RESPONSE

RONALD DWORKIN[*]

INTRODUCTION

I must begin these responses by repeating my thanks to the Boston University School of Law, to James Fleming who organized the Conference, to all those who helped him, and to the starry cast of participants to whose essays I now respond. These essays are directed to an earlier draft of my book, *Justice for Hedgehogs*, to be published by the Harvard University Press.[1] Many of their authors will find evidence of their impact on the finished book. I will try to indicate, in the published version, where I have changed the earlier draft significantly in response to criticism here, and I apologize in advance if I have neglected to mark some changes in that way. Responding to thirty-one papers in a reasonably brief paper is a challenge that requires discipline and selection. My responses are of very unequal length. The more lengthy replies are mainly to more critical papers, but I need hardly say that I did not enjoy the less critical papers any less (this may be an understatement) or deem them any less perceptive and helpful. On the contrary. So the length of my reply is no measure, either way, of my opinion of the essays. I am grateful for them all.

PANEL I: TRUTH AND METAETHICS

Shafer-Landau

Russ Shafer-Landau believes that the distinction I resist between levels of moral theory is evident in other fields. "We are not doing mathematics when we ask about the ontology of numbers. We can stand apart from theological disputes and still query the basic assumptions of religious doctrine."[2] But many philosophers of mathematics do think we are doing mathematics when we declare that numbers exist, and we certainly do not stand apart from religious dispute when we insist that there is no God. On the contrary, we stand at the center of that dispute. The distinction Shafer-Landau has in mind is at best semantic. Consider: "Victims of automobile accidents cannot recover

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[1] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript on file with the Boston University Law Review).

[2] Russ Shafer-Landau, *The Possibility of Metaethics*, 90 B.U. L. REV. 479, *** (480-81) (2010).

compensation unless someone has been negligent" and "Tort law enforces the no-liability-without-fault doctrine." The second statement is in a sense about statements like the first, but it is nevertheless itself a legal judgment. We can treat skeptical moral theories as theories about more detailed moral judgments in the same way, but they are nevertheless moral judgments as well. Shafer-Landau adds, "We can leave our grammar books aside and still ask about whether grammatical facility is innate."[3] Yes, because the latter question is biological not grammatical. No view of biology contradicts any opinion about grammar. But there is nothing else for moral skepticism to be but moral.

Star

Daniel Star believes that metaethical skeptical claims are sufficiently "logically distinct" from substantive moral claims so that I am wrong to consider the former themselves substantive claims.[4] He supports that assertion with an irrelevant example: the statement that a certain moral claim has five words in it is not, he says, itself a moral claim. True enough. But we must take content as well as grammatical structure into account in deciding whether a claim offered as second-order is itself a substantive first-order one. There is indeed a difference between "It is not the case that rich people ought to help poor ones" and "Rich people ought not to help poor ones." But the former is certainly a substantive claim in spite of its awkward diction. Star cites skeptics who argue not that all moral claims are false but that they are all neither true nor false because they all presuppose that there are such things as moral duties and there are no such things. (Compare the famous thesis that propositions about the baldness of the present King of France are neither true nor false.[5]) There are two difficulties. First, someone who says that rich people have a duty to help poor ones is not presupposing a moral duty: he is asserting one. If there are no such things, then what he says is straightforwardly false. Second, the assertion that there are no such things as moral duties is evidently itself a moral claim. (See my reply to Michael Smith.)

Star (and Shafer-Landau) have found what they take to be a hidden premise in my discussion of Hume's principle: I wrongly assume, they say, that the principle declares not only that factual claims cannot support a moral claim on their own but also that they cannot on their own "undermine" a moral claim. But this is not an independent argument: if I am right that skeptical claims are themselves moral claims, just in virtue of their content, then the distinction he and Shafer-Landau offer is pointless. Undermining the moral claim that the

[3] *Id.* at *** (481).

[4] Daniel Star, *Moral Skepticism for Foxes*, 90 B.U. L. REV. 497, *** (499) (2010).

[5] *See, e.g.*, Betrand Russell, *On Denoting*, 14 MIND 479, 485 (1905) ("Either 'the present King of France is bald' or 'the present King of France is not bald' must be true. Yet if we enumerated the things that are bald, and then the things that are not bald, we should not find the present King of France in either list. Hegelians, who love a synthesis, will probably conclude that he wears a wig.").

rich have duties to the poor is tantamount to supporting the moral claim that they do not have such duties. Star's own example of a factual undermining is odd. He supposes that the principle that ought implies can is not a moral principle. But it certainly seems to be. It contradicts some plainly moral positions, including a view some commentators attribute to Nietzsche – that it is a tragedy that though every human being ought to live greatly, only very few can manage it. Star says, however, that it does not follow from the fact that people may reject that principle on moral grounds in some circumstances that it is "always" a moral principle. But since it has the same meaning when denied as it has when asserted, how can this not follow? In any case, what else could "ought implies can" be *but* a moral principle? It is not a factual generalization. Or a natural law. It is not a logical or semantic principle. Does it belong to some as yet unnamed class of non-normative ideas?

Smith

Michael Smith thinks that I ignore the best argument for external skepticism. This does not argue that abortion is neither forbidden nor required and is therefore permissible. If it did, then I would be correct in assuming that his skepticism is actually internal because it takes up a moral stance. Rather, Smith's external skeptic holds that abortion is neither forbidden not required *nor* permitted.[6] Smith suggests one reason such a skeptic might offer for this view: since there are no moral properties that can make a moral claim of any kind true, each of these three claims must be false. But what can it *mean* to deny the existence of moral properties? That there are no morons? If so, then error skepticism is not skeptical – it fails what I call the pertinence test – because no one who thinks that abortion is wicked thinks that morons make it wicked. In any case, whatever else he means, someone who denies the existence of moral properties means to deny that anyone has a certain kind of reason – a categorical or moral reason – for or against anything. But surely that is a substantive moral claim. It has identical content to (though it is supported by a very different argument from) the nihilist's claim that because there is no god no one has any moral reason to do or not to do anything. There is no space between the conclusions of the two arguments.

Smith's analogies confirm this point. Someone who says there is no god because the idea of a god is incoherent offers the same conclusion – about what there is – as someone who cites the problem of evil as his argument for that view. Someone who says that the idea of an objective prescriptive property is incoherent travels by a different route but his conclusion – that nothing is objectively wrong – is the same, and belongs to the same domain of thought, as the nihilist's. I believe Smith misunderstands my point about so-called "internalism" and my reason for changing that subject to a more

[6] Michael Smith, *Dworkin on External Skepticism*, 90 B.U. L. REV. 509, *** (512) (2010).

consequential one. My remarks about attribution strategy do not entail that moral convictions are not beliefs. We follow the same strategy, as I say in *Justice for Hedgehogs*, in attributing beliefs about religion and superstition. We might well say that someone who claims to think superstition bunk, but makes great efforts at great cost not to walk under ladders or cross a black cat's path, does not really believe what he says or thinks he does. It does 'not follow that superstitions are not beliefs.

Smith offers important comments about my criticism of external status skepticism. He agrees that what I call the speech-act version of status skepticism has "basically" been abandoned. He calls attention, however, to a version of what I call the two-games strategy that he believes my arguments do not touch. "What distinguishes beliefs about moral matters of fact from beliefs about non-moral matters of fact, external status skeptics now say, is that beliefs about moral matters of fact are entirely constituted by desires about non-moral matters of fact, while beliefs about non-moral matters of fact are not."[7] The idea begins, I suppose, in the following story. When we accept that some proposition is true, it remains a distinct and important philosophical issue what in the world makes it true – in what its truth consists or, as Kit Fine puts it, what "grounds" its truth.[8] So though an external status skeptic might accept that "Cheating is wrong" is true, he might deny that its truth consists in the moral state of affairs of cheating being wrong. He might insist instead that its truth consists in some psychological state of affairs – of particular people having particular attitudes or desires.

