DWORKIN'S "ONE-SYSTEM" CONCEPTION OF LAW AND MORALITY

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The penultimate chapter in Ronald Dworkin's new *Justice for Hedgehogs* is entitled "Law." It may surprise Dworkin buffs to see that the chapter called "Law" covers only eight pages of a three hundred page manuscript.[1] Despite its brief length, Dworkin's discussion promises to deliver a large payoff. He announces what he calls a "sharp revision"[2] in the conception of a classical jurisprudential problem: the relation between law and morality. This revision, he says, breaks not only with the way in which other philosophers have conceived of the problem, but also clarifies the way he has come to conceive of it. Among other benefits, Dworkin promises that his reorientation will make jurisprudence "both more challenging and more important"[3] by integrating it into other disciplines. "[A]rid debates" between positivists and anti-positivists, he says, would "wither away, as would the schools themselves."[4]

In this brief Comment, I first suggest that Dworkin needs to elaborate and make consistent the various metaphors he uses in presenting his model. Second, I question whether Dworkin's analysis clearly points toward the "one-system" model he now defends.

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According to Dworkin, the traditional conception of the law/morality relation sees each as a "collection of norms"[5] that forms an independent system. The "classical" question, he says, is whether and how "the content of each system affect[s] the content of the other."[6] He asks this question from

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[1] Dworkin invokes his prior major works on law: RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, LAW'S EMPIRE (1986); and RONALD DWORKIN, JUSTICE IN ROBES (2006). Rather than "summarize [his] jurisprudential views in any detail," he says, he wants instead to "show how these form part of the integrated scheme of value this book imagines." RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 289, on file with the Boston University Law Review).

[2] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 252).

[3] *Id.* (manuscript at 256).

[4] *Id.* (manuscript at 294).

[5] *Id.* (manuscript at 252).

[6] *Id.*

each side of the relation. In thinking about how the content of law affects the content of morality, the classical question is whether we have a moral obligation to follow the law. In thinking about how the content of morality affects law, the traditional question is "how far is morality relevant in fixing law's content on any particular issue?"[7] Dworkin places his own earlier "interpretivism" alongside "positivism" and "natural law" as approaches that have accepted the traditional conception in giving answers to these traditional questions. He provides a "very general account" of each approach, "ignoring nuance."[8]

Positivism, Dworkin says, "declares the complete independence of the two systems."[9] Of course, he cannot mean by "independence" that positivists see law and morality as utterly unrelated. Instead, the question that he has positivism address concerns that very relation. Further, positivists such as H.L.A. Hart have acknowledged that the content of morality historically has influenced the content of law.[10] Instead, Dworkin seems to mean that for positivism, morality has at most a contingent role in specifying the truth conditions of legal propositions. Morality, even for "inclusive" positivism, is relevant in determining the law on a given point only if a social rule, such as Hart's rule of recognition, ultimately so specifies. This rule of recognition is a social rule, accepted "as a matter of custom and practice."[11]

Natural law, of course, has many variants. The version that Dworkin selects as emblematic sees morality as a "veto over law,"[12] in the sense that if a purported addition to law is morally outrageous, it cannot count as valid law. While of course other natural law formulations are possible, this one has noted contemporary adherents, such as Robert Alexy.[13] This formulation of natural

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[7] *Id*. *Justice in Robes* distinguishes among different "stages" in thinking about law – semantic, jurisprudential, doctrinal, and adjudicative – as well as different concepts of law: taxonomic, sociological, aspirational, and doctrinal. *See* DWORKIN, JUSTICE IN ROBES, *supra note* 1, at 2-5. His focus there, as in *Justice for Hedgehogs*, is on the doctrinal concept and the doctrinal stage, where the question is whether "moral criteria are ever, and if so when, among the truth conditions of propositions of law." *Id.* at 2; *see also, e.g.*, *id.* at 5 ("[T]he important question is whether and how morality is relevant to deciding which propositions of law are true.").

[8] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 253).

[9] *Id.*

[10] *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 203-04 (Clarendon Press 2d ed. 1994) (1961) (stating that we see the influence of morality on law "at a thousand points").

