic natural law position of Augustine and Aquinas: *lex iniusta non est lex*, an unjust law is really not a law at all.⁵ That view was, I think, too crude for Dworkin’s taste⁶—though modern natural lawyers might say that this is because we have formulated it here too crudely.⁷ As we shall see, in *Justice for Hedgehogs* he is rather dismissive of our traditional preoccupation with the question of whether evil edicts count as law in the fullest sense of the word (410-12).⁸ There is a hint of the classic position in the view of Dworkin’s that I am going to explain.⁹ But it emerges only in a complex and qualified way from a view that is really quite different in shape.

Another well-known challenge to the separation of law and morality is conveyed in the jurisprudence of Lon Fuller. In *The Morality of Law*, Fuller maintained that law had certain essential formal and procedural characteristics that themselves bore moral significance. It was not only that Fuller believed that observing the formal principles of what he called ‘the inner morality of law’—principles like generality, prospectivity, publicity, and clarity—made it more

⁴ R Dworkin, *Justice in Robes* 234 (Harvard UP 2006).

⁵ Augustine, *City of God*, IV.4 and Augustine, *Concerning the Freedom of the Will*, I, v; Aquinas, *Summa Theologiae*, I.ii, Qu. 93.3.

⁶ R Dworkin, ‘Natural Law Revisited,’ 34 *U Florida L R* 165 (1982).

⁷ See J Finnis, *Natural Law and Natural Rights* (OUP 1980), Ch. 12.

⁸ All page references in parentheses in the text are to R Dworkin, *Justice for Hedgehogs* (Harvard UP 2011).

⁹ See section 10 below.

difficult for a regime to do evil, though this he did believe.¹⁰ It was also because he thought observing these principles was itself a way of respecting an important moral value:

Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey ... your indifference to his powers of self-determination.¹¹

I think it is a flaw in Dworkin's jurisprudence that he never had much time for a view of this kind.¹²

But Dworkin developed his own challenge to the separation thesis along quite different lines. Some of it was quite specific: for example, in his 'moral reading' of the US Constitution. Dworkin maintained that constitutions and bills of rights often require us to ask and answer moral questions in our own voice as part of what it takes to elaborate and apply a legal requirement:

Most contemporary constitutions declare individual rights ... in very broad and abstract language ... The moral reading proposes that we all—lawyers, judges, citizens—interpret and apply these abstract clause's on the understanding that they invoke moral principles about political decency and justice. ... The moral reading therefore brings political morality into the heart of constitutional law.¹³

Now, a challenge along these lines seemed manageable to positivists of a certain stripe (though of course it still annoyed constitutional originalists). Those who called themselves 'soft' or 'inclusive' legal positivists could point to the fact that the moral ideas referred to in a given constitutional text were there only as a result of the contingent positing of *this* form of words, rather than *that* form of words in the constitution's framing.¹⁴ Had the positive law been

¹⁰ L Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart,' 71 Harvard LR 630, 636-7 (1958).

¹¹ L Fuller, *The Morality of Law* (Yale 1964) 162.

¹² See R Dworkin, 'Philosophy, Morality and Law—Observations Prompted by Professor Fuller's Novel Claim,' 113 U. Pennsylvania LR 673 (1964-5).

¹³ R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard UP, 1996) 2.

¹⁴ See, e.g. WJ Waluchow, *Inclusive Legal Positivism* (OUP 1994).

different—had the Eighth Amendment to the US Constitution prohibited ‘unjust punishment’ rather than ‘cruel punishment’—we would have had to ask a somewhat different moral question; and had it simply prohibited (say) capital punishment with no reference to cruelty, we wouldn’t have had to ask a moral question at all. But I think Dworkin wanted to go further than that. He wanted to argue that any bill of rights directed us implicitly to moral principles, whether this direction took the form of the use of specifically evaluative language or not.¹⁵

More generally, Dworkin became convinced quite early on in his career that one could not understand the law in any area without seeing that it comprised not just formulated surface-level rules arising out of constitutions, statutes and precedents, but deep legal principles, operating pervasively and bubbling away (as it were) in the bowels of the law, discernible only by some entangled combination of doctrinal and moral sensibility.

Legal principles were the key to Dworkin’s early work in jurisprudence from 1967. But in the 1980s and subsequently his approach involved a broader claim about legal method. Dworkin maintained that elements of moral argument were indispensable to and inseparable from legal interpretation—not just in the straightforward sense that one was required to choose a better interpretation over a worse interpretation and to reject an absurd interpretation altogether, but in the sense that *all* reading of legal materials involved making the body of enacted law and precedent the best it could be and bringing that best interpretation to bear on the facts of the particular case. Sometimes this might involve identifying the sort of hybrid moral/legal principles that Dworkin’s early work had pointed to. But often it was just a matter of discerning directly which basis for deciding a given case best fit the existing law and showed the existing law in its best possible light. Either way, sensitivity to moral facts could not be excluded from the skills that lawyers and judges would need to determine the right answer—the right *legal* answer—to the questions they faced.

3. Justice for Hedgehogs

In the last six or seven years, however, Dworkin went way beyond this, to a position I find much more challenging. It was presented in his great 2010 work,

¹⁵ R Dworkin, ‘Political Judges and the Rule of Law,’ from his book, *A Matter of Principle* (Harvard UP 1985).

Justice for Hedgehogs, though one can see it adumbrated already in *Justice in Robes* (2006), albeit in a way that many readers missed (including this reader).¹⁶

Justice for Hedgehogs is a formidable work. Its aim—as the title’s allusion to Isaiah Berlin’s hedgehog/fox distinction suggests¹⁷—is to bring together apparently disparate principles and values under the auspices of one master ethical conception.

This book defends a large and old philosophical thesis: the unity of value. ... Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest. (1)

Now, any such project is going to excite critics, both in its overall holism—‘the fox has ruled the roost in academic and literary philosophy for many decades,’ says Dworkin, ‘particularly in the Anglo-American tradition’ (1-2)—and in the detail of the particular positions and connections that the book seeks to establish. I had my issues with it. At a conference and in a special law review issue devoted to the book by Boston University Law School, I responded to Dworkin’s attack on majoritarianism in Chapter 18;¹⁸ and I do also have some reservations about his appropriation of the language of human dignity to cover the matched pair of ethical principles that constitute the book’s unifying theme (13-14 and 204-5). But the overall holistic ambition I respect. I respect Dworkin’s refusal to repeat the lazy pluralism of, say, Isaiah Berlin—the fox par excellence—a value-pluralism whose sententious expression is not matched by any intellectual curiosity about possible internal connections between various ideals.

Anyway, the claim of *Justice for Hedgehogs* is that all areas of value depend on one another. And by the time one reaches the end of the book, Dworkin has united liberty with equality, value with principle, ethics with

¹⁶ Dworkin, *Justice in Robes* 34-5. See also J Waldron, ‘How Judges Should Judge’ *New York Review of Books*, August 10, 2006.

¹⁷ Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy’s View of History* (Princeton UP 2013), 1 (quoting the ancient Greek poet Archilochus: ‘The fox knows many things, but the hedgehog knows one big thing’).

¹⁸ Jeremy Waldron, ‘A Majority in the Lifeboat,’ 90 *Boston U L R* 1043 (2010).

morality, and all of it with political philosophy, not to mention some extensive comments on religion.¹⁹

Coming just before a very powerful epilogue, the final numbered chapter (Chapter 19) is entitled simply ‘Law.’ It is relatively brief and under-argued. Dworkin said at the outset that his ‘aim in this chapter is not to summarize my jurisprudential views in any detail but rather to show how these form part of the integrated scheme of value this book imagines’ (400).²⁰ But he set out nevertheless to make a momentous case: he argued not only that the vaunted separation of law and morality could be bridged, but also that law and morality could be united, with the first (law) as a branch or tributary of the second.