However that would not help him out of the predicament I describe in *Justice for Hedgehogs*. He wants to be able to agree with anything substantive that a non-skeptic can say; he needs to be able to say, for instance, that the wrongness of cheating is a basic moral fact whose truth in no way depends on people's attitudes. If he denied that very popular judgment, he would plainly be taking up a substantive though contrary moral position. His skepticism would be internal. So he wants to be able to deny that the wrongness of cheating consists in a psychological state when he is playing the game of substantive morality but assert it, saying that true moral beliefs are indeed constituted by attitudes, when he plays a distinct, philosophical, second-level game. But, as I argue in *Justice for Hedgehogs*, he cannot do that unless he can restate the propositions at one level or the other so as to make them consistent. He cannot do that so he must choose between the two propositions. He must finally decide whether the truth of cheating being wrong is constituted just by attitudes, in which case his skepticism is internal, or whether it is constituted by the wrongness of cheating in which case he is not a skeptic at all.

[7] *Id.* at 518 (footnote omitted).

[8] *See, e.g.*, Kit Fine, *The Question of Realism*, *in* INDIVIDUALS, ESSENCE AND IDENTITY: THEMES OF ANALYTIC METAPHYSICS 3 (Andrea Bottani et al. eds., 2002).

Smith cites a recent article that offers a twist on this failed strategy. James Drier focuses not on what constitutes a moral fact but on what constitutes a belief (or any other attitude) about an alleged moral fact.[9] He considers the phenomenon described by the proposition, "Julia believes that knowledge is intrinsically good," and suggests that the difference between non-naturalism and naturalism "must, it seems to me, amount to the idea that the property of goodness enters into explanations of [such] phenomena that expressivists would explain by other means."[10] I am not sure what kind of "explanation" Drier has in mind or how Smith thinks Drier's suggestion bears on my argument. A status skeptic is not required to disagree with a "realist" about Julia's phenomenology or her brain states. Nor about the causal history of her belief: as I argue in Chapter 4 of *Justice for Hedgehogs*, a "realist" can consistently adopt any personal-history causal explanation of anyone's moral convictions that any kind of skeptic might offer. Drier takes G.E. Moore as his example of a "non-naturalist" philosopher, and says that Moore's explanation of the phenomenon of Julia's belief "must consist [of] Julia's standing in a certain doxastic relation to knowledge and intrinsic goodness."[11] But a skeptic can deny that Julia's statement about her belief describes a relation between her and goodness only if he believes there is no such thing as intrinsic goodness for her to be related to, doxastically or in any other way, and that claim, once again, can only sensibly be understood as a substantive moral thesis about goodness. Switching from moral facts to propositional attitudes doesn't help.

Nor does it help a two-games skeptic escape the predicament I described. Suppose he says:

> "I can sensibly say, like anyone else, that intrinsic goodness exists when I am playing the substantive game. So, playing that game, I say that Julia's belief is a relationship between her and goodness. But when I escape to the different philosophical game, where my contest with the likes of Moore really takes place, I deny that there is any such thing as intrinsic goodness and so I offer there a different, psychological, ground for the truth of statements about beliefs about goodness. Statements in that game are not substantive, so my skepticism is external after all."

This strategy can work only if the statements in the two games can somehow be given different content. So the would-be skeptic must still choose. If he interprets his philosophical claim, that nothing is intrinsically good, so that it contradicts Julia's substantive claim about knowledge, then his position is once again an internal one. He fails the independence test. But if he interprets it so

[9] James Dreier, *Meta-Ethics and the Problem of Creeping Minimalism*, 18 PHIL. PERSP. 23, 41-42 (2004). See also a related discussion in Fine, *supra* note 8.

[10] Drier, *supra* note 9, at 41.

[11] *Id.*

that it does not contradict Julia – as a gratuitous piece of ontology, perhaps – he is not a skeptic at all.

Garrett

Aaron Garrett provides a helpful summary account of the other contributions on the question of truth in morality.[12] He is right to find a fundamental unifying issue: are metaethical claims are independent of substantive moral ones? I believe they are not, and I have tried to answer his panel's objections to that suggestion in my replies to each of them.

PANEL II: INTERPRETATION

Zipursky

Benjamin Zipursky suggests that in *Justice for Hedgehogs* I endorse a correspondence theory of truth for science.[13] But I mention that theory only as a candidate for that role and only to have an example to contrast with a theory of truth for interpretation. The correspondence theory offers a useful example because it is familiar and its ambitions easily recognized. But I emphasize its difficulties and only speculate that perhaps these might be overcome. Zipursky believes that the account of truth in Part II of *Justice for Hedgehogs* is at odds with the account of Part I because Part I adopts a minimalist theory of truth and Part II recommends more substantive theories including an interpretive theory of truth for domains of interpretation. I had not anticipated that challenge but I think it mistaken. Thought Part I is certainly consistent with a minimalist theory, it does not express one. It argues that external skepticism is ruled out by whatever theory of truth we adopt because external skepticism, which denies truth to moral positions, is itself a moral position. Zipursky suggests that *Law's Empire* assumes minimalism. But the passage he quotes from that book just recommends that we not concern ourselves with external skepticism there. Soon thereafter, I wrote *Objectivity and Truth; You'd Better Believe It*, which takes up that very subject.[14] And *Law's Empire* also offers, as Zipursky notes, an interpretive theory of truth in law. He does not suggest any contradiction within that book. He worries, however, that an interpretive theory of law does not encourage laymen to think that judges are candid in their opinions. But since judges rarely, if ever, declare in an opinion that there

[12] Aaron Garrett, *A Historian's Comment on the Metaethics Panel at* Justice for Hedgehogs*: A Conference on Ronald Dworkin's Forthcoming Book*, 90 B.U. L. REV. 521 (2010).

[13] Benjamin C. Zipursky, *Two Takes on Truth in Normative Discourse*, 90 B.U. L. REV. 525, *** (528) (2010).

[14] Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

is no right answer to the legal issue they confront, only an interpretive theory, and certainly not a positivist one, could redeem their candor.

Fallon

Richard Fallon's essay is perceptive, challenging, and helpful. He describes an awkward situation.[15] A colleague asks you to comment on a draft of his book and you find it bad. You will be cruel if you are frank but dishonest if you are not. Two sets of questions arise. First, does it follow that there is no right answer to the question what you should do? That the case for honesty is neither stronger nor weaker than the case for kindness in these circumstances? Second, even if there is a right answer to that question, must you necessarily have compromised some moral value or virtue whatever you do? Does doing the right thing in such circumstances, all things considered, mean nevertheless doing something bad? Do kindness and honesty really conflict?

The first set of questions raises the issues of Chapter 5 of *Justice for Hedgehogs*. I urge the importance of distinguishing uncertainty from indeterminacy and that distinction is essential here. Of course you might be uncertain whether it is better – or perhaps less bad – to be cruel or dishonest in these circumstances. But I cannot imagine what ground you could have for the further conclusion that neither would better. There are no bare moral facts: moral reasoning, as I said, means drawing on a nested series of convictions about value each of which must in turn draw on still other such convictions, and so on. What ground could you have for thinking that you would never see reason, no matter how long you wrestled with the issue, why one choice of conflicting values in one set of circumstances is morally preferable to the other choice? What ground could you have for the even more ambitious hypothesis that there is no such reason to discover?

Turn to the second set of questions. Do honesty and kindness really conflict even from time to time? If I am to sustain my main claims in *Justice for Hedgehogs*, about the unity of value, I must deny the conflict. For my claim is not just that we can bring our discrete moral judgments into some kind of reflective equilibrium – we could do that, even if we conceded that our values conflict, by adopting some priorities for values or some set of principles for compromising some values in particular cases. I hope to defend the more ambitious claim that there are no genuine conflicts in value that need such compromise. It is, I agree, natural to say in a case like Fallon's that we are torn between kindness and honesty. We might disagree, however, as to *why* it seems natural.

Here is one story. Moral responsibility is never complete: we are constantly reinterpreting our concepts as we use them. We must put them to work day by day even though we have not yet refined them fully to achieve the integration

[15] Richard H. Fallon, Jr., *Is Moral Reasoning Conceptual Interpretation?*, 90 B.U. L. REV. 535 (2010).

we seek. Our working understanding of the concepts of cruelty and dishonesty is good enough for most cases: they allow us comfortably to identify and, with a good will, avoid both vices. But sometimes, as in Fallon's case, that working understanding seems to pull us in opposite directions. We can do no better at this stage than to admit this by reporting an apparent conflict. It does 'not follow that the conflict is deep and genuine, however. Just now, I distinguished two questions. What is the right thing to do? Is the apparent conflict real? These questions cannot be so independent as my distinction suggested. The first question requires us to think further, and the way we think further is to further refine our conceptions of the two values. We ask whether it is really cruel to tell an author the truth. Or whether it is really dishonest to tell him what it is in his interests to hear and no one's interests to suppress. However we describe the process of thought through which we decide what to do, these are the questions that, in substance, we face. We reinterpret our concepts to resolve our dilemma: the direction of our thought is toward unity not fragmentation. However we decide, we have taken a step toward a better, because more integrated, understanding of our moral responsibilities.

