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Truth, Ethics and Legal Thought—Some Lessons from Dworkin’s *Justice for Hedgehogs* and Its Critique

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Abstract: This paper reconstructs some of the core elements of Dworkin’s epistemology of ethics. To understand why, for Dworkin, questions of legal philosophy lead to moral epistemology, the main points of Dworkin’s last restatement of his theoretical account of law are outlined. Against this background, the paper critically assesses the merits of Dworkin’s criticism of current prominent forms of skepticism and what it teaches us about the epistemology of legal thought.

Keywords: legal epistemology; skepticism; error theory; cognitivism; non-cognitivism

1. Introduction

Ethical principles direct human action. They are of central concern for individuals. Individuals adapt their behavior to the rules they think are morally obligatory. Finding the right course of action is an element of much soul-searching for many people. It is not a trivial sideline but is of great importance to the way many people live and how they interpret their personal lives. The same is true at the societal level. Ethical questions are a central concern for societies. Sometimes the ethical codes that a society implements are repressive and do not stand the test of critical scrutiny. But sometimes the morality of a society embodies, at least in certain parts, important aspects of ethical thinking supported by critical argument. In any case, the ethical rules that are regarded as being relevant in a society are of crucial practical significance as they shape the social interactions of individuals and the course of development of societies. They determine the way human beings live, the rights that are protected, the goods that they receive and the injustices that are inflicted upon them. The classical Kantian question “What shall we do?” is therefore both on the individual and the societal level a crucially important issue of human reflection for one’s individual and social life.

The law enforces normative rules backed by powerful institutions. Law is to be distinguished from morality, but in any society the moral codes of public life and of the individual conscience influence the ways in which the law is shaped and conceptualized. Evidently, the law is of central importance to the life of an individual and to a society at large. By the means of law, a society defines the rules of social life that are important enough to be physically enforced and are to be applied by a complex institutional framework, not least by courts.

These considerations also hold at the international level even if one is well aware of the unbecoming realities of power politics. Political morality plays a prominent role in international affairs not only as an instrument of ideological argument, but sometimes also actually guiding the decision-making of political entities. Normative considerations have informed the evolution of international law in important respects. A prime example is the (albeit fragile) protection of human rights. This system of protection, with all its flaws, is certainly the product of some kind of moral reckoning of humanity after the cataclysm of the Nazi period and the Second World War.¹

¹ Cf. on the history and theory of human rights, (Mahlmann 2023a).



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These observations are truisms and lead to important questions: What epistemological status do moral judgments enjoy? Do moral judgments have a claim to truth, in whatever sense one interprets this controversial term? What about normative claims in legal arguments?

There is a huge and long-lasting debate regarding the proper methodology for interpreting legal norms. What is the result of the application of such methods? Are the results of legal interpretation legal truth, in some perhaps well-qualified sense? Or are they just pieces of political ideology couched in legalistic terms? What about the use of these methods themselves? Is there truth to be obtained through legal reflection on the right choice of method of legal interpretation?

These are substantial questions that will not be answered in the few remarks that follow. What will be the focus of attention instead is the underlying question about the truth-aptness of normative, particularly moral and ethical, judgments and the implications these findings may have for our understanding of the epistemology of law. There are many theories that deal with this particular problem. We will take a closer look at Ronald Dworkin's thoughts on these matters. They form not only a very influential but also a useful point of departure to understand some possible ways to address these difficult questions (Guest 2013, p. 159 ff). We will therefore first circumscribe more precisely the problem at issue. We will then reconstruct Dworkin's normative theory to gain a grasp of the normative claims he defends and why, from his point of view, the philosophy of law must include an account of the foundations of moral understanding. Then we will turn to questions of ethical and legal epistemology. What epistemological status do the elements of his normative theory have? As epistemological theory is unsurprisingly related to some questions of normative ontology, we will discuss this set of issues as well. We will then critically assess Dworkin's theory. Finally, we will develop some perspectives on the following question: What kind of insights can actually be gained on this in terms of practical philosophy and, in particular, the theory of law?

2. What Is the Problem?

An influential view in moral philosophy, metaethics and legal theory is that moral judgments and normative propositions in general have no cognitive content. What they actually express is less clear if one accepts this starting point. One classical view, expressed perhaps in its canonical form by David Hume, is that they are an expression of an emotion, a feeling of appraisal of a certain intention, act or state of affairs;² even though one has to add that a proper interpretation of Hume's theory most probably will lead to a rather complex picture. Another alternative is to state that moral judgments are in fact about nothing. They are vacuous, referring to imaginary entities—moral facts in the world—that do not exist. They are therefore entangled in errors (Mackie 1977). These kinds of theories not only have a long and impressive tradition, but they have also been proposed by very different thinkers, not least in the context of the attack of some analytical philosophers against any form of metaphysics (Carnap 1931, pp. 219–41). One can also find examples of this kind of approach in very recent theories inspired by the idea that a proper reconstruction of ethics has to use the tools of neuroscience (Greene 2013).

