

Ronald Dworkin

Justice for Hedgehogs.

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In 1942, Henry Luce, the proprietor of *Time* magazine, proclaimed the arrival of ‘The American Century.’ According to Luce, this would be a century during which the USA would, as the world’s preeminent power, champion the cause of freedom and justice. If there is (or was) such a thing as ‘The American Century,’ we might see Ronald Dworkin as one of its most prominent philosophers. Dworkin (who died in 2013) grew to maturity in the years after Luce made his bold statement, and he began to develop an account of law as a necessarily moral and politically ambitious enterprise. As he did so, he gave content to the idea of the USA as a champion of freedom and justice. Among other things, he argued that principles (as general guides to morally sound action) play a distinct role in the operations of a legal system. He also explored the extent to which egalitarian impulses and an ideal of ‘community’ find expression in American law. In 2011, Dworkin published *Justice for Hedgehogs*—a book in which he drew many of the most prominent strands in his earlier work together. While doing so, he pursued an ambitious new theme. This is the unity of value: the view that all sources of value in the spheres of ethics, morality, and politics form a harmonious whole. While this theme complements those present in Dworkin’s earlier work, there are reasons for thinking that, in *Justice for Hedgehogs*, he overreached himself. Before exploring these reasons, we must examine the book’s contents in some detail.

As Dworkin seeks to demonstrate that his earlier contributions to politico-legal debate form a harmonious and normatively compelling whole, it comes as no surprise to find him discussing a wide range of topics. They include truth in morals (ch 2), interpretation (ch 7), human dignity (ch 9), political concepts such as liberty and equality (chs 16, 17), and institutions such as democracy and law (chs 18, 19). Dworkin identifies two ‘reigning’ principles as knitting his exposition together. They are the principle of equal concern and respect and the principle of respect for responsibility (2). He tells us that the first principle requires government to take the interests of all citizens equally seriously. On the second, he states that it enjoins government to leave people with sufficient capacity free to decide how to invest their lives with significance. Moreover, he argues that governments that act in accordance with these principles ‘make ... it easier and more likely’ for individuals to turn their lives into ‘tiny diamonds’ of self-creation (423).

As government seeks to secure the equality- and liberty-related interests of individuals, it must, according to Dworkin, grapple with the ‘simultaneous equation’ problem (3). He explains that this problem arises since ‘you cannot determine what liberty requires without also determining what distribution of property and opportunity shows equal concern and respect for all’ (4). Dworkin brings this problem into focus with the aim of ensuring that government privileges neither liberty nor equality (374-75). Lying behind his concern with holding liberty and equality in a relationship of

what we might call equipoise is the most prominent theme in *Justice for Hedgehogs*: the unity of value.

Dworkin advances an array of arguments in support of his claim concerning the unity of value. One of these arguments has to do with the relationship between equality and liberty on the one hand and democracy on the other, while another concerns the relationship between law and morality. Dworkin rejects the view that democracy conflicts with equality and liberty. He explains his position on this subject by reference to what he calls a ‘partnership conception’ of democracy (384). On this view, democracy requires the protection of individual rights to liberty and justice, central to which is the egalitarian commitment to equal concern and respect. Hence, we should see democracy’s relationship with equality and liberty not as rivalrous but as ‘thoroughly integrated’ (4).

The idea of integration also occupies a central place in Dworkin’s account of the relationship between law and morality. He describes morality as having a tree structure. Within this structure, law is a branch of political morality. He adds that ‘political morality ... is itself a branch of a more general personal morality, which in turn is a branch of a yet more general theory of what it is to live well’ (193-194). This statement leads on to Dworkin’s account of the relationship between morality (the study of how we treat other people) and ethics (the study of how to live well). Dworkin argues for the interdependence of morality and ethics and finds support for this position in what he describes as ‘Kant’s principle.’ This principle specifies that ‘[a] person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity in all its forms’ (273-74). To this end, people must fashion institutions that give expression to the principles of equal concern and respect and full respect for responsibility.

While wedded to these principles, Dworkin makes it plain that he is alive to the limitations of moral debate in actually existing societies. His sensitivity to these limitations is on display in his examination of the relationship between tradition and the pursuit of truth in practical affairs. He states that ‘any nation’s history and contemporary politics are a kaleidoscope of conflicting principle and shifting prejudice’ (8). However, we should, according to Dworkin, seek to formulate our obligations to others in terms that give expression to ‘independent assumptions about what is really true’ (8). He adds that ‘[w]e can seek truth about morality only by pursuing coherence endorsed by conviction’ (120). Unfazed by the tension between talk of ‘independent assumptions’ and ‘conviction,’ Dworkin believes that his approach to the pursuit of truth will enable us to ‘trouble the comfortable’ in ways that advance the cause of justice (351).