On this story, apparent conflict is inevitable but, we can hope, only illusory and temporary. We confront it at retail, case by case, but we confront it through a conceptual rearrangement that works toward eliminating it. Is this too slick? But what other story might one tell? Consider this one:

> "Moral conflict is real and any theory that denies this is false to moral reality. Once we understand the nature of kindness and of honesty we see that, in cases like this one, they just do conflict. That conflict is not an illusion produced by incomplete moral interpretation; it is a matter of plain fact."

(That seems to be the claim of Martha Minow and Joseph Singer in this issue.) But what in the world could that supposed plain fact consist in? Kindness and honesty cannot *just* have one content or another because moral claims cannot be barely true. I repeat tediously: no moral particles fix what these virtues just are. Nor do the concepts have a precise and conflicting content just in virtue of linguistic practice. Moral concepts are what I call, in Chapter 8 of *Justice for Hedgehogs*, interpretive concepts: their correct use is a matter of interpretation and people who use them disagree about what the best interpretation is. Many people do believe that it would be an act of kindness to tell your colleague the truth. Or that it would not be dishonest, in this circumstance, to trim. They are not making a linguistic mistake.

There is another possibility. It might be that for some reason the best interpretation of our values requires that they conflict: that they serve our underlying moral responsibilities best if we conceive them in such a way that from time to time we must compromise one to serve another. Values don't conflict just because they do, but because they work best for us when we conceptualize them so that they do. That is a conceivable view and perhaps someone might make it plausible. That would not, however, show that conflict is just a stubborn fact we must recognize. It would provide an interpretation

that reconciles values in a different way: by showing conflict as a deeper collaboration.

Solum

Lawrence Solum has constructed a detailed, tree-structured criticism of what he takes to be my claims about interpretation: he finds that every branch I might explore ends in "obvious" falsehood or even "invalidity."[16] I do not agree with his account of the development of my views. I do not think, for example, that *Hard Cases* took any view about the difference between hard and easy cases that *Law's Empire* denied. But I am not a privileged interpreter of my own work and, in any case, Solum takes himself to be reporting how my readers understood me, not what I intended.

I believe he has misunderstood my argument and ambitions in *Justice for Hedgehogs*, though I am perhaps responsible for his misunderstandings. It is not my aim to capture what everyone who says he is interpreting has in mind, or when his self-description would be linguistic error. I rather aim to defend the idea of truth in interpretation and to identify its criteria. That is a normative, not linguistic, project. My main claim is that the conditions of interpretive truth in the genres I discuss presuppose some attribution of purpose to the activity of interpretation in that genre, and that interpretive truth is controversial because such attributions differ, sometimes widely. So I do not see how it follows from my assumption that interpretations can be false that my position is "internally inconsistent." I tried to describe my three-stage analysis of interpretation as a reconstruction, not a piece of phenomenology. Solum says that there are many exceptions to my reconstruction, which must mean that there are cases in which that reconstruction would distort the argument.

His only example is not well-chosen, however. The conductor he imagines plainly does not think that the point of interpreting a score for a fresh performance is always to create the most beautiful music. His interpretation aims at something else – to make the performance "interesting." In fact, I discuss similar examples at some length in Chapter 7 of *Justice for Hedgehogs*: a fresh performance of a classic often performed – Hamlet in my own example – serves a different interpretive purpose. Solum's conductor presumably does not think he is unfaithful to his interpretive responsibilities in offering a period performance. If he did, he would not be aiming at truth.

Sager

Lawrence Sager is a prominent defender of the thesis that courts should sometimes underenforce a constitutional provision.[17] Suppose a constitution

[16] Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551 (2010).

[17] Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U. L. REV. 579 (2010).

declares a right to state-financed health care. A court might think itself not well placed to adjudicate all the delicate questions of budget allocation and medical science it would face if it were it to try to decide exactly which health plan citizens were entitled to. It might then decline to enforce that constitutional right directly. But when the government does establish a particular health care system, the court might still rule on citizens' claims that that system discriminate illegitimately or refuses care arbitrarily. In such circumstances, Sager and others wish to say, citizens have a legal right to health care, granted by the constitution but the courts enforce only part of what they are legally entitled to have. Citizens must look to the legislature for the most important part: to have some health care rather than none.

This is indeed an available way to describe the situation Sager imagines: no one would misunderstand that description. The different vocabulary I suggest seems at least equally natural, however. We might say that not all the rights a constitution declares are legal rights. Some, like those touching foreign policy, or those much more efficiently enforced by other branches of government, are best treated as only political rights not available for private enforcement. Others, like a right to the equal protection of any health care scheme that it adopted, are indeed legal rights. Is this choice between vocabularies only a matter of verbal preference with no theoretical implications? No, a choice of legal vocabulary has roots in legal theory: it exposes general attitudes to law. The vocabulary I prefer flows from the legal theory I have called interpretivism and the assumption that legal rights are a sub-class of political rights. What picture of law does the underenforcement language reveal? What distinction between legal and other political rights does it reflect?

A positivist theory of law would explain it. A firm distinction between a theory of doctrinal law and a theory of adjudication would allow us to say, in Sager's story, that a right to health care meets the historical test for law but that the best theory of adjudication denies courts the power to enforce that right. Once we reject positivism and merge constitutional law and political morality, however, we all but erase any distinction between theories of law and adjudication. The underenforcement thesis seems tied to the two-systems picture and a positivist account of the distinctly legal system. The thesis would seem ungrounded if that positivist picture were abandoned.

Perhaps we might revive the thesis in some other way. We might want to say, for instance, that legal rights are those rights people have only in virtue of the political history of the community – only in virtue of the fact that that history includes some legally pertinent act like enacting a constitution or statute with particular words or deciding some past case a particular way. That won't do, however, because many rights that are undoubtedly political and not legal meet that test. Veterans of a fresh war may have a political right to an education following their return just because the nation has provided an education to veterans of past wars and it would be unfair to treat them differently. It would seriously misstate the position to declare that they therefore have a legal right to what they ask. I believe that Sager

misunderstands my use of that example: I offer it only as a counter-example to the only-in-virtue-of-history suggestion I just described. Those who wish to defend the language of underenforcement have more work to do.

Lyons

David Lyons asks: If, as I claim, law is part of morality, then how could a judge offer an interpretation of precedent decisions based on a legal principle he thought morally not exact?[18] How could he suppose that a contributory negligence principle provided the best justification for a group of cases if he thought a comparative negligence principle more just? I tried to answer that question in my book, *Law's Empire*, and Chapter 11 of *Justice for Hedgehogs*, and in my discussion of "family" law in Chapter 19 of *Justice for Hedgehogs*. The best available justification of a family's or a nation's morality is not necessarily the best account of what that history should have been.

PANEL III: ETHICS AND FREE WILL

Scanlon

Thomas Scanlon's discussion of determinism and responsibility is a lucid and valuable exploration of dimensions of these issues that I do not consider in *Justice for Hedgehogs*.[19] I agree that the fact that we could not actually believe that we never have judgmental responsibility is not an argument for compatibilism; it does not follow that our conviction of responsibility is not an irresistible illusion. I also agree that it is not enough, to defeat incompatibilism, simply to show that our ordinary judgments of responsibility are not best explained as assuming that our decisions are spontaneous. We need to consider and reject other arguments for the view that determinism would erase judgmental responsibility. I also agree with Scanlon's important observation that someone's being responsible for an act does not settle the question whether or the degree to which it would be proper to blame him or hold him liable for consequences. I do think, however, that once we accept that someone has the capacities Scanlon describes in sufficient degree for what he calls personal responsibility, we need a distinct kind of argument, not relying on any failure of those capacities, to absolve him from or diminish blame or liability. I offer the excuse of duress as an example of this, and I also suggest that our reluctance to blame someone brought up in poverty for antisocial acts requires the further judgment that his poverty was unjust.