There is a strange ease with which some people acquiesce to these kinds of theories, as if nothing important were at stake. One can even observe a certain satisfaction in these people in their belief that they have unmasked the true essence of moral judgment and destroyed the rationalist pretensions of ethics and practical philosophy in general. This is surprising because evidently very much is at stake. The question is whether this

² (Hume 1978, p. 468 f.): "Take any action allow'd to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call *vice*. In which-ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never find it, till you turn your reflexion into your own breast, and find a sentiment of disapprobation, which arises in you towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object".

central element of human individual and social life called ethics and the normative system based on its perceived content are actually the products of rationally controlled or at least rationally controllable—in traditional terminology ‘reasonable’—thinking and deliberation. Given the huge consequences that ethical convictions and legal systems have for human life, it is evidently of great importance whether they are the products of critical thought or the expressions of certain emotions or preferences divorced from rational critique. There is much to say about these particular theories and the value of their attack on a cognitive conception of ethics and practical philosophy.³ One way to approach the topic is to look at Dworkin’s influential theory, which has prominently challenged this stance. It develops an alternative kind of theory of moral and ethical understanding and is very much worth considering.

3. The Ethics and Law of Authenticity and Respect

Dworkin developed over the course of his life a rich body of theoretical work.⁴ Major elements of this are the analysis of norms, in particular the distinction between rules and principles (Dworkin 1977), his interpretative theory of law (Dworkin 1986) and his contributions to the theory of substantial normative questions, in particular the concept of justice as equality of resources (Dworkin 2000). At the end of his life, he added to these endeavors a reconstruction of ethics and law on the basis of the idea or concept of human dignity (Dworkin 2011). He outlines a far-reaching and ambitious project not just about the technical details of the philosophy of law but also a philosophical interpretation of human life that aims at providing guidance on how to live a life well. It is in this particular sense an *ethical* theory. ‘Ethical’ means here not a reflective theory of normative questions but a theory about the right way to live a human life—the right way to achieve human flourishing. The main thesis is that such a life lived well is not achievable without acting according to moral parameters. More precisely, the idea of human dignity is the lodestar for such a life. The respect for one’s own dignity and the dignity of others is the true path to living a life that makes sense. The theory is thus “a creed; it proposes a way to live” (Dworkin 2011, p. 1).

In Dworkin’s view, practical philosophy has a holistic nature.⁵ It is about *eudaimonia*, a life lived well, or morality in the sense of the norms guiding our behavior toward others and a legitimate conception of law. Dworkin argues that a life lived well is not only a pleasant life full of sensual joys, but also a life that takes a course that is justified if one respects moral standards. To achieve these ends, the way one leads one’s life is of central importance: “We value human lives well lived not for the completed narrative, as if fiction would do as well, but because they too embody a performance: a rising to the challenge of having a life to lead. The final value of our lives is adverbial, not adjectival. It is the value of the performance, not anything that is left when the performance is subtracted. It [is] the value of a brilliant dance or dive when the memories have faded and the ripples died away” (Dworkin 2011, p. 197).

Dworkin regards human dignity as the central foundation for such an ethical conception of human existence. Dignity, in his view, encompasses both obligatory respect for oneself and respect for others. Dworkin develops explicitly a theory that is based on Kant’s leading ideas. Accordingly, he calls his own central ethical principle “Kant’s principle” (Dworkin 2011, p. 19). The main point is that one can only respect oneself if one respects humanity as such. Dignity is the key to ethical, moral and legal understanding, but it is

³ For a survey, cf. (Mahlmann 2023b).

⁴ Cf. for an overview, (Guest 2013).

⁵ (Waldron 2014, pp. 544–49, 545): “All through the book, what Dworkin does is to look for the implication of value A in the conditions that make it sensible, appropriate, or legitimate to pursue value B. If he can do this, then he can show that there is no version of B that can be sensibly pursued as something worth trading off against value A in the way that completely independent values might be traded off against one another. It is not a point about commensurability, about each of the contestant values embodying a given quantum of some underlying good such as utility. Dworkin is a holist not a monist. He seeks cohesion rather than reduction among our apparently disparate values”.

also a tool to help us reach the unity of values⁶ that Dworkin hopes to establish.⁷ “A person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms. That is a template for a unification of ethics and morality” (Dworkin 2011, p. 19).

