

2011

## Justice for Hedgehogs (Book Review)

Robert Rodes

*Notre Dame Law School*, [Robert.E.Rodes.1@nd.edu](mailto:Robert.E.Rodes.1@nd.edu)

Follow this and additional works at: [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship](http://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Jurisprudence Commons](#), and the [Natural Law Commons](#)

---

### Recommended Citation

Rodes, Robert, "Justice for Hedgehogs (Book Review)" (2011). *Scholarly Works*. Paper 1088.  
[http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1088](http://scholarship.law.nd.edu/law_faculty_scholarship/1088)

This Book Review is brought to you for free and open access by the Faculty Scholarship at NDLScholarship. It has been accepted for inclusion in Scholarly Works by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## JUSTICE FOR HEDGEHOGS

Ronald Dworkin  
Harvard University Press, 2011

REVIEWED BY ROBERT E. RODES, JR.

Professor Dworkin begins this complex and ambitious book with a chapter called “Baedeker” after the nineteenth century guidebooks. In it, he gives an overview of his project, which is to show “the unity of value.” The “title refers to a line by an ancient Greek poet, Archilochus, that Isaiah Berlin made famous for us. The fox knows many things, but the hedgehog knows one big thing. Value is one big thing” (1).

He articulates his overarching value in terms of human dignity: “[W]e each have a sovereign ethical responsibility to make something of value of our own lives, as a painter makes something valuable of his canvas” (13). He distinguishes between ethics and morality “in what might seem a special way. Moral standards prescribe how we ought to treat others; ethical standards, how we ought to live ourselves” (191). He derives morality from ethics, relying “mainly on Immanuel Kant’s thesis that we cannot adequately respect our own humanity unless we respect humanity in others” (14). With this unitary value of human dignity in hand, Dworkin makes his way through a philosophical obstacle course with the quiet authority of a lifetime’s reflection. He states objections fairly and answers them respectfully. While, as I shall try to show, there are more objections than he has taken up, and while many of his conclusions are open to disagreement, he gives his readers an interesting journey in good company.

He answers all kinds of skepticism by arguing that a skeptical position regarding, say, morality is just another position regarding morality, and just as doubtful as any other such position. Thus, he says:

Hume’s principle [that moral conclusions cannot be derived from empirical premises] is often taken to have a stark skeptical consequence, because it suggests that we cannot discover, through the only modes of knowledge available to us, whether any of our ethical or moral convictions is true. In fact, I argue . . . his principle has the opposite consequence. It undermines philosophical skepticism because the proposition that it is not true that genocide is wrong is itself a moral proposition, and, if Hume’s principle is sound, that proposition cannot be established by any discoveries of logic or facts about the basic structure of the universe. (17)

He insists that moral and ethical questions have right answers, even if the answers are sometimes difficult to find. He cautions (91-96) against confusing uncertainty, the difficulty of finding right answers, with indeterminacy, the lack of any right answers to be found. He argues that uncertainty, not indeterminacy is the default position, that indeterminacy, like any other view of a question, cannot be accepted unless a positive case is made for it.

He deals with debate and difference of opinion by deploying an elaborate account of interpretation, and concluding that moral judgments are based on interpretations of moral concepts. For instance, to differ about whether the income tax is unjust is to interpret the concept of justice in different ways (166).

With this structure of value, Dworkin solves a number of well-known moral hypotheticals (271-299). If you see a person drowning, you must throw him a life preserver because you would not be respecting his dignity if you did not. If you see two people drowning, you may throw the life preserver to either without disrespecting the dignity of the other. If you are one of several people drowning, you can keep the life preserver for yourself if you get to it first, but you may not shoot someone to keep him from getting to it ahead of you, because by shooting people you fail to respect their dignity. Dworkin's analyses of these cases are, I believe, sound and helpful. He follows them with good analyses of the obligations arising from promises, relationships, or membership in a community.

When he comes to law and politics, Dworkin uses the standard liberal principles of equality, liberty, and democracy. But he uses them as interpretive—as opposed to “criterial”—concepts, because we have no agreed-on criteria for applying them to particular cases:

There is nothing to be said for the definitions of equality, liberty, and democracy proposed by Mill, Rawls, and most political scientists. They do not track the criteria everyone uses when he identifies egalitarian policies, liberal societies, or democratic institutions. There are no such shared criteria; if there were, we would not argue in the way we do. (349)

We do better when we accept that the familiar concepts of political virtue are interpretive concepts. Then we understand why they are so prominent in the politics of nations whose political cultures were dramatically reformed in the Enlightenment. We understand why the defining revolutions of those nations were explicitly dedicated to liberty, equality, and democracy and yet settled very little as to what these actually mean. We also understand how we should proceed to develop our own conceptions of these values: our own convictions about the concrete political rights they name. (349)

The conception Dworkin comes up with is, naturally enough, based on the principles of dignity that he has been developing throughout the book. He bases equality on the requirement of equal concern for all people making something valuable of their lives. His attempt to show how that requirement can be met in the actual distribution of resources seems to me too hypothetical to be of much use; he refers us to other works in which he has developed the subject at greater length. He finds that the same requirement of equal concern calls for what he calls a partnership conception of democracy as opposed to a majoritarian conception. The partnership conception “holds that self-government means government not by the majority of people exercising authority over everyone but by the people as a whole acting as partners” (384). He believes that equal concern requires giving everyone the vote, but he is willing to consider adjustments of representation and judicial review to implement the partnership conception.