[11] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 253). Dworkin's draft of *Justice for Hedgehogs* indicates that a footnote yet to be written will provide an "[e]xception for 'soft' ['inclusive'] positivism." *Id.* (manuscript at 253 n.212). My formulation in text, I think, accounts for that exception.

[12] *Id*. (manuscript at 253).

[13] *See* ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM 127 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 2002)

law clearly presents law and morality as separate systems, where morality may supervene in extreme cases upon the law.[14]

Dworkin characterizes his own interpretivism as rejecting both the complete independence of law and morality (which he ascribes to positivism) and the "veto" position of morality over law. He says he came to this position even while sharing the "orthodox two-systems picture"[15] common to both positivism and natural law. Even then, Dworkin says, he was able to see, against positivism, that law includes not just enacted rules, or "rules with [legal] pedigree, but justifying principles as well."[16] These principles, he says, are the ones that "provide the best justification in morality of . . . enacted rules."[17]

One interesting claim Dworkin makes about the two-systems approach is that it is "circular."[18] This circularity appears, he says, when we ask which general account of the law/morality relation – positivism, natural law, or interpretivism – is superior. If the systems of law and morality are independent in principle, then the meaning of this theoretical "superiority" must be system-specific, comprehensible only from the perspective of one or the other system. This system-specificity follows because there is, we are assuming, no superordinate system that relates law and morality.[19]

So, is the question of theoretical superiority legal or moral? If we say the question is legal – that we are trying to see which of the three approaches produces the best account of law – then we need to have a theory about "how to read legal material."[20] We need, in particular, a theory about whether and how moral rules and principles are relevant to the identification of the law. That, after all, is what divides the three competing approaches. But whether there *is* such a valid theory is precisely the question we are trying to answer. Therefore, if we approach the question of theoretical superiority from the law side of the law/morality divide, Dworkin observes, we find ourselves mired in unhelpful circularity.[21]

Suppose we begin from the other side, taking the question of theoretical superiority to be essentially moral rather than legal. Then, Dworkin says, our question is which of the three approaches produces the most morally attractive

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(1994) (defining law as a system of norms that, inter alia, "are not themselves unjust in the extreme").

[14] I doubt, however, that one can understand all natural law theories as presupposing a two-system, rather than a one-system, view of law and morality.

[15] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 253).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] As Dworkin puts it, "we take law and morality to compose separate systems of norms there is no neutral standpoint from which the connections between the supposed two systems can be adjudicated." *Id*.

[20] *Id.* (manuscript at 253-54).

[21] *Id.* (manuscript at 255).

account of law. However, answering that question commits us already to a moralized conception of law – to the exclusion of positivism, and by fiat rather than argument. Here again, we find ourselves trapped in circularity.[22]

Thus, Dworkin maintains, this two-systems approach necessarily lands us in "a circular argument with much too short a radius."[23] Or, one might say, it forces us into self-referentiality. Although Dworkin does not mention the theory of self-referential autopoietic systems – a theory that is influential on the Continent in both social and legal theory – there are interesting parallels.[24]

But while autopoietic theorists take system self-referentiality to be a basic condition, even one to be exploited, Dworkin instead regards it as something to escape. His way out is to posit not two separate systems, law and morality, but just one. "We must replace" the two-systems account, he says, "with a one system picture: law is a part or aspect of morality."[25]

This model of whole and part is only one way in which Dworkin presents his reformulated view. By contrast, the section in which he introduces the whole/part idea is entitled "Law as Morality."[26] That suggests a slightly different conception in which law and morality are effectively merged, not related as whole and part. If we see law *as* morality, then the question of how to distinguish the two, even as whole and part, does not arise.

Dworkin's other formulations, however, suggest a less unitary understanding: law, he says, is "embedded" in morality, or "flows from" morality, or "branches from" or is a "branch of" morality.[27] Embeddedness, at least to my ear, suggests a separate existence. The image of "flowing from" implies a certain distinctness in identity, as a tributary may be distinguished from a larger stream. The image of law "branching from" morality, by contrast, suggests an organic unity, even as branch and trunk may be distinguished for purposes of identification. A genealogical understanding of "branching," however, also is available. This proliferation of metaphors in a single page needs to be put in clearer order.