4. On Human Dignity and Its Consequences

4.1. *The Concept of Dignity*

Dworkin associates the concept of human dignity with two principles: “The first is a principle of self-respect. Each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity. The second is a principle of authenticity. Each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses. Together the two principles offer a conception of human dignity: dignity requires self-respect and authenticity” (Dworkin 2011, p. 203 f).

How are we to connect self-respect and authenticity with the respect for other human beings?

The core is that self-respect points toward the necessity to respect other people as well. This is in Dworkin’s view the core of Kant’s argument: “This holds that a proper form of self-respect—the self-respect demanded by that first principle of dignity—entails a parallel respect for the lives of all human beings. If you are to respect yourself, you must treat their lives, too, as having an objective importance” (Dworkin 2011, p. 255). At the core of the argument is that it is inconsistent to respect oneself because of one’s humanity but to not respect others who share the same human nature.⁸

4.2. *Duties and Human Rights*

Dworkin develops on this basis more concrete moral principles, particularly what kind of harm agents are not allowed to inflict on others and which obligations agents have to help others.⁹ Political obligations also have their root in mutual respect. Dworkin argues that a political order does not respect the dignity of its members appropriately if there is no reciprocal obligation to accept common decisions, insofar as these decisions are based on certain procedural and material conditions. Democracy creates the problem that the majority can harm others, the minority or, of course, itself. In Dworkin’s view, political obligations are therefore conditioned on the legitimacy of the public order as such that provides solutions to this problem. The roots of political legitimacy are manifold. Legitimacy is particularly dependent on the ability of citizens to protect themselves and to prevent themselves from turning into agents of dictatorship. Elements of these democratic legitimacy-creating preconditions are the need to fight injustice, to participate actively in the political process and perhaps even to take recourse to civil disobedience to assure the justification of political actions. A revolution can be justified, but only if the basic legitimacy of an order has been lost. Dworkin formulates a sharp critique of other kinds of duties derived from group or “tribal” obligations, as he calls these kinds of supposedly existing

⁶ Interpreting Dworkin as establishing a “research program”, (Raz 2016, p. 3 ff).

⁷ Senn (2017, p. 90) underlines the humanistic, individualistic and universalist thrust of Dworkin’s theory.

⁸ Griffin has made a similar point, cf. (Griffin 2008, p. 135). An interesting question is whether the objective reason to value the life of another is sufficient to create obligations toward the other and rights on the other’s side. On this matter in the context of the theory of human rights, cf. (Mahlmann 2023a, pp. 234 ff, 260 f). On this point, cf. (Waldron 2014, pp. 544–49, 547): “I may ask myself whether such an observer would regard any life pursued in this way as valuable; but it is a further point to think that any life lived in such a way (or in any satisfactory way) is valuable in a way that imposes constraints on the way that I live mine”.

⁹ A question is whether the whole of morality can really be inferred from this concept of dignity. Cf. for some criticism, (Kamm 2010, pp. 691, 694): “I think Dworkin’s account of the relation of morality and ethics may underestimate our capacity simply to act for reasons (such as the importance of others) independent of the connection between their importance and our own importance. Indeed, some might say it is this capacity that is the source of our own dignity, though it need not be the source of the value of other entities”. An example of this would be our duties toward animals.

duties to particular communities of people. Concretely, Dworkin directs his criticism against political nationalism.

In his discussion of legal institutions, Dworkin pays particular attention to subjective rights. Again, human dignity helps to calibrate an order of human rights—it provides a central yardstick to determine the content and scope of these rights. In Dworkin’s view, these include the prohibition of torture, the prohibition of punishing the innocent, due process rules and the equal treatment of women. For Dworkin, this abstract yardstick of human dignity is of universal validity, even if there is the possibility of concretizing the content of human dignity in different social contexts.

4.3. Equality and Liberty

A further central element is equality. “Left-of-center politicians struggle, with at most moderate success, to achieve incremental gains for those at the bottom, and the best politics is politics that does not ask for more than the comfortable majority is willing to give. The gap between theory and politics is particularly great and depressing in racially or ethnically diverse communities; majorities continue to be reluctant to help poor people who are markedly different from them. It is nevertheless important to continue to trouble the comfortable with argument, especially when, as I believe is now the case, their selfishness impairs the legitimacy of the politics that makes them comfortable. At a minimum they must not be allowed to think that they have justification as well as selfishness on their side” (Dworkin 2011, p. 351). He refers to his theory of equality of resources as a tool to understand what equality demands (Dworkin 2000).

Freedom is another important element of this political morality. Dworkin is of the opinion that freedoms are initially limited to certain uses of liberty, namely those uses that are morally justifiable. On this basis, in Dworkin’s view, one can find answers to questions about the limits of freedom of speech, property or religion.