[18] David Lyons, *Moral Limits of Dworkin's Theory of Law and Legal Interpretation*, 90 B.U. L. REV. 595 (2010).

[19] T.M. Scanlon, *Varieties of Responsibility*, 90 B.U. L. REV. 603 (2010).

Kane

Robert Kane, who has written probing articles about free will for many years and edited collections of essays on the issue, says that he agrees with most of my views on that subject.[20] In particular, he says he rejects, as I do, the principle I call, in Chapter 10 of *Justice for Hedgehogs*, the "hydraulic" control" principle. This assumes that people are responsible for their acts only when their acts of will are an original cause of what they do. But Kane thinks I overlook Aristotle's view that even though people are often not in control – when drunk, for instance – they are responsible for what they do then because they were in control at the earlier time when they decided to drink in excess. But, Kane continues, if determinism is true then people have never been in control, so that Aristotle's ground for insisting on their responsibility no longer holds. However that conclusion follows from determinism only if we do accept the hydraulic control principle Kane says he rejects. The contrast shows, I believe, the almost intuitive assumption of many of the best writers on the subject that something like the hydraulic control principle is correct, and that those who reject it, like Hume, have made an elementary mistake.

Allen

Anita Allen believes, rightly, that my discussions of mental disease are unsophisticated.[21] She thinks that a competent philosophical account of these pathologies has not been written. I had no intention to provide such a general account but only to characterize mental disease sufficiently to rebut the assumption that our attitudes toward such disease shows that we think people only responsible only when their free will has been the initiating cause of their action. Allen does not appear to disagree with my rejection of that inference.

Jolls

Christine Jolls has very usefully compared my distinction between performance and product value to a distinction used by social scientists studying people's contentment with their lives.[22] Performance value, she suggests, may be compared to people's ranking of their experiences one by one while product value is comparable to their ranking of their life as a whole. She points out, however, correctly, that my remarks about the importance of the narrative quality of a life as a whole qualify these comparisons. I take the research she describes to suggest that people evaluate experiences differently when placed in the context of a whole life. Commuting ranks very low as an

[20] Robert Kane, *Responsibility and Free Will in Dworkin's* Justice for Hedgehogs, 90 B.U. L. REV. 611 (2010).

[21] Anita Allen, *Mental Disorders and the "System of Judicial Responsibility,"* 90 B.U. L. REV. 621, *** (2010).

[22] Christine Jolls, *Dworkin's Living Well and the Well-Being Revolution*, 90 B.U. L. REV. 641, *** (2010).

isolated event, but the tedium disappears in any evaluation of a life engaged in the occupation that commuting permits. The oncologist cannot enjoy his conversation with lung cancer victims but he takes satisfaction in his career nevertheless. It is the isolation of the discrete lived events evaluated in the Princeton study that, to my mind, renders the study, though undoubtedly important in a variety of ways, less significant for ethics than the narrative evaluations with which Jolls compares them.

Sen

Amartya Sen's friend Anne[23] might be comforted by reading Chapter 5 of *Justice for Hedgehogs*, which discusses the phenomenon Sen calls incompleteness of ranking over lives. I emphasize there the importance of distinguishing between uncertainty as to which of two lives is best and a positive conviction that one life is not better than another nor are they equal. Anne and Beth illustrate the difference. Beth is uncertain but Anne claims a positive conviction of indeterminacy, so Anne needs an argument in support of her position. This would require some foundational ethical theory that she does not offer in Sen's account: some argument comparable to the theory of indeterminacy in artistic excellence I describe in that chapter. In any case, Anne must do more than just point out the space such a theory would occupy; she must report what theory has in fact convinced her. Beth's situation is more comprehensible – and, I fear, more familiar but for her excessive daily anguish. Carla has made her decision: a life of dashing spontaneity is the life for her. That is her way of doing it her way. In spite of Carla's glamour, however, my love goes to Dora. She is confident in her own ethical perception about what the "better things to do" are and she thinks it important to get on with doing them. She is my dream girl.

PANEL IV: MORALITY: AID, HARM, AND OBLIGATION

Appiah

Kwame Anthony Appiah argues that moral duty is not inevitably a trump over the obligations one owes, as he puts it, to oneself.[24] It may be my moral duty to keep a promise but if the result would be a markedly worse life for myself, I may be right to reject morality in deciding what is all-things-considered the best thing to do. I find this formulation of the matter difficult because I cannot see any third body or level of thought on which we can draw to make such a decision without circularity. If we draw on either moral or ethical standards, we prejudge the supposed decision. I believe, on the contrary, that we must work out an integrated interpretation of our moral and

[23] Amartya Sen, *Dworkin on Ethics and Freewill: Comments and Questions*, 90 B.U. L. REV. 657, *** (2010).

[24] Kwame Anthony Appiah, *Dignity and Moral Duty*, 90 B.U. L. REV. 661, *** (2010).

ethical responsibilities. My distinction between a good life and living well, which Appiah elegantly summarizes, is meant to help in that project.

I am particularly grateful to Appiah for pointing out an issue I had neglected in the draft: the question of how our concern for dignity should shape what we take to be a good life as well as our convictions about how to live well. I have now expanded the discussion of moral responsibility in *Justice for Hedgehogs* to reflect his suggestion. I do not agree, however, that we cannot "be guided to what we owe people by asking what acts are required if we are not to display contempt for their lives, since we can only know when we are displaying contempt for their lives if we first know what we owe them."[25] I know of no general method for deciding what we owe others that does not begin with a sense of what is needed to respect the equal importance of their lives. We must interpret the two ideas together. That is too cryptic a summary, but a large part of *Justice for Hedgehogs* tries to defend it.

Goldberg

I am grateful to John Goldberg for his encouraging remarks about my work as a whole, for his very helpful and accurate corrections of my draft – see my response to Kenneth Simons – and also for his interesting suggestions about the impact of political developments on my views.[26] No doubt I am guilty of the vice he discreetly suggests – trimming before the winds of political fashion – but not, I think, in the way he describes. My opinion has long been, and remains prominent in *Justice for Hedgehogs*, that people have an individual responsibility to identify value in their own lives and that therefore a political community must not try to impose any ethical opinion on them.[27] Conservative opinion has disagreed with every part of that view, particularly since the shift to the right that was inaugurated by President Reagan increasingly metastasizes now.

My main hope in this response, however, is to allay his fears about what he regards as my elitist attitude towards the lives people lead. My first point is verbal and perhaps unimportant. He reports that I claim that people have a "duty" or "obligation" to themselves to live well and much of his concern seems to stem from the regimenting overtones of those words. But I do not make that claim; I speak of a categorical ethical responsibility, which I believe to be a different matter. We have duties or obligations to people who can

[25] *Id.* at ***(670).

[26] John C.P. Goldberg, *Liberal Responsibility: A Comment on* Justice for Hedgehogs, 90 B.U. L. REV. 677, *** (2010).

[27] *See, e.g.*, Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113 (Stuart Hampshire ed., 1978), *incorporated in* RONALD DWORKIN, A MATTER OF PRINCIPLE 181-204 (1985); Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185-246 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283-345 (1981), *incorporated in* RONALD DWORKIN, SOVEREIGN VIRTUE 11-119 (2000).

waive them. But we cannot release ourselves from our responsibility to live well. We have that responsibility because we have something of great value in our care – our lives. I agree that this is not a familiar idea, at least so described, but I try to show that it is nevertheless implicit in the way we live and, indeed, in the entire vocabulary of our self-criticism. (I do not suppose, as Goldberg suggests I do, that people's lives are of "equal worth." On the contrary.) I do believe, as he also reports, that many of the lives people lead are failures and that this is a matter for regret not just for them but for everyone. But I try to make plain that these ethical judgments have no moral or political consequence. We do not owe less by way of equal treatment or respect, either as individuals or in politics, to those who have lived badly. Ethical judgment remains a matter of individual conviction and exhortation – not "communitarian" collective policy. We must hold fast, even in the face of changing fashions, to that liberal faith.