This is consonant with the overall approach of the book. In area after area of practical concern, Dworkin wanted to contest what common-sense tells us about conflicts between various independent values or principles. As he put it in the opening pages of the book, political philosophers insist on thinking in terms of trade-offs among political values, and not just between liberty and equality, or between democracy and rights, but also—and this is the point he attacks in Chapter 19—‘the conflict between justice and law.’

Nothing guarantees that our laws will be just; when they are unjust, officials and citizens may be required by the rule of law, to compromise what justice requires. In Chapter 19, I speak to that conflict: I describe a conception of law that takes it not to be a rival system of rules that might conflict with morality, but as itself a branch of morality. (5)

And he went on to propose that we scrap the old picture that counts law and morality as separate systems and then either seeks or denies connections between them. He proposed that we replace this with a one-system picture: law is a part or aspect of morality. Dworkin acknowledged that this ‘will sound absurd to some readers and paradoxical to others’ (405). They will think he is pushing his hedgehog agenda one bridge too far. Nevertheless this is what he now wanted to defend.

As I have said, this wasn’t always his position, and this too Dworkin acknowledged:

¹⁹ See also Dworkin’s final book, *R Dworkin, Religion without God* (Harvard UP, later this year) and the excerpt from it in the *New York Review of Books*, April 4, 2013.

²⁰ An endnote (485 n1) indicates that the chapter is intended to supplement what he said in *Law’s Empire* and *Justice in Robes*, not replace them.

When, more than forty years ago, I first tried to defend interpretivism, I defended it within this orthodox two-systems picture. I assumed that law and morals are different systems of norms and that the crucial question is how they interact. So I said ... that the law includes not just enacted rules, or rules with pedigree, but justifying principles as well. (402)

But he said, ‘I very soon came to think, however, that the two-systems picture of the problem was itself flawed, though he adds that he ‘did not appreciate the nature of [*the new one-system*] picture, however, or how different it was from the orthodox model, until much later when I began to consider the larger issues of this book’ (402).

The change was anticipated in his previous book. At the end of the long introduction to *Justice in Robes*, Dworkin said that his discussion so far in that chapter had ‘not challenged the traditional understanding that “morality” and “law” name departments of thought that are in principle distinct.’ But he said he now wanted

to suggest that this traditional understanding, which encourages us to chart relations between two different intellectual domains, is unsatisfactory. We might do better with a different intellectual topography: we might treat law not as separate from but as a department of morality.²¹

In *Justice in Robes*, Dworkin did not take the new formulation very much further than that. He did say that this is how we understand political theory—‘as part of morality more generally understood but distinguished, with its own distinct substance, because applicable to distinct institutional structures.’ And by analogy or by extension, we might say the same about jurisprudence. ‘We might treat legal theory as a special part of political morality distinguished by a further refinement of institutional structures.’²²

But the *Hedgehogs* position is more radical than that analogy suggests, because Dworkin’s position now is not just that arguments and judgments in legal *theory* are moral in character, but that that *legal* judgments are moral judgments and legal arguments are moral arguments. So when a judge faces a question about how to interpret a statute or a clause in the Constitution, or when

²¹ Dworkin, *Justice in Robes*, 34-5.

²² *Ibid.*, 35. And he says something similar towards the end of *Justice for Hedgehogs* (410): ‘Treating legal theory as a branch of political philosophy, to be pursued in philosophy and politics departments as well as law schools, would deepen both disciplines.’

she has to figure out the bearing of a line of precedents on a dispute in front of her, the question she faces is a moral question; it doesn't just involve moral elements, it is itself a moral question. We say that her job is to find out what the law requires. And Dworkin wanted to say that too, but he would insist now that that task, so described, is a moral task. It is wholly located in one of the most important branches of political morality. This is a radical claim about law itself, not just about legal philosophy. That's the claim of his that I want to discuss.

The account I am going to give will focus on what seems to me to be the essence of the new Dworkin position. But I cannot deny that some of it will be more me than Ronnie: I am going to elaborate and defend his basic position, not just expound it, and that may involve developing structures that go beyond what he said in *Justice for Hedgehogs*. I don't think anything I will say here will be incompatible with the radical content of his position in the book. But I am convinced that the best one can do—what I think I owe to Dworkin's memory—is to carry his agenda forward, not just repeat it.²³

4. Law as a branch of morality: what branch?

So: Dworkin said, in *Justice for Hedgehogs*, that 'law is a branch ... of political morality' (405). Patently this is a denial of the separation thesis. But there is still supposed to be a distinction here. Law is a *branch* of morality. Can we say anything about the distinctiveness of this branch? What distinguishes the legal sub-division from the rest of political morality?

It is tempting to say that law is a branch of morality concerned with coercion; law's demands are demands that it seems appropriate to use coercion to uphold. After all, it is distinctive of most modern law that it is associated with the coerciveness of the modern Weberian state. Unfortunately though this may distinguish law from ethics, it will not distinguish law as a branch of *political* morality, because arguably all political morality is about demands that it seems appropriate to use force to uphold. When we debate about justice we are debating about a set of principles that we think it appropriate to uphold with

²³ Also, there is one part of Dworkin's argument in *Justice for Hedgehogs*, Ch. 19, which I will not address: this is his distinction between laws that create remediable rights and laws that do not (406-8 and 412-3). I don't deny that that is an interesting discussion, but I am omitting it from consideration here because it may distract us from the central claim about law as a branch of morality.

force; the same is true of rights (even when we talk about natural or moral rights);²⁴ the same is true of our conceptions of the common good.

Dworkin's answer is different and it draws on claims he made first in 1986 in *Law's Empire*. The distinctive thing about law is not just that it is concerned with state force (though it is). The distinctive thing is that law as such embodies *a particular attitude* towards state force. Law places enormous emphasis on the point that the public justification of coercion is to be oriented to past events, like enactments and precedents.²⁵ As Dworkin put it in *Law's Empire*,

Law insists that force not be used or withheld, no matter how useful that would be to ends in view, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.²⁶

So if law is a branch of morality, it is a branch of morality concerned with the moral significance of the kind of 'past political decisions' that preoccupy lawyers. This distinguishes it from other branches of political morality. Much of political morality is (quite rightly) pragmatic and forward-looking.²⁷ It looks to deploy the force of the state to make things better for the future—for example, to make society freer or more prosperous or more equal or more democratic. But law as a branch of morality has this additional preoccupation. 'Legality is sensitive in its applications, to a far greater degree than is liberty, equality, or democracy, to the history and standing practices of the community ... because a community displays legality, among other requirements, by keeping faith in certain ways with its past.'²⁸

²⁴ See, e.g., HLA Hart, 'Are There any Natural Rights?' in J Waldron (ed), *Theories of Rights* (OUP 1984).

²⁵ Compare the mistaken reading by Jules Coleman, *The Practice of Principle* 184-5 (Oxford UP 2003) to the effect that Dworkin proposes simply that the concept of law is the concept of justified coercion. For Coleman's acknowledgement that a more sophisticated reading is available, see Jules Coleman, 'Methodology,' in Jules Coleman and Scot Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* 321 (Oxford University Press 2002).

²⁶ Dworkin, *Law's Empire*, 93.

²⁷ This is the very broad sense of 'pragmatic' defined in *Law's Empire*, Ch. 5; it comprises moral improvements of all kinds, not just utilitarian moral improvements.

²⁸ Dworkin, *Justice in Robes*, 183.

