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**HUMAN RIGHTS FOR HEDGEHOGS?: GLOBAL VALUE
PLURALISM, INTERNATIONAL LAW, AND SOME
RESERVATIONS OF THE FOX**

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Robert D. Sloane

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**HUMAN RIGHTS FOR HEDGEHOGS?: GLOBAL VALUE
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ROBERT D. SLOANE*

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INTRODUCTION

Ronald Dworkin's forthcoming book, *Justice for Hedgehogs*,¹ is a work of breathtaking scope. My task is theoretically limited to appraising the few pages of the manuscript devoted to his account of international human rights. Yet Dworkin has written more extensively about human rights elsewhere;² and given his ambition to defend the unity and objectivity of value, it would be misguided to appraise his account of human rights in isolation – divorced from what he has to say elsewhere in the manuscript about issues such as ethics, morality, objectivity, and value pluralism. Needless to say, I will not try to respond in depth to the arguments in each of these tangential areas and often

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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 See RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* 24-51 (2006) [hereinafter DWORKIN, *DEMOCRACY*].

can only indicate my affirmative views briefly or by reference. But Dworkin's account of human rights cannot be understood, still less meaningfully scrutinized, in isolation from the theoretical context in which he situates it. That account, in my judgment, captures much that is both laudable and defensible in the liberal political tradition out of which the postwar international human rights movement developed.³ But especially insofar as the manuscript aspires to provide objective moral foundations for international human rights, it strikes me as misguided – perhaps even counterproductive – in at least five ways.

First, the account of human rights in *Justice for Hedgehogs* is vague. It fails to offer much, if any, guidance relative to many of the most difficult concrete issues that arise in the field of human rights law and policy – that is, in precisely those circumstances in which international lawyers might benefit from the sort of guidance that moral foundations supposedly promise.⁴ It is also troubling, and puzzling, given Dworkin's well-known commitment to the "right answer" thesis,⁵ that the account of international human rights in *Justice for Hedgehogs* renders answers to hard moral and legal questions about those rights necessarily indeterminate, not only in practice (that is, because of our cognitive or other epistemic limits) but also conceptually.

Second, conceptions of human rights justified by avowedly objective moral foundations invariably prove inherently controversial and therefore divisive in practice. The account of human rights in *Justice for Hedgehogs* is no exception. In part for this reason, it is ill-suited to a global order that is characterized, at least empirically, by pluralism at multiple levels: cultural, political, legal, and moral. Dworkin characterizes his account of human dignity as secular and ecumenical, but in fact it seems to rely on the same kind of theological or dogmatic assertion that he disavows and critiques (correctly, in my view) elsewhere in the manuscript, viz., the "familiar and popular claim that human beings have intrinsic and equal worth."⁶

Third, and relatedly, I believe it is a methodological mistake – and at any rate, unproductive in practice – to try to derive international human rights, as *Justice for Hedgehogs* does, from an antecedent conception of human dignity (rather than vice versa). For a chief virtue of the *idea* of human rights is that it avoids foundational moral claims about the inherent nature of human beings. Human rights can best be understood as political and moral posits, which is emphatically not to say *merely* posits. Together, these posits define a particular normative vision of mankind's moral nature and potential. Since

³ See LOUIS HENKIN, *THE AGE OF RIGHTS* 1-5 (1990).

⁴ See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 20-21 (2d ed. 2003).

⁵ See, e.g., RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119, 144-45 (1985).

⁶ DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1, (manuscript at 129) (emphasis added).

World War II, the human rights movement has sought, as a progressive social, legal, and political project, to instantiate that vision both within states and internationally.⁷ The normative vision of man's moral nature and potential that is constructed by international human rights is neither arbitrary nor merely conventional.⁸ It draws upon, among other things, history, prudence, the best current scientific understanding of human nature, and the phenomenology of human experience. But it is international human rights, which, in combination, (aspire to) *constitute* a particular political conception of human dignity; they do not, properly conceived, derive from an antecedent and ostensibly objective conception of human dignity (metaphysical, interpretive, or otherwise).⁹

Fourth, in the realm of international human rights, the value monism advanced in *Justice for Hedgehogs* is neither persuasive nor practicable. Whatever should be said about value pluralism as an interpretive thesis, what matters to the universality and normative force of human rights in law and practice, is the empirical fact of value pluralism, which Dworkin has recognized explicitly in other work.¹⁰ A functional and helpful account of international human rights must also recognize it.