Goldberg worries that my account of what authenticity requires is too demanding. (I think he overstates the self-inspection that I believe authenticity demands.) He therefore calls my account "illiberal." But though the view that people do not live well unless their lives are original or exciting is plainly silly, there is nothing particularly illiberal about it. Or particularly liberal in what might seem the opposite idea that people should never reflect on their ethical responsibilities at all. The idea that political liberals have lax views about ethics and personal morality was, for years, a canon of conservative and communitarian opinion. Goldberg mentions that view but says he does not mean to endorse it. So I am unclear why he thinks my ethical views "illiberal." I am also unclear why he thinks that I would defeat my arguments for ethical independence if I made my opinions about how to live well closer to what he thinks sensible. Surely an "illiberal" ethics is not a prerequisite for a liberal politics. Once we accept that people have a personal responsibility to decide for themselves what living well means, ethical independence seems a necessary condition even for people who lead lives anyone else would consider tedious and poor.

Goldberg's main philosophical concern, as I understand it, is that my emphasis on authenticity does not "sit" well with my opinion that ethical value is objective. But one of my main ambitions in *Justice for Hedgehogs* is to show that these ideas, so often separated in what he calls "existentialist" theory, in fact require each other. The value of authenticity depends on the objective importance of the choices we make and the assumption that some choices really are better than others. I believe, and argue, that much modern philosophy is confused for that reason. Goldberg apparently rejects my arguments but I cannot find any explanation in his essay why.

Kamm

Frances Kamm's characteristically deep and complex study of moral and ethical responsibility is particularly valuable for showing me the importance of the role that concern for others can and should play in defining what a good

life is.[28] (See also my response to Kwame Anthony Appiah on that point.) *Justice for Hedgehogs* now discusses that issue. I cannot reply to all her other concerns and examples, so I shall focus on those I consider most crucial: her discussion of the so-called double effect cases.

In *Justice for Hedgehogs* I suggest a view I can here summarize only crudely: it is inconsistent with a person's dignity that others should usurp his decision about what use of his own body or life is desirable. Kamm offers this apparent counter-example: a government that taxes me to build a museum is taking over my decision about the best use of my money. Two difficulties: first it begs the question to suppose that the money government takes for appropriate public use is my money, and, second, control over my money is in any case not part of the control I argue is necessary to responsibility for one's life. Kamm says that my suggestion fails to discriminate between turning a trolley with a switch so that it runs over one person rather than five and turning the trolley by exploding a bomb that sadly kills one person nearby. I do not think it right to discriminate between these cases. She objects, finally, to my observation that it does not discredit my suggestion that we might be uncertain whether and how it applies to the strange "loop" hypothetical she discusses, or whether we should accept the result of applying the suggestion in that case. I believe that hypothetical cases discredit a principle only if we are clear that we would not accept the principle in those cases and, I said, this is far from clear in the loop case. Kamm describes cases in which we act because our action will produce some state of affairs even though we do not act with the intention to create that state of affairs. But my suggestion does not require the use of the idea of intention that her examples illustrate.

Simons

I found Kenneth Simons's essay very helpful in pointing out that my formulations of the duty of rescue in the draft he considered were wrong or at least misleading.[29] For instance, my example of an obvious case for a duty of rescue suggested that the high level of threatened harm I described in that example was a necessary condition of any duty, which of course it is not. I have tried to make my position clearer in the final book, and I am grateful to him (as well as to John Goldberg who offers a similar criticism of that draft) for helping me in that way. He (and John Goldberg) also pointed out that my formulation of the level of care people must morally take to prevent unintended harm would have ridiculous consequences. I have revised the paragraph to make plain my intention to carry over the formulation of that duty of care set out *Law's Empire*.[30] Simons also raises interesting issues about the

[28] F.M. Kamm, *What Ethical Responsibility Cannot Justify: A Discussion of Ronald Dworkin's* Justice for Hedgehogs, 90 B.U. L. REV. 691 (2010).

[29] Kenneth W. Simons, *Dworkin's Two Principles of Dignity: An Unsatisfactory Nonconsequentialist Account of Interpersonal Moral Duties*, 90 B.U. L. REV. 715 (2010).

[30] RONALD DWORKIN, LAW'S EMPIRE 301 *et seq* (1986).

role of what I called the scale of confrontation in fixing a duty of rescue. I do not mean to rely just on the fact that people do have the natural reactions he mentions. I believe these natural reactions pertinent to the interpretive question I do believe fundamental. If someone is suffering or in danger directly in front of you, and you ignore him, it is hard to avoid the conclusion that you care less for human life than you should. That conclusion would not, however, follow from an ex ante decision by the community as a whole to devote so much of a health care budget to prevention that it would be impossible to provide the expensive end of life care it otherwise could.

Sreedhar and Delmas

In their powerful and largely persuasive essay, Susanne Sreedhar and Candice Delmas argue that, given my account of political legitimacy and political obligation, I should recognize that these phenomena are rare.[31] Their argument raises a series of important questions about both issues that I had not addressed in the draft they considered, and I am grateful for the opportunity they offer to consider them here. Is legitimacy an all-or-nothing matter so that any government lacking full legitimacy is wholly illegitimate? Or is legitimacy a matter of degree? If the latter, within which range do the degrees of legitimacy travel? What is a perfectly legitimate state? What is the floor of legitimacy beneath which a state has no legitimacy at all? Is political obligation uniform within a state so that if any single member has no such obligation then no member does? Or can some of those over whom a state exercises dominion have an obligation to obey its laws while others do not?

Let us say that the government of a political community is legitimate when it meets the conditions necessary to claim political obligation from its members. Political legitimacy has two dimensions: how a purported government has gained acquired its power and how it uses that power. I discuss the acquisition issue in Chapter 18 of *Justice for Hedgehogs*; my remarks here only concern the exercise issue.

We should take legitimacy to be a matter of degree; I would define its range in the following way. A perfectly legitimate government is one that embraces and enforces the absolutely best conception of equal concern and respect for all citizens. It is of course controversial what the best conception is and therefore what a perfectly legitimate government would be. In Part V, I argue for a particular view. It is harder to state a floor beneath which any purported government is wholly illegitimate. I think this best done by understanding legitimacy as a relation between a government and each of those it purports to govern: that makes it easier to consider the last few questions I just listed. We may say: a government is illegitimate with respect to a particular person it

[31] Susanne Sreedhar & Candice Delmas, *State Legitimacy and Political Obligation in* Justice for Hedgehogs*: The Radical Potential of Dworkinian Dignity*, 90 B.U. L. REV. 737, *** (2010).

claims to govern if it does not recognize, even as an abstract requirement, the equal importance of his fate or his responsibility for his own life.

We must distinguish governments that recognize this requirement of equal concern and respect in the abstract, but fail to identify an adequate conception of what it means, from those that reject that requirement, for some individual or group, even in the abstract. The distinction demands interpretive judgment and this must be sensitive to time and place: it must take into account prevailing ideas within the political community in question and also in the larger community of nations to which it belongs. When it is widely believed that everyone's fate is better protected and his dignity better expressed when he is governed by royal or ecclesiastical appointees of a god, and when the true religion is established as canonical, then an overall benevolent monarchy or theocracy may be consistent with some degree of legitimacy. When it is accepted almost everywhere that an equal concern for women is consistent with and perhaps demands their disenfranchisement, a state that discriminates in that way may retain some legitimacy. But as these mistaken ideas lose their grip, the legitimacy of such a state wanes and the political obligation of its citizens weakens so that, for instance, their case for civil disobedience is stronger.

It is all too easy, of course, to find examples of government that denies even in principle that the fate of some people they rule is of equal importance to the rest: in the ante-bellum American South, for example, Nazi Germany, apartheid South Africa, the genocidal nations of Africa, and the Soviet tyranny. Such a government has no legitimacy for those it treats in that way; they have no political obligation at all. What about members of the majority in such states? They are in a morally complex and difficult situation. So long as they may reasonably hope for a political change within the constitutional structure, they must work for that change through methods that may well include, when this would be effective, civil disobedience to the laws that institute and enforce the discrimination. But they owe it to their fellow citizens to obey those laws, fair in themselves, that maintain civil society while they work to improve their state's legitimacy: the ordinary criminal and commercial law, for example. If the tyranny is extreme, and particularly if the government has itself abandoned the rule of law, their political obligation may disappear altogether. They may find themselves on the terrain not of civil disobedience but of revolution.