That said, law is not the only branch of morality concerned with the moral significance of past events. Personal morality is concerned, among other things, with *promising* and with the moral significance that is to be attached to the past events we call promises. And this is a useful analogy for illuminating Dworkin's position. P's promising Q that he will do ϕ makes a difference to the moral situation: it makes a difference to what P ought to do and it makes a difference to what Q ought to do and to what it is permissible for Q to do; depending on the circumstances it may also make a difference to what R and S and T ought to do (if R, S, and T are, for example, friends of P and Q). But the moral difference that is made by P's promising Q that he will do ϕ is sometimes not easy to figure out; it depends a lot on the background and it may depend a lot on ϕ . We can't always read off from what is *said* in the promise-making event the moral difference that the promise-making makes to the situations of promisor and promisee. I will return to this analogy several times in what follows.

So the claim is that, as a particular branch of political morality, law concerns itself with the moral significance of certain events. What events? Well, it includes what we might call general enactments, i.e., public resolutions expressing formally and in general terms a determination to pursue certain policies, uphold certain standards, apply certain rules, and make available certain frameworks for the future. (In other words, *legislative events*: but I am trying to characterize the distinctive preoccupation of the legal branch of morality in terms that don't use specifically legal terminology.) Law is the branch of morality concerned with the significance of events like these.

It is not just legislative events. There is also the moral significance of previous official decisions about individual people's rights and responsibilities; the moral significance of them as precedents, committing us as a matter of consistency to certain standards or principles that there is a moral case for continuing to honour as we go forward.

Events of both these kinds happen, and when they do, their happening has moral significance. Some of that significance has to do with the consequences of the event: a problem is solved, coordination supersedes chaos, interactions are more efficient, things become more just. But some of the moral significance has to do with the sheer fact that an event of this kind has taken place: for example, that representatives of the community have adopted a general formal prospective resolution in the name of us all; never mind what we think about the consequences of that resolution, the event itself is significant. Law, on this

account, is that part of public morality tasked with paying attention to the moral significance of events of this kind.

It is by no means a straightforward agenda. We disagree about the inherent significance of events of both kinds. For example, the significance of past individual decisions remains uncertain and controversial; we have a settled practice of *stare decisis* in some countries (and not in others); but even where we do have it, we continue to debate its moral grounds and its moral force. Some jurists revere precedent; others say with Oliver Wendell Holmes that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'²⁹ No one has been able to furnish a final and generally accepted account of why precedent decisions have moral force at all. It might be thought that things are clearer with legislative events. The importance of enacted resolutions, especially in a democracy, may be thought to be reasonably settled among us. But even here, voices are raised argumentatively from time to time trying to enhance (or diminish) our sense of the moral significance of events of this kind.³⁰

And that's just the beginning. In both areas, we continue to debate the relation between the character of the events—the enactment or the precedent decision—and the precise moral difference that is made. Such debate is very familiar in regard to *stare decisis*: how does one determine the exact normative content of a past decision as a precedent. How exactly do principles of consistency, fairness, and certainty bear on that inquiry? But it is controversial too with legislation, as jurists debate the merits of textualism and intentionalism, not to mention a broad and non-interpretive pragmatism.³¹

We know that enactment events in our tradition involve an attempt through their production of *text* to *specify* the difference they are supposed to make to what it is appropriate for a citizen or a business to do. For example, an enactment event might produce a text which reads, 'Every citizen must do ϕ .' Evidently there is an aspiration here to make it the case that citizens ought to do ϕ , which perhaps is not an obligation they would otherwise have. But the text may be in need of interpretation: ' ϕ ' may not be clear on its face. And even a *clear* textual specification is not straightforward in its moral impact: it may be directed at an area of conduct where there are already very strong and

²⁹ OW Holmes, 'The Path of the Law,' 10 Harvard LR 457 (1897).

³⁰ See, e.g., J Waldron, *The Dignity of Legislation* (Cambridge UP 1999).

³¹ See Antonin Scalia, *A Matter of Interpretation* (Princeton UP 1999), Greenawalt, Posner.

overriding reasons in operation—so that the force of any reasons provided by the enactment will be somewhat less or their content somewhat different from that specified, being compromised by other reasons already in the field. Sometimes the force of these other reasons is connected with other enactment events, whether the framing of a constitution or, more broadly, the content of the *corpus juris*, into which a new enactment has to be integrated. But sometimes they are free-floating moral reasons, which for example make one application seem ‘obvious’ and another ‘absurd.’³²

Think back to our analogy. Promisor P may say to promisee Q, ‘I promise to do ϕ .’ It looks as though the moral upshot of this is that P has a moral obligation to do ϕ when the time comes. But that impression may be misleading. In the fraught circumstances of moral life, we are not always in a position to read off from what is said the moral difference that a promise makes. If circumstances have changed when the time comes, or if ϕ is morally dodgy or particularly demanding, or if P has made other promises or incurred other debts, then what P has an obligation to do may be a matter of judgment. Dworkin’s own example in *Justice for Hedgehogs* of a complex promise in the tangled circumstances of an overcommitted family (407-9) is a fine illustration of this.

All of this is by way of reflection—partly by analogy—upon the idea that the events giving rise to what we think of as positive law are events whose moral impact has to be assessed by moral reasoning against a moral background.³³ This is the idea I am invoking to give sense to Dworkin’s claim that law is not separate from, but a branch or tributary of, political morality. As I have said, using my analogy, it is as though we were to focus on that branch of morality that is concerned with the moral significance of promises (which are also contingent events that have moral impact against a moral background).

³² Consider the importance of the eight pages proving that the United States is a religious nation in the US Supreme Court’s interpretation of the immigration statute considered in *Church of the Holy Trinity v. United States* 143 U.S. 457, 465-72 (1892).

³³ It should be apparent to those familiar with recent writing in legal philosophy that, in thinking all this through, I have been helped immeasurably by the work of Mark Greenberg, who over some years has defended a position quite similar to the one I am now attributing to Dworkin. See M Greenberg, ‘How Facts Make Law,’ 10 *Legal Theory* 157 (2004) and ‘The Standard Picture and Its Discontents,’ in L Green and B Leiter (eds) *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press, 2011). The position I think Dworkin now holds seems to be close to a position Greenberg called ‘the dependent view,’ which at that time he distinguished from Dworkin’s position. That distinction makes perfect sense given that Dworkin’s view was evolving over the time Greenberg was writing these essays.

Only, it is a much denser, more formal and better established set of practices that law is concerned with; law is concerned with practices that are formalized, routinized, and recorded and which accumulate and build on one another reflexively. They do so in ways that seem to be amenable to and to require special skills, which often seem quite distinct from the broader skills of the political moralist.

5. An intermediate step?

An unreconstructed defender of the two-systems view (law as a system distinct from morality) may be willing to acknowledge a lot of this. A two-systems theorist need not deny that enactment and decision-events make a moral difference; he need not deny that the overall difference that an enactment makes to the moral position of those to whom it is addressed is not necessarily the difference it explicitly aspires to make. Nor need he deny that political morality should include a large branch that considers these matters: it will be an aspect of what he thinks of as the morality of political obligation (our obligation to obey the law).

But the two-systems theorist will insist that the *legal* difference that an enactment makes is not necessarily the same as the moral difference that the enactment makes. There may be an analogy between the two: the legal difference, just like the moral difference, is not necessarily the exact difference that the enactment-event aspired (in its text) to make. The legal difference will be determined by a process of legal interpretation (quite distinct from moral interpretation) of the text produced by the enactment event. Nevertheless, the disparity between the legal difference that an enactment aspires to make and the legal difference that it actually makes will usually be a different disparity—and a disparity established in a different way—from the disparity between the moral difference that an enactment aspires to make and the moral difference that it actually makes. Attending to these differences, the two-systems person will say, is important for grasping the distinctive character of law as something quite separate from morality.