Yet Dworkin's dominant conception, I think, is the schema of whole and part. Immediately after announcing his banishment of the two-system picture, Dworkin asks "[h]ow law should be distinguished from the rest of political

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[22] *Id.* (manuscript at 254) ("If law and morals are two separate systems, it begs the question to suppose that the best theory of what law is depends on . . . moral issues.").

[23] *Id.* (manuscript at 255).

[24] The classic and comprehensive work on law as an "autopoietic" system is NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Klaus A. Zeigert trans., Oxford Univ. Press 2004) (1993). One attempt to make the theory comprehensible and useful to Anglo-American legal academics is Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 CARDOZO L. REV. 1987 (1998).

[25] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 255).

[26] *Id.*

[27] *Id.*

morality."[28] While this formulation might seem to imply a resurrection of the two-system schema, Dworkin adds quickly that he means to consider "how these two interpretive concepts should be distinguished to show one as only part of the other."[29] Here again, then, we see the schema of whole and part.

While this formulation seems to imply a logical or conceptual approach, the path Dworkin charts instead is social-theoretical and historical. "Any sensible answer" to the question of how law develops into a "part" of morality, Dworkin says, "will capitalize on the phenomenon of institutionalization."[30] "Political morality itself emerges as a useful category only when political institutions emerge: law emerges from political morality only when institutional practices have become sophisticated in a certain direction."[31] Dworkin seems to be working with a social-evolutionary theory here.[32]

One finds a similar emphasis on institutionalization and evolution in the work of one of Dworkin's admirers: the great German philosopher and sociologist Jürgen Habermas.[33] Habermas's account, however, suggests that an understanding that centers around historical processes of institutionalization points us to a distinction in modern societies between law and morality, not a relation of whole (morality) and part (law).

According to Habermas, part of the process that Max Weber called the "rationalization" of Western societies was the differentiation of both law and morality from customary norms.[34]   Like Dworkin, Habermas sees the emergence of law from morality in the development of legal institutions – specifically, institutions that generate legal norms through legally prescribed procedures.[35]   Habermas refers to this feature of legal evolution as law's "positivization," and for him – unlike Dworkin – this counts as a distinction between legal and moral norms. So, too, does the necessary or "internal" link Habermas sees between the validity of a legal norm and its coercive

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See id.* (manuscript at 256) (raising, without answering, the question of whether "anthropologists can find the historical origins of the elaborate legal structures and practices with which we are familiar in the development of . . . tribal moralities" and referring to this approach as a "genealogy").

[33] For an indication of Habermas's admiration for Dworkin's work, see generally JÜRGEN HABERMAS, *Ronald Dworkin – A Maverick Among Legal Scholars*, *in* EUROPE: THE FALTERING PROJECT 37 (Ciaran Cronin trans., Polity Press 2009) (speech honoring Dworkin on his reception of the Niklas Luhmann Prize in December 2006).

[34] Habermas's most systematic consideration of law is JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992).

[35] *Id.* at 111.

enforcement – a link not necessary in the case of moral norms.[36]   For Habermas, the institutional dimension of law and its coercive mechanisms differentiate law from morality rather than establish law as part of the moral whole. In my view, Dworkin's recognition of law's institutional and coercive dimension should point him in the same direction. That, however, would leave him closer to the "two-system" view he claims to reject, rather than a "one-system" conception in which law is a part of morality.

I see that the position Dworkin ultimately wants to defend – that "in many circumstances moral facts figure among the basic truth conditions of propositions of law"[37] – might seem to follow more naturally if we were to see law as part of morality. I do not see, however, that Dworkin has justified why we should understand law and morality as one system rather than two, with law figuring as "part" to morality's "whole." Nor is it apparent to me why this conception of law's relation to morality would serve, as Dworkin claims it would, to "integrate" jurisprudence or legal theory into "the other intellectual domains of the time"[38] – domains, that is, other than morality. To me, following Habermas in pursuing connections between legal theory and social theory seems more promising.

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[36] *Id.* at 155-56. Dworkin, too, sees a connection between the concept of a legal right and its enforcement: "Legal rights," he says, "are political rights that are properly enforced, directly on a citizen's demand, by an adjudicative body."   DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 2).

[37] DWORKIN, JUSTICE IN ROBES, *supra* note 1, at 225 (stating that he has held this position "for many years").

[38] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 256).