PANEL V: POLITICS AND JUSTICE I

Baker

C. Edwin Baker's ambitious and impressive article[32] was completed just before his tragic death. He believed, contrary to my own opinion, that citizens need have no more concern for their fellow citizens when they act together in

[32] C. Edwin Baker, *In Hedgehog Solidarity*, 90 B.U. L. REV. 759 (2010).

politics than they need have, on the view I defend in Part IV of *Justice for Hedgehogs*, when they act as individuals. Politics, he thought, should be understood as a competitive activity in which each citizen works to advance his own values and goals by winning a collective decision to create an ethical environment he approves. There are losers as well as winners in this competition. Political majorities must be tolerant of minorities: they must not coerce them to embrace the majority's values or otherwise violate their liberty or other rights. But majorities need not otherwise refrain from using politics to shape the community to their own convictions about good lives. They need not try to be neutral out of concern for those who disagree with them.

Baker also disagreed with me, in a parallel way, about democracy. He agreed on the need for what I call, in Chapter 19 of *Justice for Hedgehogs*, a partnership conception of that ideal. But he thought that I favor an "epistemic" interpretation of partnership in which the community's role is limited to identifying and enforcing a correct theory of distributive and political justice, while he favored a "choice" interpretation in which majorities choose the values that define the community as a whole. "This alternative sees people in the partnership as trying to convince each other about, and as acting as a partnership to pursue, ethical ideals. It treats equality of respect, not equality of concern, as the sovereign virtue."[33] He thought that conceiving of citizens as "reason-giving" partners in "communicative action" as well as in competition with one another allows us to provide a more secure basis for principles of justice than I am able to provide. He adopted Jürgen Habermas's view that people in conversation commit themselves to certain principles, and it is these commitments that identify justice for them.

It will be helpful to distinguish two questions. First, do the members of a coercive political community have an obligation, when they design an economic structure, to treat the fate of each citizen as equally important? Second, are they obliged not to adopt laws that can only be justified by assuming the truth of ethical ideas controversial within the community? Chapter 17 of *Justice for Hedgehogs* answers the first question: yes. Though Baker denied the need for equal concern, I am not sure he meant to disagree. I think he rather associated equal concern with a "yes" answer to the second question. If we assume that the commitments of "communicative action" require a good faith attempt to secure (even if they do not presuppose) agreement then a "yes" answer to the first question sorts better with his view of democracy than a "no" answer does. Mutual concern is the best route to consensus. So I see nothing in Baker's arguments inconsistent with the equal concern I defend.

Turn to the second question. I answer this yes and Baker answered: no. He believed that the majority in a "choice" democracy should have the power to choose texts for public education that reflect their values and to establish a particular religion as official. It is not hard to anticipate how these powers

[33] *Id.* at ***(792, ¶ after FN 97).

would be used in American states controlled by what are suddenly, as I write, called "Tea-Party" Republicans. I believe he underestimated the coercive power of that kind of control.[34] His version of tolerance would not in fact encourage the "reason-giving" among citizens he hoped for. On the contrary: a majority confident of its power to choose public school text books, for example, would have little reason to try to explain itself to those left out.[35] The conception of liberty I describe in *Justice for Hedgehogs*, which allows the ethical environment to be set organically so far as possible through individual choices one by one rather than by collective action, provides much more incentive for conversation aimed at persuasion.

West

Robin West is dissatisfied with my metaphor that treats individual rights as trumps.[36] (She says that in card games cards trumped go in the discard pile. So, of course, do the trumping cards.) But I believe that her real dissatisfaction is not with the metaphor but with the rights and hence the trumps that some groups have claimed. She says that when rights are recognized, acts that some people resent are not as efficiently deterred. Indeed not. But that obvious fact invites us to consider which alleged rights are sufficiently important to have that consequence. Perhaps none are: that is a matter left to further thought. However, West herself thinks that recognizing some rights – rights to sexual freedom and other rights she believes important – has led to social gains. She should therefore concentrate her efforts on explaining why the rights she thinks impose unacceptable costs – the right of private citizens to guns, for instance – are not genuine rights and so should not be treated as trumps. Demonizing words is no substitute for actual argument. West also says that I do not believe that legislators have a duty to legislate to improve people's well-being. I have no idea how she has collected that false opinion. She says that in *Justice for Hedgehogs* I do not explicitly "endorse" the obvious duties of citizens and their representatives to provide liberal education, to protect people from private violence, or to improve the environment. She has not read Part III or very much of Part IV carefully enough. She blames my supposed failure on my

[34] RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 150 (2006) ("The selection of texts would be intensely controversial, and the danger of manipulation by local political and religious groups would be great indeed.").

[35] For a frightening example, see Russell Shorto, *How Christian Were the Founders?*, N.Y. TIMES, Feb. 11, 2010, MM32 (Magazine) (describing the Texas State Board of Education's process for amending its social-studies curriculum guidelines). "[Board member] Don McLeroy . . . proposed amendment after amendment on social issues to the document that teams of professional educators had drawn up over 12 months, in what would have to be described as a single-handed display of archconservative political strong-arming." *Id.*

[36] Robin West, *Rights, Harms, and Duties: A Response to* Justice for Hedgehogs, 90 B.U. L. REV. 819 (2010).

concern for ethical independence, but she has ignored or seriously misunderstood the distinctions I labored to make between the ethical and moral environments of a community and between imposing ethical convictions and encouraging people to take their ethical responsibilities seriously. See James Fleming's contribution to this issue and my response to his contribution.

Fleming

James Fleming raises, among other important matters, the question of how far government may attempt to influence citizens' ethical opinions by means short of coercion.[37] As he shows, my arguments about ethical independence rest on two difficult but crucial distinctions. The first is the distinction between morality and ethics, and hence between a community's moral and ethical environments. In *Justice for Hedgehogs* I emphasize that distinction in suggesting that, just as government must impose collective decisions about morality on everyone, so it may work towards a moral environment in which sound principles of justice are more likely to be recognized and accepted. But since the government may not impose collective decisions about the good life or how to live well, so it may not labor to create an ethical environment that sponsors one controversial view on those subjects. The second distinction is that between government imposing a particular ethical environment, which it may not do, and encouraging its citizens to take ethical decisions seriously. As Fleming points out, this latter distinction is at the center of my book, *Life's Dominion*. (I have accepted his suggestion to incorporate that book by reference explicitly into *Justice for Hedgehogs*.) The argument of *Life's Dominion* considers whether the divisive issues of abortion and euthanasia are matters of morality and argues that they are not. They are crucial issues of ethics. Government does not deny respect for ethical responsibility when it acts to improve people's sense of the gravity of decisions about either abortion or euthanasia, but it does do that when it attempts to impose one view of the matter on them. As Fleming points out, this second distinction requires difficult boundary judgments distinguishing government programs aimed to heighten ethical responsibility from those either endorsing or coercing particular choices. But if the distinction reflects important principles, as I think it does, then we must make those judgments as best we can. Fleming notes my distinction, in *Life's Dominion*, between arguments inside-out and outside-in. Though the structure of *Justice for Hedgehogs* may suggest the latter, I tried to show, in the advance summary of Chapter 1, that its underlying structure is inside-out.

[37] James E. Fleming, *Taking Responsibilities as Well as Rights Seriously*, 90 B.U. L. REV. 839 (2010).

Baxter

Hugh Baxter usefully contrasts my view of the development of law from morality with that of Jürgen Habermas.[38] I believe the two approaches are compatible; indeed complementary. I agree that there are two tasks for legal theory: describing the way in which law *is* a special department of morality and the way in which it is a *special* branch of morality. Habermas describes the "positivization" of morality into law to explain the second of these phenomena from the point of view of social theory. I try to explain the first from an interpretive standpoint. I do not see, however, how understanding either law or morality self-referential helps to resolve the circularity in what I call the two-systems approach.

McClain

Linda McClain has written an intriguing essay about parallels between my account of how a hedgehog might construe truth and value and the account she finds embedded in the best-selling novel, *The Elegance of the Hedgehog*.[39] I have ordered the novel and much look forward to reading it.

Minow and Singer

"It may actually be true," Martha Minow and Joseph Singer write, "that our values conflict."[40] But what kind of argument would be necessary to show that they do? Do Minow and Singer accept some ontology that makes conflict "barely" true? I doubt they believe in morons. But what else could make a value conflict just "actually" true? (I elaborate this question in my response to Richard Fallon.) We may be uncertain how to resolve apparent conflicts. But, as always, we must be careful not to confuse uncertainty with indeterminacy. We need a positive argument for the latter. I acknowledge, in that response, that we use certain concepts in spite of not having made them sufficiently precise to resolve apparent conflicts. But it does not follow that no successful interpretation can be found or imagined that does resolve the conflict, and that is what Minow and Singer must show to sustain their suggestion. That would take more by way of philosophical argument, I believe, than they offer.