Finally, inasmuch as *Justice for Hedgehogs* aspires to show that all values, properly construed, fit together in a coherent, reconcilable, and integrated whole, it is incongruous and anachronistic for the manuscript to conceptualize sovereignty as in conflict with human rights, such that human rights, at times, "trump" sovereignty.¹¹ Many contemporary international lawyers would argue, to the contrary, that the best conception of sovereignty in the modern era is not opposed to, but rooted in, respect for human rights.

I conclude by suggesting why, despite these objections, the account of human rights in *Justice for Hedgehogs* to some extent resonates with our intuitions – because they are *our* intuitions, that is, those of twenty-first century political liberals in the generic (not partisan) sense. I have argued in past work that, given the structure and political dynamics of the contemporary international legal order, a normatively universal conception of human rights, which can be justified in terms of the tenets of contemporary political liberalism, is the peculiarly appropriate functional concept to govern how

⁷ See DONNELLY, *supra* note 4, at 16 ("The essential point is that 'human nature' is seen as a moral posit, rather than a fact of 'nature,' and a social project rooted in the implementation of human rights. It is a combination of 'natural,' social, historical, and moral elements, conditioned, but not simply determined, by objective historical processes that it simultaneously helps to shape."); Michael Ignatieff, *Human Rights as Idolatry*, in HUMAN RIGHTS AS POLITICS AND IDOLATRY 53 (Amy Gutmann ed., 2001).

⁸ See DONNELLY, *supra* note 4, at 21.

⁹ See *id.* at 18-21.

¹⁰ See RONALD DWORKIN, JUSTICE IN ROBES 76-78 (2006). For further discussion, see *infra* text accompanying notes 126-163.

¹¹ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 211) ("Human rights . . . do not merely trump collective goals. They also trump another principle prominent in international law: sovereignty.").

states and cognate collective entities must treat people within their power.¹² But that justification, unsurprisingly, depends on the normative force of traditional liberal views: *skepticism* about objective truth in value (or at least our epistemic access to it); a *political*, not ontological, conception of the self as an agent; and a legal framework that guarantees citizens the optimal level of *informed* autonomy consistent with the needs of the polity, so that they may reconsider and, if warranted, revise even their most deeply held beliefs in the light of new argument and evidence.¹³

Insofar as Dworkin's account of international human rights conforms to our intuitions, it is because the two principles of dignity that he expounds in *Justice for Hedgehogs* capture core premises of contemporary political liberalism, including – the book's title notwithstanding – the fact of value pluralism. For reasons beyond the scope of this Essay, I do not find the philosophical defense of objectivity in the realm of value in *Justice for Hedgehogs* persuasive.¹⁴ But the point of emphasis is that an equally if not more compelling defense of human rights need not rely on unclear and inherently controversial claims about the objectivity of "our" values. It is more plausible and constructive, as Michael Ignatieff has argued, "to build support for human rights on the basis of what such rights actually *do* for human beings."¹⁵

I. FOUNDATIONALISM: CLARITY AND CONTROVERSY

Analytically, the universal normative¹⁶ validity of human rights can be justified in one of two diametrically opposed ways: either by defending or by disavowing objective moral foundations for international human rights. *Justice for Hedgehogs*, which builds on and incorporates Dworkin's previous work in this area,¹⁷ clearly situates his explanation in the former category: it

¹² See generally Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527 (2001).

¹³ See WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 81-82 (1995).

¹⁴ I remain unpersuaded for substantially the reasons explained in BRIAN LEITER, *Objectivity, Morality, and Adjudication*, in NATURALIZING JURISPRUDENCE 225 (2007). I agree, in particular, with what Leiter calls the naturalistic conception of objectivity, the view that "objectivity in any domain must be understood on the model of the natural sciences, whose objects of study are objective in the sense of being 'mind-independent' and causally efficacious (i.e., in making a causal difference to the course of experience)." *Id.* at 226 (footnote omitted).

¹⁵ Ignatieff, *supra* note 7, at 54.

¹⁶ The assertion that human rights are *descriptively* universal is false. See, e.g., DONNELLY, *supra* note 4, at 89 ("Cultural relativity is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability."); American Anthropological Association, *Statement on Human Rights*, 49 AMER. ANTHROPOLOGIST 539, 542 (1947).