4.4. Democracy

Dworkin also develops a particular concept of democracy. He distinguishes a majoritarian conception from a partnership version of democracy. The former is based on majority principles. A partnership conception of democracy focuses on political recognition. Differences of impact of citizen action are possible while realizing this kind of idea: “First, it must not signal or presuppose that some people are born to rule others. There must be no aristocracy of birth, which includes an aristocracy of gender, caste, race, or ethnicity, and there must be no aristocracy of wealth or talent. Second, it must be plausible to suppose that the constitutional arrangement that creates the difference in impact improves the legitimacy of the community” (Dworkin 2011, p. 392). On this basis, Dworkin also considers the question of judicial review and constitutional courts. He argues that these legal tools can be useful but, in certain contexts, they can become problems for democracy.

4.5. Law and Morality

Law is, from Dworkin’s holistic perspective, a subchapter of moral thinking: “We now treat law as part of political morality” (Dworkin 2011, p. 405). A central property of law is its institutional dimension. Dworkin thinks that to interpret law as part of political morality does not erode the distinction between law as it is and law as it should be. To help us to avoid any such problems we can distinguish between *prima facie* valid law that is legitimately not applied because of moral reasons and law for which such reasons for nonapplication do not exist. Yet another case is law that violates basic principles of ethics to a degree such that it cannot be regarded as law anymore.¹⁰ In Dworkin’s view, debate about the concepts of law can lose sight of these basic distinctions: “The ancient jurisprudential problem of evil law is sadly close to a verbal dispute” (Dworkin 2011, p. 412).

¹⁰ Cf. for an argument that admitting that law and justice can conflict, as Dworkin does, weakens, though does not refute, Dworkin’s value holism (D. Smith 2012).

From this point of view, Dworkin answers the question as to whether the legitimacy of law is based on certain procedures and specific moral standards. The central example is the sovereignty of parliament and its limits: “The answer seems clear enough. Once, in Coke’s time, the idea that individuals have rights as trumps over collective good—natural rights—was very widely accepted. In the nineteenth century a different political morality was dominant. Jeremy Bentham declared natural rights nonsense on stilts, and lawyers of that opinion created the idea of absolute parliamentary sovereignty. Now the wheel is turning again: utilitarianism is giving way once again to recognition of individual rights, now called human rights, and parliamentary sovereignty is no longer evidently just. The status of Parliament as lawgiver, among the most fundamental of legal issues, has once again become a deep question of political morality. Law is effectively integrated with morality: lawyers and judges are working political philosophers of a democratic state” (Dworkin 2011, p. 414).

All in all, reflection on law and legal practice appears to be an essential element of the ethical life of a society. “We must therefore do our best, within the constraints of interpretation, to make our country’s fundamental law what our sense of justice would approve, not because we must sometimes compromise law and morality, but because that is exactly what the law, properly understood, itself requires” (Dworkin 2011, p. 415).

These theses lead obviously to a central question, namely: What epistemological status have these normative theoretical assumptions, which ultimately (given that law is part of morality) are foundational moral principles? Are they expressing truths, or could they at least express the truth if improved? This is an important question because Dworkin talks not only about technical questions of law and morality, but also about the way to live a good life in the deepest sense imaginable: “Remember, too, that the stakes are more than mortal. 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” (Dworkin 2011, p. 423).

5. Refuting Skepticism

5.1. Varieties of Skepticism

The main concern of Dworkin’s epistemological thought is to refute varieties of skeptical arguments.¹¹ The basic distinction is between internal and external skepticism (Dworkin 2011, p. 3 ff). Internal skepticism doubts that any particular proposition of morality can be justified; it does not question, however, that propositions in morality are possible. A central example of such internal skepticism is the thesis that morality can only be revealed by God; however, as no God exists, no moral order is accessible to human beings. This is an example of what Dworkin calls global internal skepticism. There is also a partial, local internal skepticism. A central example of this kind of skepticism is cultural relativism, which argues that justified moral positions are only possible in relation to particular cultural backgrounds.

External skepticism, in contrast, denies that the project of moral justification makes any sense. Moral judgments with rational content are not possible in principle. Internal and external skepticism are further divided into error and status skepticism. Internal error skepticism maintains that morality is possible but a particular precondition of moral judgment does not exist. An example of this is the case just referred to, namely the assumption that morality is necessarily of divine origin, but that God, however, does not exist and that therefore moral justification is impossible. External error skepticism asserts that all moral judgments are false. There is no internal status skepticism because status skepticism deals with the nature of moral judgments. Status skeptics argue that it only seems that moral judgments are about moral insights, whereas in fact they express something very different, specifically the inner attitude of the agent. “Status skeptics

¹¹ Cf. (Guest 2013, p. 132 ff) on a variety of skeptical challenges to an “ordinary” view of the interpretation of law in court.