The distinction between uncertainty and indeterminacy is particularly important in a legal context. It is often difficult to decide which of competing interpretations of legal practice and material is, all things considered, better:

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[38] Hugh Baxter, *Dworkin's "One-System" Conception of Law and Morality*, 90 B.U. L. REV. 857, ***[861ish] (2010).

[39] Linda C. McClain, *Justice and Elegance for Hedgehogs – In Life, Law, and Literature*, 90 B.U. L. REV. 863 (2010) (comparing and contrasting MURIEL BARBERY, THE ELEGANCE OF THE HEDGEHOG (Alison Anderson trans., Europa Editions 2008) (2006) and DWORKIN, *supra* note 1).

[40] Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, *** (2010).[906, after FN 10]

reasonable lawyers and judges disagree. (I do not believe, as Minow and Singer suggest I do, that all apparently hard cases are really easy. In fact, my view is closer to the contrary: that all apparently easy cases are hard.) They demonstrate, in their illuminating review of dram shop cases, the great variety of available strategies of legal argument. But they do not provide, so far as I see, any reason to think that one of these is not overall best even if we cannot be confident which is – any reason to suppose that professors and judges must just choose, perhaps by throwing a dart. Perhaps they mean that no specifically legal argument can show which is best. I might then disagree with the distinction between legal and non-legal argument they assume but, in any case, they main claim is one about conflicts in value not just law. Should we say, as they suggest, that any decision in a hard case, either way, will produce unfairness to some? If the law, properly understood, justifies some party's claim to a right enforceable on his demand, or to resist such a claim, then how can a decision recognizing or denying such a claim be unfair if it is all things considered correct? It is a matter for regret, on several counts, when a legal decision must disappoint reasonable expectations. But calling the decision unfair seems to misstate and simplify those reasons.

PANEL VI: POLITICS AND JUSTICE II

Freeman

Samuel Freeman suggests, in the course of his very instructive essay, that my ambition to charge people the true opportunity costs of their choices in work and consumption cannot help us to fix a theory of justice in distribution because what we take true opportunity costs to be depends on which such theory we have already assumed.[41] If we decide that a utilitarian scheme is most fair, for instance, then we will think that the true opportunity costs of a person's choices are those fixed by the price system that best promotes utility. If we think some other theory of justice superior, we will take true opportunity costs to be those set by prices in an economic system that enforces that other theory. So even if we assume that asking someone to pay the true opportunity costs of his choices respects his responsibility for his own life, we cannot draw any conclusion from that assumption about which theory of justice is best.

However, the conception of equality of resources described in *Justice for Hedgehogs* uses the idea of opportunity costs at a more basic level than Freeman recognizes. Any defensible interpretation of equal concern supposes that no one in a political community is initially entitled to more resource that another; it asks whether any reason consistent with that assumption justifies an economic system in which some prosper more than others do. Utilitarians, Rawlsians, and other theorists offer such reasons: that treating people with

[41] Samuel Freeman, *Equality of Resources, Market Luck, and the Justification of Adjusted Market Distributions*, 90 B.U. L. REV. 921 (2010).

equal concern requires maximizing their average welfare, or improving the situation of the worst off group, or something of the sort. They then offer models of economic systems that these different assumptions would justify and, as Freeman says, any such model carries with it its own distinct calculation of the true opportunity costs of one's persons choices to others.

Equality of resources, on the other hand, offers the idea of a fair distribution of opportunity costs not as derivative from other reasons for allowing deviation from flat equality but as *itself* a reason for deviating and limiting the scope of such deviation. It defines true opportunity costs recursively as those measured by prices in a market in which all have equal resources and in which insurance against risks of different sorts is marketed on equal terms. The price of hypothetical insurance is fixed by a market with equal resources on assumptions about what insurance it is reasonable to assume would be purchased in that market. The yield of that market then structures, through taxation and redistribution, future markets in which prices set true opportunity costs. So the ambition to make people responsible for their choices is at work in that conception of distributive justice right from the start.

Michelman

Frank Michelman argues that in spite of my denials I actually do recognize freedom as a general value in itself, and not just those aspects of freedom necessary to ethical independence, because I accept that any political constraint on freedom must be justified by showing some rational purpose it serves.[42] I agree that government needs at least some justification for denying me the right to spit on the sidewalk even though that regulation offers no threat to my special responsibility for my own ethical values. But this shows, not that freedom is a value in itself, but only that government needs some at least minimal justification for any act a citizen deems harmful whether that act constrains his freedom or allegedly harms him in some other way. It needs some justification for building a new airport or laying a new road in one place rather than another: its decision must not be whimsical. When the Supreme Court held (regrettably) that Texas is not required to provide equal finance for schools in each area of the state, it nevertheless declared that "the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose.""[43] Freedom is not, on its own, a special value in American constitutional jurisprudence.

Michelman offers two examples to test my argument in other ways. Would a law be objectionable if it forbade falconry to those who did not demonstrate skill in firearms in spite of the fact that guns are not used in falconry? Yes, because, as I understand the example we are to assume that there is no rational basis for the law at all. What about a "Malthus" law that, in order to serve

[42] Frank I. Michelman, *Foxy Freedom?*, 90 B.U. L. REV. 949 (2010).

[43] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)

environmental and not ethical goals, imposes a tax on couples who have more than four children? In fact, several American states have limited welfare payments for children beyond a certain number; this certainly acted and was perhaps intended to act as a deterrent. But I believe that Michelman's Malthus Act would not only restrict freedom but violate liberty on the moralized conception I defend in *Justice for Hedgehogs*. Dignity requires that people be allowed to make certain fundamental ethical decisions for themselves, and this provides a justification for claiming certain liberties that does not depend on government's purpose. It would not, I assume, be an acceptable justification for prohibiting abortion that the ban is designed to provide a larger workforce for the future. Procreative decisions are, as a plurality of Supreme Court justice put it, "matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[44] That description would surely apply to a decision to have children.

Sloane

Robert Sloane usefully summarizes his comments on my account of international law in distinct theses.[45] (1) He says that my account makes hard questions about human rights indeterminate. But he has not sufficiently distinguished uncertainty from indeterminacy.[46] I have not, it is true, attempted much detail in drawing particular human rights from my general account (though I have suggested how arguments for some rights might be constructed). As I admit in the book, my account is abstract: international lawyers who accept it will often disagree about its application to particular claimed rights. But that is true of any attempt to describe a theoretical basis for human rights. I do not find Sloane's suggestion – that we determine human rights by asking what rights people need – any less abstract or less provocative of disagreement than the test I offer. (2) He believes that since there is much disagreement in the world about fundamental ethical questions I am ill-advised to rest my case on what he calls the "theological or dogmatic assertion" that "'human beings have intrinsic and equal worth.'"[47] Later, however, he says, correctly, that I in fact reject this assertion. I distinguish it from the different claim that it is objectively and equally important how each life goes. Sloane may misunderstand that latter claim. He thinks it is a descriptive claim about the dignity people manifest. But I try to make clear that it is not. (3) He thinks that since different cultures in the world embrace different values we should

[44] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (joint opinion of O'Connor, Kennedy, Souter, JJ.).

[45] Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox*, 90 B.U. L. REV. 975 (2010).

[46] DWORKIN, *supra* note 1 (manuscript at Chapter 5).