¹⁷ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 216); see also DWORKIN, DEMOCRACY, *supra* note 2, at 23-51.

argues that human rights follow from objective moral foundations.¹⁸ I have argued in previous work that this kind of justification for human rights is misguided, both theoretically and as a strategy to promote the actual protection and enjoyment of human rights by human beings.¹⁹ I will not reiterate those arguments in depth here. But, briefly, at least two problems afflict efforts to supply objective moral foundations for human rights. Ignatieff captures them succinctly in his essay *Human Rights as Idolatry*:

It may be tempting to relate the idea of human rights to propositions like the following: that human beings have an innate or natural dignity, that they have a natural and intrinsic self-worth, that they are sacred. The problem with these propositions is that they are not clear and they are controversial. They are not clear because they confuse what we wish men and women to be with what we empirically know them to be. . . . [T]hey are controversial because each version of them must make metaphysical claims about human nature that are intrinsically contestable.²⁰

While I share many of the substantive conclusions Dworkin reaches in *Is Democracy Possible Here?* (“*Democracy*”) about the extent to which the practices adopted by the United States after the terrorist attacks of 9/11 respect (or fail to respect) human rights,²¹ at the theoretical level, I find his justification for these conclusions problematic. The account of human rights in *Democracy* and *Justice for Hedgehogs* is foundationalist. Like other such accounts, it is, as Ignatieff says, unclear and controversial. To that extent, I think that those who do not already share Dworkin’s moral, political, and legal convictions will be unlikely to find (what I regard as) his substantively sound conclusions persuasive. So even were his conception of human dignity objectively true in a philosophically meaningful sense, which I doubt, it might nonetheless be misguided – and perhaps even counterproductive – to advance it as the appropriate foundation for international human rights.

A. *Clarity: The Nature and Scope of Human Rights*

By human rights, Dworkin means, as many define them,²² “the rights that all human beings have just because they are human,”²³ even if those rights have

¹⁸ DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 214-16).

¹⁹ See Sloane, *supra* note 12, at 558-59, 591 (“Paradoxically, then, the feature of comprehensive ‘conceptions of the good’ that proves most adverse to an international order structured by respect for universal human rights is dogmatic universalism – the claim that one system of value prescribes what ‘is right’ for everyone and can therefore be justifiably imposed, through violence if necessary, on others.”); see also DONNELLY, *supra* note 4, at 18-20 (arguing that foundational appeals in the realm of human rights inevitably prove both “contingent and contentious”).

²⁰ Ignatieff, *supra* note 7, at 54; see also Sloane, *supra* note 12, at 558-59.

²¹ See DWORKIN, *DEMOCRACY*, *supra* note 2, at 23-51.

²² See, e.g., DONNELLY, *supra* note 4, at 10.

²³ DWORKIN, *DEMOCRACY*, *supra* note 2, at 29.

not been codified by treaty or otherwise recognized and even if they have been mistakenly interpreted. *Justice for Hedgehogs* offers, in other words, a moral rather than legal account of human rights. International law might instantiate the rights expressed or implied by the account in *Justice for Hedgehogs* and Dworkin's earlier work.²⁴ But it would not be a forceful objection to his account simply to observe some discrepancies between the human rights recognized in positive international law and those expressed or implied in *Justice for Hedgehogs*. On the other hand, it might well be a forceful objection if the account in *Justice for Hedgehogs* turns out to suggest a list of human rights that differs substantially from those that international law recognizes or, conversely, that casts doubt on rights that almost everyone regards as fundamental. I will suggest, for the reasons that follow, that this may be the case.

1. What Are Human Rights for Hedgehogs?

Dworkin's account of international human rights, consistent with his ambition to defend the unity of value, derives from and reflects the same two principles of human dignity that inform his views on ethics, morality, responsibility, obligation, and political and legal rights. The first principle, that of *self-respect*,²⁵ holds that once a human life begins, it is objectively important that it go well. It matters that each human life "be a successful performance rather than a wasted opportunity."²⁶ The second principle, that of *authenticity*,²⁷ holds that each human being "has a special, personal responsibility for identifying what counts as success in his own life" and therefore must "create that life through a coherent narrative that he has himself chosen and endorses."²⁸ In moral rather than ethical terms, this implies constraints on legitimate state coercion, although the scope of those constraints remains unclear at such an abstract level.²⁹

According to *Justice for Hedgehogs*, the distinction between human rights, on the one hand, and political rights, on the other, lies in the degree of abstraction appropriate to each. Within a polity, members of that polity enjoy a robust political right "to the *best* understanding of what the two principles of dignity, properly interpreted, in fact require,"³⁰ where "best" means, among other things, objectively true and precise. In contrast, human rights entitle

²⁴ See DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 215).

²⁵ *Id.* (manuscript at 128). Dworkin previously called this the principle of *intrinsic value*. DWORKIN, DEMOCRACY, *supra* note 2, at 9.