The two-systems theorist may even acknowledge that in the end it is the moral impact of the law that matters most. It is after all the moral force of the legal events that determines what we ought to do.³⁴ But he will insist that we

³⁴ Hart believed that one of the most important reasons for distinguishing positive law from morality was to keep a clear and uncluttered sense of what morally we ought to do, which in the end was the crucial question. See H.L.A. Hart, *The Concept of Law*, 3rd edition ed. L

cannot assess the moral difference that the law makes unless we have a clear—and separate—sense of *the law* that is aspiring to make the moral difference. Even if morality underwrites the moral difference that law makes, *still* we need to be able to say what the law *is* that all this moral fuss is about.

Dworkin would have said there are good grounds for resisting this point. Though of course he believed that it was important to have a clear understanding of any event (such as legislation or a past decision) that was supposed to make a moral difference, he would, I think, deny that the best way to get that was to first identify a legal proposition, extrapolated from the event by some process of legal (as opposed to moral) interpretation. Let me explain.

The process of legislation, as we know it, might offer us a text, which will claim to stand as a legal proposition:

1. Enactment event \rightarrow text: ‘Every citizen must do ϕ .’

and from this it might seem that we can extrapolate a legal proposition

2. It is the law that every citizen must do ϕ^\dagger

(where the difference between ϕ and ϕ^\dagger reflects the impact of specifically legal interpretation applied to the legislative text). A practice of making such extrapolation might have grown up among us, encouraged by participants in enactment events, who aspire to control what citizens make of what they (the enactors) have done. We must remember that the events whose moral significance we are studying here are relatively self-conscious institutional events. Part of their institutionalization consists in the use of set formulas in which their aspiration to make a moral difference is couched; and part of their routinization is our taking it for granted that, in a great many cases and for a great many purposes, attention to those formulas is all that is required for figuring out the difference that they make. We have institutions hundreds of years old dedicated to the production of liturgies like

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.³⁵ Every citizen must do ϕ .

These events have an articulate and recorded presence among us, and their processes are oriented to the production of a text. Our practice of keeping track

Green (OUP, 2012) 210-12; see also L Murphy, ‘Better to See Law This Way,’ 83 NYU Law Review 1088 (2008)

³⁵ The verbal form used at the beginning of every piece of legislation in the United Kingdom.

of such texts creates the impression that there is a legal *something* that exists, important in itself apart from and prior to our determination of what morally is to be done in the light of what has happened among us.

But in the end, Dworkin will say, this is just an impression, a sort of optical illusion. What ultimately matters is the move from step 1, above, to

3. Citizens have a moral duty to do φ^*

(where the difference between φ and φ^* reflects the net impact of step 1 on citizens' overall moral duty). And it is unclear what step 2 adds to the transition from step 1 to step 3. Is it a matter of interpretation? Well, if there is a considerable difference between φ and φ^\dagger and a considerable difference between φ^\dagger and φ^* , we might be better off moving directly from φ to φ^* using interpretation in Dworkin's sense, forgetting about φ^\dagger as a sort of halfway house along that path.

At best, step 2 is a heuristic. Extrapolating a step 2 from step 1, and pausing there, may often be a good strategy en route to step 3. But it is sometimes misleading and it is usually dispensable. Particular views about the moral importance of enactment events might encourage the formulation of step 2—textualism, for example. But textualism is ultimately a *moral* theory—a controversial moral theory—about the respect owed to the enactors and the process of enactment; it is part of what bears on the move from step 1 to step 3, and non-textualists will think they have reason to regard that account of the move to step 3 with suspicion.³⁶

The point is perhaps clearer in the case of precedent, where the effort to identify an equivalent of step 2 in the passage from decisional event to moral significance often seems strained and artificial. We begin with a court order for a particular case

³⁶ Someone might say that the move from step 1 to step 2 is important for those (such as Holmes's 'bad man') whose concerns are not moral and who just want to be able to predict sanctions, taxes, etc. But even for that case, we might be uneasy about the value of step 2. Consider this process of reasoning:

1. Enactment \rightarrow text: '*Every citizen must do φ .*'
 \downarrow
2. It is the law that every citizen must do φ^\dagger
 \downarrow
3. A citizen would be prudent to do φ^*

(where φ^* reflects the net impact of step 1 on the bad man's overall prudential situation). If one's ultimate concern (as a bad man) is step 3, there might be many ways of proceeding from 1 to 3 that do not involve extrapolating anything like step 2 or pausing there.

1. Court order: 'On account of circumstances c , defendant D is to do ϕ .'

The implications for D are pretty straightforward, but what about the implications for the rest of us in later cases? Well, principles of consistency, fairness, and certainty might make it appropriate for us to talk about the moral impact of 1 on the situation of citizens generally:

3. Citizens have a moral duty to do ϕ^* in circumstances c^*

(where the differences between ϕ^* and ϕ and between c^* and c reflect the net impact of step 1 on citizens' overall moral duty). As we all know in reckoning with *stare decisis*, the move from a decision in one case to a decision about how another case ought to be decided is by no means straightforward.

We can try for the intermediate step, extrapolating something that looks like a legal rule from the original ruling:

2. It is the law that every person in circumstances c^\dagger must do ϕ^\dagger

(where the differences between c^\dagger and c and between ϕ^\dagger and ϕ reflect some process of specifically legal interpretation of step 1). But it is often a strain to extrapolate anything like a canonical form of words from a precedent. Judges are not legislators and—by contrast with the case of enactments—there is little plausibility to the claim that a particular doctrinal formulation determines the moral significance of the precedent. So what's the value of step 2? Either it is altogether unhelpful or, if it does seem helpful, that is most likely because we have moved from step 1 directly to step 3 and are now projecting back a little bit. Step 2 is a fragment or abbreviation of the move from step 1 to step 3; it has no independent importance. That, I think, would be Dworkin's position.

Promises are a bit like this also. These days they are not expressed liturgically. I guess that if all promises were couched in the form

I, JW, hereby promise that I will do ϕ

then morality might underwrite the practice of determining our obligations purely by verbal extrapolation. But promises don't work like that in moral life. They are expressed in all sorts of ways (not often in a given formula), and their significance for the promisor and others is always an upshot of various factors, seldom a simple function of what was said. And that's exactly what is true of law. Doctrine, in the case of precedent; text, in the case of enactment—their identification may be useful heuristics for decision-making in the branch of morality we call law. But they don't really pick out a range of important and considerable objects in a realm differentiated from morality.

6. The difference between Dworkin and Raz

(Please do not read this section unless you are really interested in the minutiae of recent jurisprudence. Section 7 is more interesting and it begins on p. 19, below.)

In a 2004 article entitled ‘Incorporation by Law,’ Joseph Raz (who is usually regarded as an arch-positivist) came close to the position I am attributing to Dworkin. In that piece, Raz began by pointing out that morality is the background field against which all agency is assessed, judges’ as well as others’: ‘Even judges are humans. In being human, they are subject to morality.’³⁷ True, it seems to be the job of a judge to impose requirements on other people that derive simply from acts of will on the part of legislators. And it is hard to see how these impositions can be moral impositions; it is hard to see that the acts of will that constitute positive law can be regarded as the constitution of moral duties. ‘No one can impose a duty on another just by expressing his will that the other have that duty.’ So, says Raz,

If governments can do so, this can only be because and to the extent that there are valid principles that establish their right to do so. Those principles, the principles establishing the legitimacy of man-made laws and of the governments that make them, are themselves, whatever else they are, moral principles.³⁸

‘How do we know that?’ Raz asks.