therefore do not say, as error skeptics do, that morality is a misconceived enterprise. They say it is a misunderstood enterprise" (Dworkin 2011, p. 32). External status skeptics are adherents of those theories in metaethics that deny in various ways that there is something like a content of morality that can be rationally reconstructed.¹²

5.2. Self-Contradictions of Skeptics

Dworkin's main concern is external status skepticism. This version of skepticism forms the real challenge because internal skepticism accepts in principle the possibility of normative arguments; it just doubts that there is, at the moment at least, a convincing theory justifying such normative arguments. Dworkin's argument highlights a central point that, in his view, is the main problem with status skepticism: It is self-contradictory. Every status skeptic, Dworkin argues, entangles herself necessarily through the very denial of any possible rational content of morality in moral argumentation. Dworkin provides the following example to illustrate his point: Four persons are discussing moral issues. Person A asserts that it is morally impermissible to terminate a pregnancy. Person B disagrees and argues that under certain circumstances an abortion is permissible—for example, for underaged mothers. Person C disagrees with both positions and asserts that abortion is neither forbidden nor obligatory; it is always permitted. That is so because abortion has no different status from cutting one's fingernails. Person D finally asserts that all three are wrong because abortion is neither permitted, nor obligatory, nor prohibited, because she is a status skeptic. From her perspective, these normative categories of being prohibited, obligatory or permitted have no sense at all. The point of Dworkin's argumentation is that the radical status skeptic D entangles herself by what she says against her intention in a moral argument. Her position is (implicitly) as normative as the position of those who argue like A, B and C, that there is a normative point to the matter: that abortion is always forbidden, that it is permissible under certain circumstances or that it is always permissible. This is so, according to Dworkin, because D's assertion ultimately has a normative consequence, namely that abortions are permissible. In fact, Dworkin says, the status skeptic agrees with C, as the upshot of D's argument is that abortion is allowed.

This is of crucial importance for Dworkin's argumentation. He thinks that normative arguments are unavoidable. This is what Dworkin calls "Hume's Principle", referring to Hume's distinction between facts and norms (Dworkin 2011, p. 44 ff). Nobody can avoid normative arguments because even the critique of the possibility of such argumentation in the end has normative consequences. Therefore, the true task is to engage with the interpretative project and to argue about what kinds of normative positions are actually justified: "External skepticism should disappear from the philosophical landscape. We should not regret its disappearance. We have enough to worry about without it. We want to live well and to behave decently; we want our communities to be fair and good and our laws to be wise and just. These are very difficult goals, in part because the issues at stake are complex and puzzling and in part because selfishness so often stands in the way. When we are told that whatever convictions we do struggle to reach cannot in any case be true or false, or objective, or part of what we know, or that they are just moves in a game of language, or just steam from the turbines of our emotions, or just experimental projects we should try on for size, to see how we get on, or just invitations to thoughts that we might find diverting or amusing or less boring than the ways we used to think, we should reply that these observations are all pointless distractions from the real challenges at hand" (Dworkin 2011, p. 68). As an alternative, one has to engage in the holistic project of determining the justified content of morality and law.

¹² A substantial number of approaches can be understood to fall under Dworkin's categories of external skepticism, cf. e.g., (Ayer 1948, p. 102 ff; Hare 1952, p. 163 ff; Mackie 1977, p. 15 ff; Blackburn 1984, p. 167 ff; Gibbard 1992, p. 126 ff).

6. Questions of Ontology

The epistemic questions lead to questions of moral ontology. Dworkin argues that ontological questions are irrelevant to the issue of justification. The debates of moral realists and nonrealists miss the real problem in his view. Moral realists assert that there are objective facts in the world which are the truth conditions for true moral propositions. Nonrealists deny the existence of such moral facts and therefore take morality as an expression of the subjective attitudes and preferences of individuals. Whatever the ontological stance may be, Dworkin argues, it is irrelevant to epistemological questions. The normative argumentation is independent from the question as to whether there are moral facts in the world or not.

Ontological questions have, in Dworkin's view, two dimensions: first, whether moral facts have causal effects on moral judgments; and second, whether the truth of a moral proposition is dependent on the existence or nonexistence of moral facts in the world. However, in Dworkin's view, neither is the case. There are no discernible causal effects of moral facts in the world. The thesis of the dependence of the truth of moral assertions on corresponding moral facts in the world is in itself not justified by the criterion of their correspondence with facts in the world. There is no epistemic fact in the world that verifies the thesis that the truth condition for the truth of moral assertions is the correspondence of these assertions with moral facts in the world. Morality, in Dworkin's view, is therefore an argumentative project independent from ontological facts.