His idea of liberty is based on “ethical independence,” which is for him essential to the authenticity that dignity requires. “Authenticity is the other side of self-respect. Because you take yourself seriously, you judge that living well means expressing yourself in your life, seeking a way to live that grips you as right for you and your circumstances” (209). “Authenticity is damaged when a person is made to accept someone else’s judgment in place of his own about the values or goals his life should display” (212). Therefore, “Government must not restrict freedom when its justification assumes the superiority or popularity of any ethical values controversial in the community” (369).

I am not sure Dworkin would go as far as Mill in forbidding government interference with self-regarding conduct. For instance, he would allow seat belt legislation because “seat belt convictions are not foundational, and government need not assume that courting danger is a bad way to live in order to justify measures that reduce the costs of accidents to the community.”<sup>1</sup> In general, then, he is more concerned with whole lives and less with individual acts than Mill is. But his conclusions are pretty much the same: he is not willing to protect individuals against self-destructive choices, and he is not willing to protect the social ambience for the majority (370).

Here I part company with him. I do not think that allowing people to accept substandard living or working conditions, to trivialize their sexuality, or to blow their minds away on drugs is consistent with the dignity that

---

1. I do not think Mill would regard “the costs of accidents to the community” as sufficient to make the non-wearing of seat belts other-regarding. See *On Liberty*, 2d ed. (London: J.W. Parker, 1859), 143-47.

Dworkin makes central to his value system. In my Jurisprudence course, I use the case of *Commonwealth v. Farrell*, decided by the Supreme Judicial Court of Massachusetts in 1948.<sup>2</sup> I use it for a critique of Mill, but I think it will do for Dworkin as well. It involved a particularly brutal sadomasochistic encounter causing a man to be tried for assault and battery upon a woman by means of a razor blade and a lighted cigarette. The defense asked for a jury instruction that consent on the woman's part would require acquittal. The trial court refused to give the instruction, and was upheld in doing so.<sup>3</sup> The requested instruction is strongly counterintuitive, but I do not see how either Dworkin or Mill could have avoided it.

But Dworkin is firm in rejecting intuitive moral discernment. He insists that what we think are intuitive judgments are in fact arrived at by applying general principles:

We often realize that an act is wrong immediately we spot it. When I see someone beating a child, I "see" the wrongness of his act at once. However, that is not an instance of moral facts causing moral conviction. I would not have "seen" the wrongness of beating the child had I not already formed the conviction that causing gratuitous pain is wrong. (72)

Dworkin rejects what he calls the causal impact hypothesis—the view “that moral facts can cause people to form moral convictions that match those moral facts”—the view, in other words, that when we think something is wrong it may be because it actually is wrong (70-75). His reasoning here is hard to follow. I think he is saying that saying I think X is wrong because it is wrong is tantamount to attempting to prove the moral conclusion that X is wrong from the empirical premise that I think it is wrong. Thus it violates Hume's principle that moral conclusions cannot be derived from empirical premises. But Dworkin's appeal to Hume here is misplaced, for Hume, although he will not derive moral conclusions from empirical premises, is quite ready to make moral conclusions an object of immediate—I would like to say empirical—discernment:

The final sentence, it is probable, which pronounces characters and actions amiable or odious, praise-worthy or blameable; that which stamps on them the mark of honour or infamy, approbation or censure; that which renders morality an active principle, and constitutes virtue our happiness, and vice our misery: it is probable, I say, that this final sentence depends on some

---

2. 78 N.E.2d 697.

3. *Ibid.*, 705. See also 706, rejecting expert testimony calculated to show that the victim was a masochist.

internal sense or feeling, which nature has made universal in the whole species.<sup>4</sup>

I would say, along with Jacques Maritain,<sup>5</sup> Edmond Cahn,<sup>6</sup> and, I believe, Hume, that the conviction that causing gratuitous pain is wrong comes from a synthesis of immediate judgments that I arrived at when I saw people beating children, kicking dogs, and knocking over old ladies.<sup>7</sup>

Dworkin's doctrine of ethical independence raises further problems when we consider social justice. It was forty some-odd years ago that I first encountered Dworkin's views in that regard. I fell into a conversation in an Oxford common room with a fellow American who turned out to be Dworkin. The subject was a project discussed in the United States at the time for bringing Mexicans into the country temporarily for agricultural labor. I took the position that we should not bring people into our country to live and work under conditions that were, by our standards, degrading. He insisted, as he does in the book, that we must never deal with a person for his own good except as he himself wishes to be dealt with. I was thoroughly worsted in the argument, but I still think I was right. Human dignity can, and often does, require us to interfere with arrangements people make to their own satisfaction. To deny that is to take the side of Justice Peckham in *Lochner v. New York*:

[W]hen the State . . . has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employé), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from working [beyond] a certain time prescribed by the State.<sup>8</sup>

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living are mere meddling interferences with the right of the individual . . .