By their content. They are principles that allow ... some people to interfere in important ways in the lives of others. Valid principles that have such content are moral principles, or nothing is. ... [W]hatever else we grace with the title ‘moral,’ principles that impose, or give people power to impose on others, duties affecting central areas of life are moral principles. That much about the nature of morality is clear.³⁹

It seems to follow, he says, that if we assume our legal system is legitimate and binding, then ‘we cannot separate law from morality as two independent normative points of view, for the legal one derives what validity it has from morality.’⁴⁰

Now, as a hard positivist, Raz also believes that ‘the very existence of the law, even of morally legitimate law, means the exclusion of morality.’

Think about it: judges are bound by morality. So, absent any law, they would decide the case on the basis of moral considerations. Does it not follow that where there is law, it either makes no difference to their decisions or it forces them to deviate from what they would do on the basis of morality alone—that it in effect excludes morality? Is it not the case that whenever the law makes a difference to the outcome, it excludes morality? If it is the purpose of the law to make a difference to our life,

³⁷ J Raz, ‘Incorporation by Law, 10 Legal Theory 1 (2004).

³⁸ Ibid., 6.

³⁹ Ibid.

⁴⁰ Ibid., 6-7.

does it not follow that its realization of its purpose depends on its ability to exclude morality?⁴¹

The question to ask, then, is how law can make such a difference, swerving the judge away from simply applying the moral principles that as a human being she is bound to apply. The answer seems to be that law can only make such a difference if morality—moral principles—require it to make such a difference. As Jules Coleman characterizes Raz's position:

If we must always do what morality requires us to do, then the only time we would be permitted to act on the basis of considerations that appear to be 'non-moral' is when morality itself counsels us to do so. It follows that one should act on the basis of the law's reasons only when morality counsels that one do so.⁴²

If this is Raz's position, then it is quite close to Dworkin's. As we will see, both of them are interested in the way in which moral principles frame the distinctive demands upon us—black-letter demands—that law seems to make. Moral principles (e.g., moral principles that determine political legitimacy) determine the bindingness of legislation and moral principles determine the importance of precedent (e.g., moral principles about consistency and fairness, or moral principles about the importance of certainty). We attend to these 'sources of law' because we are morally required to. That seems to be something that Raz and Dworkin have in common. And Raz highlights the commonality by concluding that 'if we take the law to be normatively valid we cannot construe its requirements as constituting a point of view independent of morality, a point of view that represents a separate normative concern that has nothing to do with morality.'⁴³

But Raz is a legal positivist and Dworkin was not. What's going on? Here's one possibility. Obviously the passage I quoted from Raz six lines ago depends very heavily on an 'if' at the beginning: '*if* we take the law to be normatively valid....' Isn't that where morality gets snuck in, to tinge everything else that follows? That sounds right, although I think Dworkin would have wanted to insist that the normal mode of involvement in a legal system—the involvement of a judge for example—is the involvement of someone who does definitely regard statutes and precedents as normatively valid sources of law. It can't be the case, he would say, that in order to maintain the separation thesis—the thesis that judges don't need to make moral judgements in doing their legal work—one has to attribute to judges a radical detachment from the legal system in which they are operating.

There is also a subtler point of difference, and this draws on my discussion, above, in section 5. Raz treats morality as a background field, relative to which law-making and the law that is made make a difference. But unlike Dworkin, Raz thinks that there is really is something, some *thing*—the law—which having been made displaces moral requirements. That seems to suppose that we can identify the law that makes a difference and that the law, so identified, is positive law and thus something distinct from morality. Raz thinks it is necessarily distinct because its whole point is to make a difference to morality. So, for Raz,

⁴¹ Ibid., 8.

⁴² J Coleman, *The Architecture of Jurisprudence*, 121 Yale L J 2 (2011).

⁴³ Raz, 'Incorporation by Law,' 7.

step 2 in the various syllogisms we set out in section 5 (pp. 14 and 16) really does have jurisprudential importance. I think this is the part of Raz's picture that Dworkin departs from.⁴⁴

For Dworkin's view is that the law that makes a difference to what background morality requires must itself be understood in moral terms. It must be understood in moral terms not just in regard to the moral significance of the events (like enactment) that generate it, but in its content, and also in the difference it makes. Since it makes a moral difference and does so on moral grounds, the difference it makes is now what morality, after all, requires.

So there's the contrast. Raz thinks the law that makes a moral difference—relative to the demands of background morality—must be identifiable without making any moral judgment (certainly not about its subject-matter). Dworkin believed that the law that makes a moral difference—relative to the demands of background morality—must itself be identified morally. In a way it is quite remarkable that the distinction between the positions held by two jurists as diametrically opposed as Ronald Dworkin and Joseph Raz have been over the years—should come down to this nuanced difference.


7. 'The true embodiment of everything that's excellent'

We return now to the main thread of the argument. When the philosopher Simon Blackburn wanted to make fun of *Justice for Hedgehogs*, he said that its author had come dangerously close to echoing W.S. Gilbert's Lord Chancellor in *Iolanthe*:⁴⁵

The Law is the true embodiment
of everything that's excellent.
It has no kind of fault or flaw
and I, my Lords, embody the Law.

'On the face of it,' says Blackburn, 'what the law is and what it ought to be are two very different things.' So Dworkin's identification of law as a branch of morality is, he says, a very odd view:

In the US, for instance, is it really plausible that the partisan, geriatric, moral anosognosics so often found ornamenting the Supreme Court have

⁴⁴ I hasten to add that Dworkin did not develop his view by reference to or by contrast with Raz's 2004 article. This is my construction, as a way of understanding Dworkin's view. But Dworkin did attack Raz's thesis of the necessarily non-moral character that law must have (in order to make a moral difference) in R Dworkin, 'Thirty Years On,' 115 Harv L R 1655,  (2002).

⁴⁵ Simon Blackburn, 'Review of *Justice for Hedgehogs*,' Times Higher Education, 27 January 2011, available at <http://www.timeshighereducation.co.uk/414939.article>

unerringly enshrined nothing except every kind of excellence into US law?⁴⁶

Dworkin's response to Blackburn's observation was to deny that he was maintaining the moral perfection of the law or denying the contrast between law as it is and law as it morally ought to be

I declared pretty much the exact opposite opinion in Chapter 19 of *Justice for Hedgehogs*, and in everything else I have written about law over very many years. He [Blackburn] may think the difference unimportant between the Lord Chancellor's optimism and the very different view, which I defend, that moral judgment often plays an interpretive role in deciding what the law on some matter is. If so, that is regrettable: an inability to tell the difference has contributed to bad legal theory and sometimes very bad legal decisions.⁴⁷

But this won't quite do because the view that Dworkin says he is defending—'that moral judgment often plays an interpretive role in deciding what the law on some matter is'—is, as we saw in sections 2 and 3 of this paper much less radical than the view actually articulated in *Justice for Hedgehogs*. Dworkin has always maintained that our moral judgment plays an interpretive role in our determination of what the law is. The distinctive thing about *Justice for Hedgehogs* was supposed to be an acknowledged move to the much stronger claim that 'law is a branch, a subdivision, of political morality' (405). If that's the latest view, then Dworkin *does* have to respond to what would seem to follow—namely, that what the partisan, geriatric, moral anosognosics so often found ornamenting the Supreme Court have enshrined in the law, like the *Citizens United* decision or the very recent decision about the Voting Rights Act, is now part of political morality.⁴⁸ And if, as he has indicated, he is not prepared to simply retreat to the classic natural law position—*lex iniusta non est lex*—then he has to tell us how to think about bad law.