7. Indeterminacy and Uncertainty

Dworkin distinguishes between indeterminacy and uncertainty. Indeterminacy means that certain moral dilemmas are ultimately unsolvable. Uncertainty, in contrast, means that certain concrete cases may be unclear without excluding the possibility that, in principle, a reasoned solution is possible. Dworkin does not deny the uncertainty of many questions of value, but he does deny the thesis that the indeterminacy of values makes the rational debate about values impossible. Therefore, agents cannot evade the need for moral argumentations and thus the responsibility to engage seriously and as keenly as they can with moral arguments. Nor, of course, can they evade finally facing the obligation to act accordingly. This responsibility is also connected to the idea of human dignity: "In brief: we try to act out of moral conviction in our dealing with other people because that is what our own self-respect requires. It requires this because we cannot consistently treat our own lives as objectively important unless we accept that everyone's life has the same objective importance. We can—and do—expect others to accept that fundamental principle of humanity. It is, we think, the basis of civilization" (Dworkin 2011, p. 112).

8. Concepts and Interpretation

Dworkin outlines a theory of interpretation that is based on a certain theory of concepts. In his view, there are three kinds of concepts: criterial concepts, natural-kind concepts and interpretive concepts (Dworkin 2011, p. 158 f). Criterial concepts are concepts with identifiable criteria for the right use of those concepts. Therefore, the same concept can be used by different users differently without implying a substantial difference of opinion if both simply use different application criteria. If somebody thinks, to use Dworkin's example, that a brochure is a book, while somebody else thinks that a brochure is not a book, then there is no substantial difference of opinion about the meaning of the concept "book" but simply different ways of using it. Natural-kind concepts are distinguished by the fixed nature of the designated entity in nature—for example, "lion" refers to a particular species of predator. The third kind of concept is of central importance to Dworkin's own theory. These are interpretative concepts. Overlooking the existence of such concepts has had a particularly negative influence on the philosophy of law, he argues. To discuss the content of interpretative concepts is different from discussing the content of criterial concepts. Here, in the case of interpretative concepts, there are real, substantial differences of opinion. One engages in debates with substantial content when questioning what concepts like dignity,

justice, freedom and so on actually mean. This conflict has to be solved in the framework of a normative interpretation of these concepts.

9. Is Dworkin Right?

Dworkin develops a far-reaching political theory that includes a theory of morality and law. The many questions that can be raised about the content of this theory cannot be addressed in the context of these remarks. The focus of attention is the epistemological theory that Dworkin proposes, which is the basis for the substantial content of his theories about politics and law that have been outlined above in a rough sketch and are understood as being part of morality.

9.1. *The Normativity of External Status Skepticism*

The first epistemological problem of some importance is whether the position of an external status skeptic is in fact self-contradictory. The point of Dworkin's argument is that the position of an external status skeptic formulates, against her will, a normative assertion concerning the permissibility, obligatory nature or prohibition of certain actions. The argument is that one cannot escape such statements, such that even if one maintains that any moral proposition has no content because there are no moral entities in the world and there is no other discernible, intrinsically normative content of such assertions, one is still necessarily entangled in normative assumptions. More precisely, Dworkin argues that in cases like the example he uses, one asserts the permissibility of an act because that is the only default position left—if it is not obligatory or prohibited, it must be permitted.

The problem is that Dworkin's argument presupposes the necessary existence of morality and thus the very entity whose existence the external status skeptic puts in doubt. This position of the external status skeptic does not imply a self-contradiction, as Dworkin maintains. The external skeptic does not necessarily have to assume that a particular action is permitted, prohibited or obligatory if she asserts that a normative evaluation of certain situations or intentions is impossible. She argues that a world without a moral status of action is not only imaginable, but in fact is the world we live in. When she asserts that there are no such normative categories, the consequence is simply that human beings can do a certain thing—can act in a certain manner—if they have the wish to do so and if they have the factual ability to do so because there are no obstacles to such action. In the case of Dworkin's example, a skeptic like D would argue that a person may or may not terminate a pregnancy depending on her own opinions if there are no external obstacles—including, of course, legal prohibitions—that prevent her from acting as she wishes. This does not imply that it is permitted in a normative sense, as this is exactly what has been put in question by her argument. The only thing an external status skeptic asserts is that it is in fact possible to act according to the particular motivation that this agent experiences and to terminate or not to terminate the pregnancy. There is an important difference between being *permitted* to do something and being *simply able* to do something. This difference can only be denied if one presupposes that necessarily a normative, deontic status is ascribed to an intention or action. However, this has to be shown—it cannot simply be presupposed by the argument.¹³

This, of course, does not mean that external status skepticism is right. In fact, it is not—it is profoundly flawed. Rather, it just means that the refutation of external skepticism must proceed in a different way than Dworkin envisages. How that may be done will be addressed after some other remarks about moral ontology intrinsically related to Dworkin's argument about epistemology.