While much in *Justice for Hedgehogs* has normative appeal, it is by no means obvious that Dworkin has demonstrated the unity of value. This becomes apparent on close examination of his declaration that ‘[y]ou cannot determine what liberty requires without also deciding what distribution of property and opportunity shows equal concern for all.’ Dworkin’s use of ‘also’ in this statement expresses his commitment to ensuring that equality and liberty stand in a relationship of equipoise. But how, precisely, is this to be done? Dworkin’s decision to use the imperative ‘cannot’ (in the same statement) yields an answer that does not sit comfortably with his claim that we can hold the two values in equipoise. For it appears to indicate that we must take considerations of equality into

account before we turn to liberty. If this is the case, then Dworkin is in the business of sequential ordering: equality first; then liberty.

These points support the conclusion that the pursuit of equality is a sequentially prioritized social goal in *Justice for Hedgehogs*. This goal has to do with moving towards and sustaining an egalitarian end-state in which the interests of all members of society enjoy adequate protection. To the extent that this is the case, liberty takes on the appearance of a means to an egalitarian end. Individuals in the social context that Dworkin argues for will have only as much liberty as is consonant with equality. Viewed in this light, liberty, far from being a consideration or interest with a status equal to that of equality, looks like a matter of secondary importance. Moreover, we might see Dworkin as conceding some ground on this point. For he declares (at an early point in his exposition) that '[a] theory of liberty is ... embedded in a much more general [and unquestionably egalitarian] political morality' (4).

This statement—with its informing commitment to egalitarian political morality—may provide a basis on which to explain Dworkin's audacious decision to argue (late in his career) for the unity of value. For equality yields a touchstone by reference to which it becomes possible to determine, among other things, the scope of liberty and the democratic process. To the extent that this is the case, an observation made by Michael Oakeshott (on the coherence of philosophical analyses) merits attention. Oakeshott states that 'the coherence of [a] philosophy, the system of it, lies ... in a single "passionate thought" or conviction that pervades its parts' (M. Oakeshott, *Hobbes on Civil Association* (Basil Blackwell, 1975), 17). Oakeshott's statement certainly seems to have relevance to Dworkin when we recall his declaration that '[w]e can seek truth about morality only by pursuing coherence endorsed by conviction'.

Met with these points, Dworkin might have responded by arguing that 'political morality ... is itself a branch of a more general personal morality, which in turn is a branch of a yet more general theory of what it is to live well'. But this does not provide a convincing basis on which to dismiss the argument that he secures the unity of value by using equality as a touchstone. For Dworkin, as we have noted, embraces 'Kant's principle.' And this principle states that '[a] person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity in all its forms'.

Just as Dworkin advances a far from convincing argument concerning the unity of value in *Justice for Hedgehogs*, he also stakes out a shaky position on legal reform in pursuit of his egalitarian agenda. This becomes apparent in his chapter on 'The Law' (ch 19). In this chapter, he identifies the most prominent feature of the British legal landscape, Parliamentary sovereignty (the constitution's highest-order norm), as morally retrograde since it constitutes a standing threat to the interests of individuals. This is because the legal sovereign (Parliament) can, according to the doctrine of Parliamentary sovereignty, make or unmake any law as it pleases. Dworkin notes that in the seventeenth century, Chief Justice Coke recognized this threat. Moreover, Coke contemplated the possibility of identifying acts of Parliament as unconstitutional. But as Dworkin gloomily records, this did not happen and, in the next two centuries, Parliamentary sovereignty became a settled feature of the constitutional terrain. Dworkin adds that, in more recent times, Parliamentary sovereignty has,

as in Coke's time, 'become a deep question of political morality' (414). He finds support for this claim in the fact that judges have again begun to contemplate the possibility of striking down acts of Parliament that override the fundamental interests of individuals.

Thus far this might seem like a story of moral progress (rejection of the doctrine of Parliamentary sovereignty) delayed but still in view. However, before we draw such a conclusion, we must note a further feature of Dworkin's exposition. While the notion of 'progress' predicates movement from a less valuable state of affairs towards a superior alternative, Dworkin talks (where Parliamentary sovereignty is concerned) of a 'wheel ... turning' (414). This figure is in one way apt but in another problematic. Its aptness arises from its success in conveying a sense of movement at some points in history towards (retrograde) and at others away from (progressive) the doctrine of Parliamentary sovereignty. But it is problematic insofar as it fails to impress upon readers the fact that Parliamentary sovereignty has, since the arrival of universal suffrage in the twentieth century, become a means to the end of a strong democracy (with all matters of practical concern remaining open to revision through the democratic process). And strong democracy is (as Dworkin grudgingly concedes) a practice that is an expression of the dignity of those who participate in it (387-88). Thus we find ourselves contemplating two practices that serve the cause of human dignity: strong democracy (through the Parliamentary process) and rights-based protections of fundamental interests (as a component of democracy on the 'partnership' model).

The picture that emerges from Dworkin's reflections on Parliamentary sovereignty is one of moral complexity. This complexity leaves Dworkin's argument for his preferred conception of democracy looking less powerful than he claims. This becomes apparent when we consider an argument on the subject of democracy advanced by the sociologist Charles Wright Mills. We find in Wright Mills a conception of democracy that clearly tends in the British direction. For he states that '[d]emocracy means the power and the freedom of those controlled by law to change the law, according to agreed-upon rules—and even to change these rules' (C. Wright Mills, *The Sociological Imagination* (Penguin Books, 1970), 130). He adds that democracy, as he understands it, also means 'some kind of collective control over the structural mechanics of history'. This observation brings into focus a feature of Dworkin's partnership conception that should (notwithstanding its attractions) give us pause. To the extent that the partnership model works to secure the just end-state that informs Dworkin's thinking, it presents a barrier to 'collective control of the mechanics of history.' For this reason, Dworkin's efforts to secure human dignity appear, at the same time, to be an assault on human dignity.