One immediate and quite plausible response is to deny that it follows from the claim that law is a branch of morality that therefore every legal

⁴⁶ Ibid. Wikipedia tells me that anosognosia is 'a deficit of self-awareness, a condition in which a person who suffers certain disability seems unaware of the existence of his or her disability.'

⁴⁷ <http://www.justiceforhedgehogs.com/32/>

⁴⁸ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Shelby County v. Holder*, 570 U. S. ___ (2013).

decision is moral and good. If Dworkin is right, then judges faced with a difficult case—actually judges in every case—have to figure out what morality requires. That is their task. But they don't always do it or do it well. (The same is true of many people facing moral decisions.) They may be careless in their moral calculations or they may hold moral views that are disgracefully wrong. When they do, the result will be a moral question that is answered badly (but that nevertheless has its effect in the world). Many of Dworkin's denunciations in the *New York Review of Books* of past decisions of the partisan, moral anosognosics so often found ornamenting the US Supreme Court have this character.⁴⁹

Not only that, but Dworkin began his career 45 years ago by insisting that there is a difference between the law and what the Supreme Court justices have decided, a difference that individual citizens may act upon without attracting any legitimate complaint that they are violating the rule of law: 'A citizen's allegiance is to the law, not to any particular person's view of what the law is, and he does not behave improperly or unfairly so long as he proceeds on his own considered and reasonable view of what the law requires.'⁵⁰ This was part of the original significance of Dworkin's 'right answer thesis.'

The point is that courts and other legal decision-makers often act lawlessly, they often regret their past lawless behavior, and citizens sometimes have to figure out what to do in response to self-styled legal decisions that do not really reflect what the legal branch of morality requires at all. In this regard, all that Dworkin's position in *Justice for Hedgehogs* implies is that the standards used to evaluate the lawfulness of a court's decisions are ultimately standards drawn from the particular branch of political morality that we have been discussing. And that is not the position of Blackburn's Lord Chancellor.

8. An analogy with dodgy and unfortunate promises

What I have said, however, is not a complete response to Blackburn. For as Dworkin acknowledged even in 1968, the citizen considering what the law

⁴⁹ See, e.g., R Dworkin, 'The Court's Embarrassingly Bad Decisions,' *New York Review of Books*, May 26, 2011; 'The Decision That Threatens Democracy,' *New York Review of Books*, May 13, 2010; 'The Court and Abortion: Worse Than You Think,' *New York Review of Books*, May 31, 2007; etc.

⁵⁰ R Dworkin, 'On Not Prosecuting Civil Disobedience,' *New York Review of Books*, June 6, 1968, reprinted as a chapter on 'Civil Disobedience' in R Dworkin, *Taking Rights Seriously* (Harvard UP, 1977).

really requires does have to take into account the precedential effect of past cases, even when those past cases have been badly decided.

If the law is doubtful, [the citizen] may follow his own judgment, even after a contrary decision by the highest competent court. Of course, he must take the contrary decision of any court into account in making his judgment of what the law requires. Otherwise the judgment would not be an honest or reasonable one, because the doctrine of precedent, which is an established part of our legal system, has the effect of allowing the decision of the courts to change the law.⁵¹

This is but an instance of a broader and obvious point. Not only do we have to consider the significance as precedents of badly decided cases, we also have to consider the significance, as enactments, of bad legislation, legislation that treats people unjustly or denies them things they have a right to. Once made, these enactments and many of these precedents become part of what is to be taken into account in legal decision-making. Can decision-making which is necessarily contaminated in this way possibly count as moral?

The answer is ‘Yes.’ Once again the promising analogy can help us. Sometimes when we talk about JW promising to do ϕ , we imagine that ϕ is innocuous or even beneficial: what could be more righteous than the moral significance of such a promise? But sometimes people make promises to do things that are, if not downright wicked, then wrong or unfair or show signs of bad character. (I don’t mean murderous promises, but promises that are morally dodgy: I promise to cover up someone else’s illicit affair, for example, or I promise to influence the Admissions Office at my university in favor of my friend’s sons or daughters.) Or never mind morally dodgy promises: JW may promise in an ill-advised moment to do something he really can’t afford to do or something that will take up so much of his time that he won’t be able to devote any time to his other obligations. Often we make promises—or I do, even if you don’t—that make it impossible to perform other promises, like contracting separate lunch dates on the same day. Let’s call these ‘unfortunate promises.’

Morality has to deal with—come to terms with, figure out the moral significance of—unfortunate and dodgy promises, as well as righteous ones. This is because the moral force of a promise does not evaporate altogether just because it is dodgy or unfortunate. A promise was made and someone is now relying on it. But it is not just a matter of its moral force weakening: as in

⁵¹ Ibid.

‘same content, lesser force.’ The promise is compromised, and what is now actually morally required of the promisor may not be all or even anything that he explicitly undertook to perform. (In the case of the man who promised to cover up an illicit affair, he might have an obligation to warn the erring husband before speaking truthfully to the innocent wife or he might have an obligation to avoid situations where the truth might be required of him. In the case of someone who promises to do something that he hasn’t the time or the money for, he may have an obligation to do some of what he promised, even if he can’t do it all. And so on.) All this is part of morality, though it is a domain of the distinctly second-best. Since these promises have been made, they have to be dealt with, and there are (morally) right and wrong ways of dealing with them.

Well, so, similarly, the part of morality that is law—the part of morality that deals with the moral significance of past political events like precedents and enactments—sometimes has to consider the enactment of unjust statutes and the making of perverse or unfair decisions. It has to respond to political events that are unfortunate and that may have an impact on what is now morally required which we wish were not the case. Just because law is a branch of morality, it does not follow that what the law requires is morally perfect or never morally regrettable.⁵²

The point takes on a particularly poignancy because law makes its moral claims among people who disagree about good and bad, right and wrong, just and unjust.⁵³ I’m a liberal; you’re a conservative. The statutes you regard as unfortunate, I regard as paragons of justice. The precedents I regard as unfair, you regard as righteous decisions. Left to our own individual devices, we would come up with quite disparate accounts of the moral background and of the net moral difference that these controversial measures make to it. But of course we are (mostly) not left to our own individual devices. Since it is important that there be resolutions and decisions that can stand in the name of

⁵² Note that I am not dealing at this stage with *evil* statutes or *horrendous* precedents, where we might be tempted to say they make no moral difference whatsoever except to elicit our resistance. I will deal with those at the end of this section.)

⁵³ Here I may seem to be interpolating—even more than in the rest of the paper—my own views in legal and political philosophy: see J Waldron, *Law and Disagreement* (OUP 1999). And I guess I am; but Dworkin was sensitive to these matters too: see Dworkin, *Law’s Empire*, 211-15.

us all even when we disagree about what those decisions should be, we need to share ways of determining the moral impact of the relevant events.⁵⁴

The prospect that certain enactments and decisions are mildly unjust or unfair and have to be morally dealt with as such seems to drive us towards a view like the one defended in section 5. The net moral impact of one of these events may not be able to be simply ‘read off’ from the text produced by the event itself by a process of ‘legal interpretation,’ (at least if the interpretation is not morally sensitive). This reinforces our sense of the unhelpfulness of what I called step 2 in the syllogisms I set out in that section.⁵⁵ It is what I suggested too, on pp. 9-10 and 16 above, about promises: given the prospect that some promises may be dodgy and others unfortunate, we cannot simply read off what the promisor has an obligation to do from the text, as it were, of the promise.