¹³ Michael Smith argues that Dworkin's account fails because external error skeptics only propose a philosophical thesis and do not imply a normative position, and because external status skeptics can hold (without contradiction) that moral beliefs are about desires related to nonmoral matters of fact, and moral truth is related to moral beliefs of this latter kind (M. Smith 2010, p. 509 ff).

9.2. *The Relevance of Ontology*

It is certainly true and a rather traditional insight of the theory of science that any scientific theory based on empirical data implies standards that are not derived from the empirical data themselves. This has been extensively discussed in the context of the limits of induction, but also in other contexts—for example, as to the assumption of the existence of rigid, permanent objects existing over time.¹⁴ Therefore, Dworkin's assertion is entirely correct that any correspondence theory of moral truth—deriving the truth of a moral proposition from its correspondence with moral facts in the world—cannot itself be based on the correspondence with certain epistemic facts in the world (at least if one shies away from an infinite regress). Whether a correspondence theory of moral truth is plausible or whether other theories are preferable is of no concern to us here. The only important point is that such epistemological principles are not themselves based on something like “epistemic realism”. They are simply specifications of the basic assumptions that enable human beings to develop systems of knowledge.

This observation does not imply, however, that questions of moral ontology are entirely irrelevant. It only means that the conditions for the truth of moral propositions are themselves not derivable from a correspondence theory of truth, at least not in the sense of a correspondence of epistemic principles with epistemic facts in the world.

There are good reasons to be skeptical about moral realism.¹⁵ This does not mean, however, that one is forced to accept the idea that the content of morality is simply the expression of subjective preferences. There are other epistemic standards guiding our selection of nonreferential truths. We just discussed one example where such standards are relevant, namely the question of which truth conditions for moral propositions we are justified in applying. One way to answer this particularly difficult question is to engage in normative theorizing to understand better what standards are actually relevant for convincing normative arguments. One is therefore faced with the question that Dworkin identifies—and not surprisingly—as the main task of practical philosophy, namely to engage with the development of a substantial normative theory based on convincing arguments. However, this task is raised on different grounds than Dworkin identifies, being the double purpose of understanding better what is normatively justified and why this may be so.

10. Perspectives

How are we to move forward from this point of reflection?¹⁶ The first element of a useful account of this epistemology of moral judgments is to remain aware that moral judgments have cognitive content. Noncognitivism is on the wrong track. Let us take an example: There is wide agreement that it is legitimate to guarantee the right to vote for both men and women and of course any other sexual identity, though there are repressive regimes that still deny this right to women. How do you argue for that simple proposition? The first element is, it seems, to ascertain a relation of equality between different persons, male and female, in certain relevant normative respects. Usually, the right to vote is based on the capacity for autonomous, responsible self-determination. The question, then, is whether there are any reasons to think that women have a lesser capacity for autonomous, responsible self-determination than men. This was the guiding assumption of discriminatory practices for millennia, in more recent times as in antiquity, expressed in excluding women from the right to vote. This factual assumption about the unequal capacity for autonomous, responsible self-determination is, of course, anthropological nonsense—men and women share the same capacities, here as in other cognitive respects. That this assumption is nonsense has not prevented generations of people from asserting its truth and defending patterns of discriminatory treatment of women on the ground that

¹⁴ Cf. for a classical example (Russell 1959, p. 83 ff).

¹⁵ For a different view, cf. e.g., (Enoch 2011).

¹⁶ For a fuller argument, cf. (Mahlmann 2023a).

women have different cognitive abilities. If this argument loses its basis, as it has done in many countries around the world, it seems self-evident that this established relation of equality as far as the capacity for autonomous, responsible self-determination is concerned gives rise to the normative obligation to treat men and women in relation to the right to vote equally. There is no argument concerning the equal right to vote that maintains that men and women are equal in the relevant properties underlying political self-determination by democratic vote but that they still should be treated unequally. The principle of the equal treatment of equal persons in normatively relevant respects is taken to be self-evident. Of course, this principle could also be questioned, though in practice it is not. One can ask whether there are any reasons not to apply the principle to treat equally things that are in normatively relevant respects equal, but it is hard to come by any remotely plausible argument that this kind of principle should not guide our action.

It is useful to observe that the argument so far is full of cognitive content. The answer to the question as to whether there is a relation of equality between men and women regarding the factual reasons underlying the assigning of voting rights is based first on ascertaining empirical facts concretely as to whether women have the same capacity for autonomous, responsible self-determination as men or not. It is also based on ascertaining whether, given what we know about the capacities of men and women, there is a relation of equality between them in this respect. The ascertainment of such a relation of equality is clearly a cognitive act; it is not something that one *feels*, in any understandable sense of that term. It also seems to be a judgment with cognitive content to assert that things that are in normatively relevant respects equal should be treated equally. Again, this judgment is not a mental act that is usefully described in emotivist terms. Therefore, arguments about such matters (for example, about the properties of women and about what normative consequences are to be drawn from them) are not just exchanges of emotional attitudes, and this is actually one of the reasons for possible progress in moral affairs. Argument is possible and sometimes succeeds against such powerful foes like interests, habits, traditions and ideologies.