[47] Sloane, *supra* note 45, at ***[976] (quoting DWORKIN, supra note 1 (manuscript at 129)).

not try to ground a theory of human rights in any of these. That seems to me insufficiently to distinguish between truth and strategy. We need to decide what human rights people actually have before we can sensibly develop tactics for persuading others, who may not share our philosophical opinions, to embrace our views or to sign treaties trying to realize them. Of course, we should take pluralism into account in deciding what account of human rights could possibly be agreed in treaties and enforced in practice. Perhaps – thought this is far from evident – it would be wise tactics not to stress the principled foundations of our views when we know others would reject those foundations.[48] But we need to know what we believe is the truth about human rights before we begin to negotiate or persuade; otherwise we could have no aim in view. (4) He thinks I mean to say that human rights conflict with the best conception of the concept of sovereignty. But I have in mind not the concept of sovereignty, which I agree is interpretive, but what I describe as the "Westphalian" conception of sovereignty: that one nation or group of nations must not interfere in the internal affairs of another. (5) Perhaps he confuses my disapproval of the philosophical use of the idea of intuition, which includes a claim of perception or other causal phenomenon, with my own use of the idea of conviction, which does not.[49] (6) He says I think it self-evident that people everywhere embrace the two principles of dignity I describe. In fact, I say it is false that they do.[50] (7) He misunderstands my account of objective value. This supposes only a value whose existence is independent of the beliefs and attitudes of people. I do not suppose, as he may think I do, that there can be value without creatures for whom these are values. He holds a crude version of scientism, which restricts objectivity to causal domains, and which I reject.[51] (8) He believes I should be alarmed that on my account the scope of genuine human rights might be narrower as well as broader than is recognized in treaties and conventions. On the contrary, much that is claimed in such documents is at least dubious.

Bone

Robert Bone, in a pellucid and important analysis, identifies serious puzzles in the idea of procedural rights.[52] He calls attention to my article on the subject of three decades ago[53] ""and points out the further work that would be needed to defend the central ideas of that article. I do believe that what I called moral harm is at risk in much civil litigation – when the plaintiff tries to

[48] See my discussion of the role of religion in human rights literature in Chapter 15 of *Justice for Hedgehogs.*

[49] *Id.* (manuscript at Chapter 4).

[50] *Id.* (manuscript at Chapter 9).

[51] *Id.* (manuscript at Chapter 4).

[52] Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011 (2010).

[53] RONALD DWORKIN, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72 (1985).

enforce a legal right that what he takes to be based on an independent moral right and the defendant tries to show that he is not guilty of any violation of such a right. But I believe Bone is right to suggest that in other civil cases, when the best interpretation attributes an entirely instrumental purpose to legislation, a more thorough cost-benefit analysis might be appropriate. In such cases, which he illustrates, it might be misleading to speak of procedural rights; we should speak only of the role that would be assigned to procedure by the overall best accounting.

Macedo

This is among my shortest responses because I agree so thoroughly with Stephen Macedo's contribution to this issue.[54] He provides an excellent account of the difficulties even in defining a majoritarian decision procedure. He makes a sensible suggestion: that the adjective "majoritarian" be dropped from discussions of democracy because it does not discriminate between significantly different political systems. I have not followed that suggestion because the term is so popular in political discussion, and because I have used in so often myself that I believe it would be misleading or at least clumsy for me now to avoid it. But I agree with the spirit of his suggestion.

Waldron

Jeremy Waldron devotes most of his lively article[55] to the "lifeboat" example I mention very briefly in *Justice for Hedgehogs*. But he also offers an interpretation of the argument of Chapter 18 as a whole. He says that my "point" in rejecting a definition of democracy that "ties the term firmly to majority-decision" "is to suggest . . . that when we have debates about the democratic or undemocratic character of judicial review of legislation, we should not center those debates on the point that strong judicial review disempowers popular majorities."[56] But my point is rather to reject *any* definition that "ties" democracy "firmly" to any specification. That would be to treat democracy as criterial.[57] If we treat the concepts as interpretive, as I suggest, then it a majoritarian conception is certainly an eligible one even though, as I think, unsuccessful.

Waldron is unsure what claim I mean to make through the lifeboat example. As I said in both chapters, I intend only a very limited and highly circumscribed point: only that the majoritarian decision principle is not, as he has claimed it to be, a general principle of fairness independent of context –

[54] Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029 (2010).

[55] Jeremy Waldron, *A Majority in the Lifeboat*, 90 B.U. L. REV. 1043 (2010).

[56] *Id.* at ***.[1049, around (5)]

[57] DWORKIN, *supra* note 1 (manuscript at Chapter 15).

that is, an "intrinsically" fair process.[58] His own fresh discussion of the example in this issue suggests that he agrees. He says that the lifeboat passengers should be invited to choose, through a vote, from a menu of procedures to decide which of them should be thrown overboard, but now adds that majority decision should not be on the menu. But if there are reasons why majority rule should not be on that menu, then these are equally reasons why a majority should not be authorized to pick from the menu – unless the menu includes no option that would antecedently and in a known way favor some passengers over others. His own suggestion – choosing death for the oldest or least healthy passengers – would be ruled out by that test. We do want a procedure that does not bias the process from the start. But head-counting would be very unlikely to satisfy that condition.

This is most certainly not an argument, however, that majority rule is never a fair method of decision. On the contrary, I insist that it is appropriate in politics when conditions of legitimacy are met. Waldron believes he has other arguments against judicial review, beyond the intrinsic fairness of the majority decision principle. The lifeboat example has no power whatever to impeach any such arguments he offers; I certainly do not regard that example, as he fears I do, as a "knock-down" argument against a majoritarian conception of democracy. He refers to the extended case I have made over several years for a different conception, a case summarized and elaborated in this chapter. He declares that the lifeboat example adds nothing whatever to that case. He is absolutely right. That brief example is directed only at what I take to be a mistaken philosophical assumption that should not figure in the argument. It is not intended to replace or even bolster the positive case to which I devote many pages.

A further issue. Waldron says he has never received an honorable answer to a question he has been asking for twenty years. Why, if majority rule is not intrinsically fair, is it appropriate on final appellate courts like the Supreme Court, which decides many very important cases by a 5-4 vote? I offered the obvious answer at the conference this issue reports, but since Waldron repeats his claim in his written article, he must have found my reply dishonorable. I am shameless enough to repeat. The choice among checks on majoritarian procedures must of course depend on which options are available. Judicial review is an available option for checking legislative and executive decisions.

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[58] "[T]he fairness/equality defense of the majority-decision rule ["MD"] is well known," Waldron declares. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1388 (2006). He elaborates:

> Better than any other rule, MD is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions. When we disagree about the desired outcome, when we do not want to bias the matter up-front one way or another, and when each of the relevant participants has a moral claim to be treated as an equal in the process, then MD – or something like it – is the principle to use.

Id.

It is also an available option for checking judicial review itself through a hierarchal system of appellate courts. But of course judicial review is not available to check the decision of the highest appellate court; if it were the court would not be the highest. It does not follow that if the judges in this series of reviews disagree the disagreement should be settled by a vote among them. A Supreme Court's 5-4 decision might overrule the unanimous decisions of a great many more judges on lower courts.

But the head-counting procedure does hold on the Supreme Court itself, and it makes perfect sense to ask what alternatives, beyond judicial review, are available. We can easily imagine some. Constitutional courts might give more votes to senior judges because they have more experience. Or more votes to junior judges because they are likely better to represent popular opinion. The Supreme Court does give each justice an equal vote, but it also gives some justices much more power than others in shaping constitutional law. When the Chief Justice is in the majority, he decides the often crucial question who will write the opinion for the Court; when he is not the senior justice in the majority does. No vote decides that issue. The Court's practice of adopting majority rule for the verdict itself can sensibly be challenged. But since judicial review is logically not an option at that stage, the choice of a majority decision procedure hardly suggests that that procedure is intrinsically fairer than a different process that includes judicial review.

One more peripheral issue. It is a penalty of seniority that I am sometimes taken to have abandoned distinctions and arguments I have not mentioned for a long time. (One example is the distinction between rules and principles I thought important in 1963.[59] I take this opportunity to say that I still do regard that distinction as sound and important.) Waldron asks why I have not appealed, in my discussion of judicial review in *Justice for Hedgehogs*, to another distinction I made long ago: between people's preferences about their own lives and their preferences about what should happen to other people. I said that it would be unfair to take the latter preferences into account in an overall utilitarian calculus.[60] He is right: I could appeal to the same distinction now to explain why a majoritarian process with no judicial or other check is not well suited to produce unbiased results. He is also right to notice that, just as my original use of the distinction asked only that cost-benefit analysis be qualified, not abandoned altogether, I could only use the distinction in this context to suggest that majoritarian politics should be qualified not abandoned. But that is all I do suggest. I assume that majoritarian procedures are appropriate – indeed sometimes necessary – in circumstances when they are fair. Judicial review is among the arrangements that might improve their fairness though, as I emphasize, it is not the only such arrangement.

[59] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[60] *Id.* at 234 *et seq.*