On the other hand, the point made in the last paragraph but one might drive us in the opposite direction. Since we (who disagree about justice) need to share an understanding of the moral impact of unfortunate enactment- or decision-events, maybe there is some advantage in our attachment to processes of legal interpretation that do not immediately ignite the moral controversies that exist among us. Maybe this is an argument for the importance of what I called step 2 in section 5. But if so, it is itself a moral argument about the moral importance of our having an interpretive approach we can share.⁵⁶

Similar points (both ways) might be made in the light of another fact about the governance of modern societies. Not only do we have to govern by law in the heat of disagreement, we also have to govern in the context of layers and layers of precedents and enactments that precede us and our particular controversies. The moral significance of every enactment-event and decision-event *now* is determined alongside the moral significance of just about every enactment-event and decision-event there has ever been around here. For most laws and the precedential effect of many decisions outlive the judges and the majorities that decided them. Some live on for centuries; others for a few months or a few decades. We do not work with any sort of ‘Year Zero’ principle

⁵⁴ Analogously, promisors and promisees need to share ways of determining what to do about certain promises even when they disagree *inter se* about which ones are morally dodgy or unfortunate.

⁵⁵ Above, pp. 13 and 15.

⁵⁶ It’s like what is sometimes called normative or ethical positivism: see J Waldron, ‘Normative (or Ethical) Positivism,’ in Jules Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to *The Concept of Law** (OUP 2001), 411.

that automatically invalidates all the laws that held sway under majority A when majority A is replaced, through electoral competition, by majority B. Majorities come and go, in the turn-taking characteristic of electoral politics. But the legal measures they enacted and the legal arrangements they inherited live on unless something specific is done to repeal or overturn them. The statute book is replete with legislation that has survived four or five (or twenty or thirty, or two or three hundred) parliaments. And it is not just legislation. The principle of *stare decisis* ensures that the principles underlying judicial decisions continue to exercise their force in legal decision-making long after the judges who gave force to them have gone under the ground and the monarchs who appointed the judges have passed away. Our law is a sort of archaeological midden. And sometimes what was decided in the reign of Henry IV *does* have an impact on what it is right to do now (alongside what was decided in the reign of every monarch that succeeded Bolingbroke). It is part of the rule of law that we take, not just last week's enactments and decisions, but *this whole heritage* seriously. And sometimes we need to have hold of distinctive moral principles for doing so, like the principle of integrity that Professor Dworkin introduced.⁵⁷

All of this indicates that Dworkin's position, as set out in *Justice for Hedgehogs* has multiple resources to cope with the moral perspicuity of a Simon Blackburn who can spot a bad law when he sees one. The claim that law is part of morality does not require us to say that bad laws are not laws at all, or that bad laws are really *good* laws if only we could see. It does require us to say that in most cases when we are faced with enactments and precedents that morality frowns upon, we still have to try to figure out their significance along with all the rest of the *corpus juris* for our moral obligations. 'Nothing guarantees that our laws will be just,' Dworkin acknowledged (5). But that doesn't mean that we separate the relation between law and morality; it means we *complicate* the relation between law and morality.

9. Downright evil laws

We have been talking about mild cases: law-creating events that morality frowns upon, or law-creating events whose moral significance is a matter of dispute among us. What about downright evil laws?

An example that Dworkin considers (411-2) is the case of the Fugitive Slave Acts of the antebellum period in the United States—enactments that required non-slavery states in the north to cooperate coercively in returning

⁵⁷ Dworkin, *Law's Empire*, Ch. 6.

fugitive slaves to their owners. His view seems to be that even such wicked laws as these might make a moral difference:

The United States Congress (let us assume) was sufficiently legitimate so that its enactments generally created political obligations. The structuring fairness principles that make law a distinct part of political morality—principles about political authority, precedent, and reliance—gave the slaveholders' claims more moral force than they would otherwise have had. (411)

But Dworkin goes on to say that the moral claims of the slaveholders 'were nevertheless and undoubtedly undermined by a stronger argument of human rights.' His conclusion—'So the law should not have been enforced' (411)—is pretty straightforward, but he insists that the situation is not as simple as if we were being asked about the morality of returning fugitive slaves to their owners in the absence of such a law.

Maybe there are some laws that are so murderously wrong in their character that they have no impact on the moral situation at all—except to generate an obligation to resist them. In *Justice for Hedgehogs* Dworkin hints that this might have been true of some Nazi edicts and it might be a truth that we want to express by denying that the Nazi edicts were valid law. But whether we want to commit ourselves to that form of words or not—and Dworkin fears that '[t]he ancient jurisprudential problem of evil law is sadly close to a verbal dispute' (412)—the important thing is to keep our eye on the moral issue. Did the processes by which Nazi edicts were 'enacted' have any moral claim on German citizens at all? Answering that question (in the negative) does not really require us to pause and ask whether the Nazi 'enactments' made law.

10. Conclusion

When Dworkin introduced or adumbrated the picture I have been describing at the end of the Introduction to *Justice in Robes*, he suggested that his move to the one-system view might not make a whole lot of difference to how one argues in and around the law:

My suggestion has no independent substantive force: I can say everything I wish about the interconnection between law and morality in the classic

vocabulary that assumes that these are sensibly regarded as in the main distinct intellectual domains.⁵⁸

It might not make much difference in the way we actually talk about law. But Dworkin went on to say this:

the shift I recommend would organize our subject matter in a more pellucid way. It would encourage us to see jurisprudential questions as moral questions about when, how far, and for what reason authoritative, collective decisions and specialized conventions should have the last word in our lives. We would no longer doubt that justice plays a role in fixing what the law is. We could then concentrate on the more complex and important issue of precisely what that role is.⁵⁹

There may be something to this no-difference thesis, but I doubt it. For one thing, Dworkin's statement in that last extract seems to repeat the misstep that he made earlier, saying that he was presenting jurisprudential questions as moral questions.⁶⁰ But that's too modest. To repeat: the position in *Justice for Hedgehogs* is not simply that jurisprudence is part of moral philosophy, it is that law is part of morality.

Admittedly, "jurisprudence" is ambiguous: it can refer not just to legal philosophy, but to an active body of doctrine considered as part of the law, or to both. But if it refers to doctrine then I have to say it is not clear at all that Dworkin's position does leave everything as it is.

In section 5, I suggested that the impression of a separate system of positive law, identifiable apart from a full consideration of the moral significance of some law-creating events, might be warranted in certain straightforward cases. It might be warranted on the basis of institutional familiarity with certain kinds of law-making and perhaps also on the basis of the implicit acceptance of certain moral principles about how to assess law-making events. This range of cases might encourage a sort of 'step 2' mentality that does indeed seem to leave everything as it was when the two-system view was accepted.

But whenever these assumptions fail, whenever we are dealing with cases that are not routine or that are beginning to arouse interpretive controversy, or

⁵⁸ Dworkin, *Justice in Robes*, 35.

⁵⁹ *Ibid.*

⁶⁰ See above p. 7, n19, quoting Dworkin, *Justice for Hedgehogs*, 410.

even whenever we look more closely even at the easy cases, the impression of independent law begins to evaporate. Suddenly ideas that had been relegated from law to that other system—morality—begin to seem important in figuring out the significance of what happened in the legislature. And it may no longer seem so sensible to say that we must hold off on our moral analysis until we have first got the legal situation straight. Reasoning about law for such cases might begin to seem quite unfamiliar to anyone reared in the two-systems faith. Unfamiliar, perhaps, but morally more responsible: for as Dworkin put it in *Justice in Robes*, ‘[w]e would no longer doubt that justice plays a role in fixing what the law is [and we] could then concentrate on the more complex and important issue of precisely what that role is.’⁶¹

⁶¹ Dworkin, *Justice in Robes*, 35.

I do not envy those who have had to put into words today the loss of Ronald Dworkin as a father or a friend. I have the easier task of conveying a sense of the importance of his philosophical thought, particularly in the philosophy of law.