At some stage, it has to be admitted, one has to trust one's own judgments—for example, that what we know about the cognitive capacities of men and women leads, in fact, to the conclusion that the capacities, as far as autonomous, responsible self-determination is concerned, of men and women are equal. This is also the case for the normative conclusion that it is just to treat men and women equally because of their equal capacities to determine themselves, as far as the right to vote of men and women is concerned.

This observation should come as no surprise because it mirrors a general epistemological pattern. One has to trust that one's judgment is true at some stage in any form of human reflection, from the most mundane cases to the bases of complex scientific theories. If you consult a timetable on your smartphone to ascertain the time when the train to Bern leaves from Zürich, you can control your initial conclusion—that it leaves at eight o'clock—by looking again at the same timetable or by consulting another Internet source to see whether the information is confirmed; but in the end you have to trust your own judgment that you deciphered the signs you read in the timetable correctly, that you interpreted their meaning properly and that, in fact, the train leaves at eight o'clock. The same is true for a scientist who has to trust that she understood the meaning of the signs on her computer screen documenting some experimental data correctly, and—before submitting a paper with a theoretical interpretation of the data—that she got her calculations, equations and interpretations right. Normative reflection is, in certain respects, less of an epistemological outlier than some people think.

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References

- Ayer, Alfred Jules. 1948. *Language, Truth, and Logic*, 2nd ed. New York: Dover.
- Blackburn, Simon. 1984. *Spreading the Word*. Oxford: Oxford University Press.
- Carnap, Rudolf. 1931. *Überwindung der Metaphysik durch logische Analyse der Sprache Erkenntnis, Bd. 2*. New York: Springer.
- Dworkin, Ronald. 1977. *Taking Rights Seriously*. Cambridge: Harvard University Press.
- Dworkin, Ronald. 1986. *Law's Empire*. Cambridge: Harvard University Press.
- Dworkin, Ronald. 2000. *Sovereign Virtue*. Cambridge: Harvard University Press.
- Dworkin, Ronald. 2011. *Justice for Hedgehogs*. Cambridge: Harvard University Press.
- Enoch, David. 2011. *Taking Morality Seriously*. Oxford: Oxford University Press.
- Gibbard, Alan. 1992. *Wise Choices, Apt Feelings*. Cambridge: Harvard University Press.
- Greene, Joshua. 2013. *Moral Tribes*. New York: The Penguin Press.
- Griffin, James. 2008. *On Human Rights*. Oxford: Oxford University Press.
- Guest, Stephen. 2013. *Ronald Dworkin*, 3rd ed. Redwood City: Stanford University Press.
- Hare, Richard Mervyn. 1952. *The Language of Morals*. Oxford: Oxford University Press.
- Hume, David. 1978. *A Treatise of Human Nature*. New York: Oxford University Press.
- Kamm, Frances Myrna. 2010. Morality: Aid, Harm and Obligation: What Ethical Responsibility Cannot Justify. *Boston University Law Review* 90: 691.
- Mackie, John Leslie. 1977. *Ethics: Inventing Right and Wrong*. Harmondsworth: Penguin Books.
- Mahlmann, Matthias. 2023a. *Mind and Rights. The History, Ethics, Law and Psychology of Human Rights*. Cambridge: Cambridge University Press.
- Mahlmann, Matthias. 2023b. *Rechtsphilosophie und Rechtstheorie*, 7th ed. (English Translation in Preparation). Baden-Baden: Nomos.
- Raz, Joseph. 2016. A Hedgehog's Unity of Value. In *The Legacy of Ronald Dworkin*. Edited by Wil Waluchow and S. Sciaraffa. Oxford: Oxford University Press.
- Russell, Bertrand. 1959. *Our Knowledge of the External World*. Chicago: The Open Court Publishing Company.
- Senn, Marcel. 2017. *Rechts- und Gesellschaftsphilosophie*, 2nd ed. Zürich: DIKE.
- Smith, Dale. 2012. Law, Justice and the Unity of Value. *Oxford Journal of Legal Studies* 32: 383–400. [[CrossRef](#)]
- Smith, Michael. 2010. Dworkin on External Skepticism. *Boston University Law Review* 90: 509–20.
- Waldron, Jeremy. 2014. Justice for Hedgehogs. *The Philosophical Review* 123: 544–49. [[CrossRef](#)]

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