---

4. David Hume, *An Enquiry Concerning the Principles of Morals*, ed. Tom L. Beauchamp (Oxford: Oxford University Press 1998; orig. pub. 1777), 5.

5. Jacques Maritain, "On Knowledge Through Connaturality," in *The Range of Reason* (New York: Charles Scribner's Sons, 1952), 22.

6. Edmond N. Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (New York: New York University Press, 1949).

7. Robert E. Rodes, Jr., "On Lawyers and Moral Discernment," *Journal of Catholic Legal Studies* 46 (2007): 59.

8. 198 U.S. 45, 54 (1905).

9. *Ibid.*, 61.

Perhaps I am wrong to attribute this view to Dworkin, for our conversation was a long time ago, and the book says nothing about social justice issues one way or the other. But social justice is not to be achieved without limiting people's choices for their own good, and Dworkin insists that that is not to be done.

Dworkin's absolutizing of ethical independence may be attributable in some part to his attitude toward religion. He treats it as cosmically irrelevant. "A god's existence and achievements, if any god does exist, are matters of fact, albeit rather special and exotic facts. Any god's moral authority, if this exists, is a matter of value" (343). And Hume has taught us that we cannot derive matters of value from matters of fact. Accordingly, "no divine authority can provide a ground for basic human rights. On the contrary, the logic of argument runs the other way: we must assume the independent and logically prior existence of human rights in order to accept the idea of divine moral authority" (340). Having thus disposed of God, Dworkin is left without a teleological support for human dignity. He therefore contents himself with an ipse dixit:

We are charged to live well by the bare fact of our existence as self-conscious creatures with lives to lead. We are charged in the way we are charged by the value of anything entrusted to our care. It is important that we live well; not important just to us or to anyone else, but just important. (196)

From the necessity that we live well, he derives from Kant, as we have seen, the necessity that we care about other people living well.

This intuition deserves the fullest respect, but it is insufficient. We are indeed charged to live well, and it is indeed important for us to do so. But the charge does not hang in the air, it comes from God, and the way to fulfil it is to deploy our resources creatively in love of God and neighbor. When we are hindered in doing that, whether by our own act, or by the acts of others, or by the economic and social institutions under which we live, our dignity is undermined and injustice is done us. We are constantly tempted to accept injustices of this kind, or to inflict them on ourselves—to trade off dignity for cash or some other ephemeral object. If the law can encourage us to resist such temptations, it should do so. Ethical independence is important, but in cases like *Commonwealth v. Farrell* or *Lochner v. New York* it can be subordinated to the dignity it is meant to serve.

Dworkin ends his book with a short chapter on law. He points out that he has presented his views on the subject at length in other works, and says: "My aim in this chapter is not to summarize my jurisprudential views in any detail but rather to show how they take their place within the integrated scheme of value this book attempts" (400). He treats the concept of law as

interpretive rather than criterial, and, evidently for that reason, rejects the conventional treatment of law and morality as two separate systems (402-3). The problem with having two systems, as he sees it, is that the question of the relation between them cannot be assigned to either. I find this argument unconvincing. I am quite content to say that the question of what part moral considerations play in legal decision making is a legal question, while the question of what moral obligations are created by legal dispositions is a moral question. Separating the two questions does not seem to me to prevent accepting Dworkin's view of the unity of values. There is also a question of what part morality plays in decision making by plumbers (whether lead pipe is so toxic that it would be immoral to use it), and a question of what moral obligations are created by plumbing work (whether there is so little hot water that it would be a wrong to other people in my building if I were to spend fifteen minutes in the shower). But these questions do not make a single system of morality and plumbing. While law is more impacted by values than plumbing is, it has, like plumbing, a strong technical (and criterial) element that defines it for most of its practitioners.

*Justice for Hedgehogs* has, in my opinion, achieved its purpose of defending the unity of value. In the process, it has succeeded in placing human dignity at the center of the legal enterprise where it belongs. It has also neatly disposed of moral skepticism and moral relativism. It has offered persuasive answers to many questions of moral and legal obligation. With its distinction between interpretive and criterial concepts, it has provided a useful insight into the structure of legal analysis and the source of legal disagreement. It is, then, in many ways a valuable book. But I wish Dworkin had been able to carry his understanding of human dignity beyond the wistful existentialism of his conclusion: "Without dignity our lives are only blinks of duration. But if we manage to lead a good life well, we create something more. We write a subscript to our mortality. We make our lives tiny diamonds in the cosmic sands" (423). All very true, but it is not enough.