I want to acknowledge what we have lost, from his being no longer among us; but also I want to affirm what we gained—at Oxford, in London, in New York, in the world—from his voice and from the light of his intellect.

What we have not lost... Well, we still have the books—*Taking Rights Seriously*, a collection of papers that in 1977 transformed our understanding of rights and right answers; *Law's Empire*, a decade later, a powerful argument about interpretation and integrity; then in 2011, the great synthesis, *Justice for Hedgehogs*, an affirmation of the unity of value, bringing into a single Dworkinian vision an ethic of dignity and a comprehensive legal and political theory. What these books embody—and I have named only three out of the fifteen or so that grace the Dworkin bookshelf—what these books embody in jurisprudence is the most thoughtful and lucid alternative to legal positivism that we have had in the modern era.

I don't mean anti-positivism, as though Ronnie's aim was just to refute the claims of his teachers at Oxford. His work may have started that way 45 years ago, in 'The Model of Rules.' But in fact what has been most valuable in Ronnie's jurisprudence is the elaboration of an alternative theory of law, which, mostly, was allowed to develop under its own elegant momentum.

In this great and graceful body of work, Ronnie gave us a living jurisprudence, one which credited the practice of law with reason and thoughtfulness, not just the mechanical application of rules. It was a jurisprudence that taught us to take seriously forms of argument that—to the bewilderment of positivists, pragmatists, and all sorts of skeptics—have lawyers and judges delving doggedly again and again into the books of the law to search for legal answers to hard cases, rather than just admitting defeat at the first sign that there is not going to be any text or precedent directly on point.

He had the effrontery to suggest that there were right answers to the legal problems posed in hard cases and that it mattered whether we got the answers right or wrong. This was a view which many disparaged, but it was a view that respected the position of plaintiffs and petitioners as people coming into law to seek vindication of their rights, not just as lobbyists for a quasi-legislative solution. It was a position, too, that respected the obligation of judges never to give up on the sense that the existing law demanded something of them, even in the most difficult disputes. Under the Rule of Law, we don't just settle points of law pragmatically. We proceed, as far as possible, in a way that keeps faith with what is already laid down.

Dworkin helped us chart the topography of law; for the *corpus juris* is not just a heap of norms; beneath the explicit rules there are principles and policies that a legal system has committed itself to implicitly, over the years; deep subterranean channels of moral concern that flow through every part of the law.

In an argument of quite stunning complexity, his 1986 book *Law's Empire* set out grounds for the responsibility that lawyers and judges have to the laws as a whole, including their responsibility to measures enacted by people who may not have shared their views

about justice. Our job, he said, as lawyers, scholars, and judges, is to bring interpretive coherence—integrity—to the whole body of the law.

The unearthing of these principles and the burden of this integrity meant that legal reasoning, in Ronnie's opinion, *is a form of moral reasoning*. This was the artery of his jurisprudence: that legal reasoning *is a form of moral reasoning*. Certainly, it is a complicated and uneasy form, for it depends on judgments about the moral importance of contingent events like enactment and the setting of precedents that ordinary moralizing does not concern itself with. 'Nothing guarantees that our laws will be just,' Ronnie acknowledged. But that doesn't mean that we *separate* the relation between law and morality; it means we complicate the relation between law and morality. Like a system of ethics that has to deal with the moral significance of promises we wish had never been made, so too the morality of law has to come to terms—come to *moral* terms—with statutes we wish had never been passed and precedents we wish had not been laid down. But the mark of legality is the felt need to respect those with whom we share the community, including those whose decisions we disagree with—to respect on moral grounds the legacy that they have contributed to, as we expect them to respect the legacy—the same legacy of law—that we have contributed to.

As I said, the affirmation of this entanglement of law and morality was the artery of Ronnie's jurisprudence. And for the philosophy of law generally, these are ideas of momentous importance. They will resonate down the generations. They are not uncontroversial by any means, but the controversies they provoke have been productive, sparkingly productive, in the otherwise desiccated landscape of our subject.

It is not just legal philosophy. No one can do justice in ten short minutes to thought as wide-ranging as Ronnie's. There is his work in constitutional law: what he called 'the moral reading' of the American constitution; and his conviction that even in Britain, a bill of rights with strong judicial review was not only possible, but would strengthen democracy by strengthening the conditions that make democracy legitimate.

Then there is his writing on equality in moral and political philosophy, which he began working on at the end of the 1970s—producing two articles of massive importance in the first ever issues of *Philosophy and Public Affairs*. Like many here today, I had the good fortune to attend the seminars on these and other topics—where Ronnie stood with other titans like Bernard Williams, Charles Taylor, Amartya Sen, and Derek Parfit. (Those were the days when lectures and seminars at Oxford were something more than just adjuncts to courses.) It is impossible to overestimate the influence of these pieces on equality—'What is Equality? 1. Equality of Welfare' and 'What is Equality? 2. Equality of Resources'—in setting the agenda for the study of justice—luck egalitarianism and so on—in the 1980s, 1990's and beyond.

We marvelled then at the range of Dworkin's ideas. We thought he was a glamorous fox who knew ever so many things. We didn't always see that, while he was working both on the theory of equality and on the jurisprudence of *Law's Empire* and on the substance of end-of-life and abortion issues in *Life's Dominion*, he was also laying the foundations for a unifying ethical vision that, in the manner of the hedgehog, would bring together these different facets of a comprehensive theory of justice.

The vision was unified, in his great ethical work, *Justice for Hedgehogs*, by a principle of dignity. Each person, said Ronnie, has a certain responsibility for the precious shape of his or her own life, and everyone has a duty to respect the conditions under which others are able to discharge that responsibility. That's what 'human dignity' meant for Ronnie and it

underpinned both the principles of responsibility that were so important in the luck-egalitarian side of his account of equality and the principles of mutual respect that are represented in the rule of law. His great work of synthesis, *Justice for Hedgehogs* revealed this as the foundation of all his positions—and I do mean ‘foundation,’ which is not the same as the fortification that allows a philosopher to see off contrary intuitions. I mean that *Justice for Hedgehogs* bravely identified a very deep underpinning for his various positions, even though that explicit identification made each of them somewhat more vulnerable, by presenting a deeper as well as a wider and more integrated target.

*

I talked at the beginning about what we have lost and what, through Ronnie’s life and work, we gained. What we have and can treasure still are the writings, the books, the articles (whether they are in the *Oxford Journal of Legal Studies* or the *New York Review of Books*), the jurisprudence, the new ways of connecting ethics and political philosophy.

What we have lost, though, is what you have heard about from others this afternoon: the warmth of his chortling good humor; the liberality of his positions and personality; his generous and embracing charm; the strength of a mind that could sustain an argument in a lecture for 90 minutes without a note; the dogged and delighted commitment to intellectual exchange—Ronnie was never one to allow himself the last word in an argument and he wouldn’t allow anyone else the last word either.

I had the honor to engage him for years in arguments about judicial review—a disagreement that has loomed large in the pleasure and profit of exchange, but that is dwarfed by everything I owe to him in the example he set of a commitment to the upland expansiveness of political philosophy pursued in the radiance of an affection for the law.

I have tried to be calm in what I’ve said this afternoon about Ronnie’s thought and legacy. But it is very difficult. This is not just a tribute; it is a love letter, to a man who 35 years ago at Oxford helped me find my feet, who over the years set forth for me the virtue of argument through his own good-humored example, who showed me—showed us all—how much more you can achieve by taking seriously the nobility of law’s empire than by any corrosive or skeptical detachment from its aspirations.

To his memory, then, I pledge a resolve, as far as I am able, to carry this on, with others I hope, to continue the refreshment of jurisprudence with these insights Ronnie gave us, in a way that does justice to the generosity and unity of his vision.