These points give us grounds for thinking that the position Dworkin stakes out on democracy does not lend strong support to his claim concerning the unity of value. Nonetheless, he declares (again in his chapter on law and morality) that judges and lawyers are 'working political philosophers of a democratic state' (presumably on his favoured 'partnership' model). This point and his claim that law occupies a place in the 'tree structure' of morality make it plain that he regards law as a progressive force. For law affords those who participate in its operations with means to track and give expression to moral truths: for example, the truth that people can achieve dignity and live well

if they establish a legal system in which the principles of equal concern and respect and full respect for responsibility occupy central places.

But Dworkin's commitment to the view that law (as a progressive force) affords a route to moral truth comes under acute strain when he turns to an analysis of the controversy generated in the antebellum USA by the Fugitive Slave Act 1850 (FSA). The FSA made it possible for slaveholders to assert a property right in slaves who had fled to free states. The fact that the Act established this right leads Dworkin to identify it as an example of 'evil law' that generated a 'moral emergency' (410-411). However, the FSA's moral odiousness is not the end of the matter. For Dworkin invites his readers to assume that 'Congress ... was sufficiently legitimate so that its enactments generally created political obligations' (411). He adds that '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). These points lead him to conclude that judges could, in the 1850s, find a legal basis for treating the FSA as valid [and at the same time 'evil'] law. Dworkin thus presents us with a system of law that far from being an engine of moral progress, operated as an impediment to its pursuit. Moreover, his analysis of the controversy surrounding the FSA brings into focus a collision between procedural principles (concerned with political authority, precedent, and reliance) and substantive ones (concerned with equal respect and concern). While he declares that 'a stronger argument of human rights' points the way to progress (411), he seems to accept that the judges who wrestled with the FSA found themselves dealing with a problem of uncombinability. Such problems arise where the decision to embrace one source of value entails the rejection of another.

Dworkin's inability to advance convincing arguments in support of his claim concerning the unity of value means that *Justice for Hedgehogs* lacks the sort of impact he plainly meant it to have. Moreover, the legal controversies on which he focuses (concerning Parliamentary sovereignty and the FSA) lend the book a rather forlorn air. These examples alert us not to the strengths but rather to the limitations of the egalitarian form of politico-legal life Dworkin spent his career analyzing. To the extent that this is the case, Dworkin takes on an appearance that is in some ways reminiscent of Hegel's Owl of Minerva. For Hegel, this creature embodies the fact that philosophy is a retrospective discipline. Hegel tells us that 'philosophy paints its grey in grey' when 'a shape of life has grown old ... and cannot be rejuvenated'. Moreover, he seeks to impress this point on his readers by declaring that 'the Owl of Minerva begins its flight only with the onset of dusk' (G.W.F. Hegel, *The Philosophy of Right*, ed. A.W. Wood (Cambridge University Press, 1991), 21). By this he means that those who practise philosophy can only make sense of states of affairs that lie in the past. This point is relevant to Dworkin insofar as he sought in *Justice for Hedgehogs* to capture prominent features of a long-lived politico-legal form of life. In taking on this task, Dworkin wrestled with practical difficulties (e.g., prejudice in the antebellum South as an impediment to the pursuit of justice). Moreover, he showed himself to be willing (notwithstanding his invocation of the unity of value) to face up to the potential intractability of these difficulties. However, the upshot is a book (and, indeed, a career-long project) that ends in a *diminuendo* and not the *crescendo* Dworkin clearly had in mind when he invoked the idea of the unity of value.

Dworkin's unconvincing argument for the unity of value prompts the conclusion that, ultimately, he was not the philosopher of the American Century that he might have aspired to be. For he was unable to point the way to an end-state in which legal and other institutions ideally realize liberty, equality and other sources of positive value. Moreover, the chapter in *Justice for Hedgehogs* on law and morality engenders the impression that Dworkin senses that this may be the case. For his reflections on Parliamentary sovereignty and the Fugitive Slave Act do not (as we have noted) yield the treasure for which he was clearly digging. However, it does not follow from these points that we should count as a failure the career of which *Justice for Hedgehogs* was the (underwhelming) culmination. While alerting us (against his best efforts) to problems of uncombinability, Dworkin brings into focus competing sources of value in the American and British politico-legal traditions. While we may not be able to find in these traditions pointers to an ultimate end-state, we can explore the range of ways in which to configure the values they instantiate and sustain. Thus we might see Dworkin, in the role of the Owl of Minerva, alerting us to the passing of a misplaced belief that we can take up residence in a politico-legal Utopia. But this still leaves open the possibility of what another philosopher of the American century, John Rawls, called, 'realistic utopianism.' This involves exploring the bounds of practicable political possibility.

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