²⁶ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 128).

²⁷ *Id.* Dworkin previously called this the principle of *personal responsibility*. DWORKIN, DEMOCRACY, *supra* note 2, at 10.

²⁸ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 128).

²⁹ DWORKIN, DEMOCRACY, *supra* note 2, at 21.

³⁰ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 211) (emphasis added).

people only to treatment that conforms to a *good-faith* interpretation of the two principles.³¹ Political elites must therefore treat those in their power “as the two principles of dignity require”³² but in a more general sense. They must adopt, in the manuscript’s words, “an attitude” that is consistent with the two principles,³³ and presumably they must also try in good faith to respect those principles. To identify a (moral) human right, according to *Justice for Hedgehogs*, we therefore ask only whether a particular act (or omission) is “so plainly inconsistent with one or another of the principles of human dignity that [it] cannot be understood as expressing a good faith attempt to respect people’s dignity.”³⁴

2. Hedgehogs and Hard Cases

The most immediately striking feature of this account of human rights, given Dworkin’s other views as expressed in *Justice for Hedgehogs* and prior work, is that it renders many human rights strongly indeterminate,³⁵ not just as a practical matter, for that may be true of political and legal rights too given our cognitive and other epistemic limits, but conceptually. If two officials each adopt an attitude consistent with the two principles and try in good faith to treat people as they believe the principles require, then both, by hypothesis, respect international human rights, even if they reach radically different conclusions about the nature or scope of particular rights.

We can see, or so it seems at first blush,³⁶ why egregious violations of human rights would fail this good-faith test. Dworkin supplies examples: The first principle prohibits genocide, torture, and racial discrimination because those acts cannot plausibly be thought to reflect a good-faith effort to treat people as though it matters equally that their lives go well.³⁷ The second principle prohibits violations of the freedoms of speech, association, and religion because, absent those freedoms, people would lack the agency that they require to exercise their special responsibility to “determine the values that define success in their lives.”³⁸

³¹ *Id.* (manuscript at 211-12).

³² *Id.* (manuscript at 212).

³³ *Id.* (emphasis removed); see also DWORKIN, DEMOCRACY, *supra* note 2, at 35.

³⁴ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 212).

³⁵ Or perhaps optional, although in that event, the right would not, it seems, qualify as a genuine (moral) human right; otherwise, how could it simultaneously be optional? It would need to be express or implicit in *any* bona fide account of the two principles of human dignity Dworkin expounds.

³⁶ *But see infra* text accompanying notes 64-75.

³⁷ See DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 212); see also DWORKIN, DEMOCRACY, *supra* note 2, at 36-38.

³⁸ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 212); see also DWORKIN, DEMOCRACY, *supra* note 2, at 37.

But apart from such clear examples, and at times even within them, the two principles offer a remarkably thin and vague account of human rights. The conception of human dignity constituted by the two principles renders many human rights either questionable (they may not be human rights at all) or vague (their nature or scope is unclear). We may or may not, for example, enjoy a human right to health of some sort.³⁹ The human right to freedom of expression may or may not guarantee neo-Nazis the right to march through an Illinois neighborhood prominently displaying swastikas, where many Holocaust survivors reside;⁴⁰ or of a Danish newspaper to publish cartoons caricaturing Islam.⁴¹ Nor do the two principles help to strike the right balance between potential communal rights (for example, linguistic rights or the right of all peoples to self-determination) and traditional civil and political rights.⁴² Indeed, it is unclear, according to the account in *Justice for Hedgehogs*, whether certain social, economic, and cultural rights even qualify as genuine human rights. Officials of politically liberal states with a record of respect for human rights can and do reasonably differ on these and other contentious issues. So even were they to embrace the two principles of human dignity, they might well nonetheless, in good faith, differ about such issues.

To a certain degree, indeterminacy of this sort is a virtue of Dworkin's account of human rights. It is consistent with the generally accepted idea that international human rights place limits on states but allow them a non-trivial measure of political autonomy within those limits. Human rights do not, for example, require one particular form of democracy, legal system, or conception of due process.⁴³ States enjoy, in the phrase coined by the European Court of Human Rights and since recognized outside that court's

³⁹ An even more controversial example would be the oft-mocked right to "periodic holidays with pay," which appears in the Universal Declaration of Human Rights art. 24, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]. Plausible arguments based on good-faith interpretations of the two principles of human dignity exist both for and against such a right.

⁴⁰ See *Village of Sokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 23 (Ill. 1978).

⁴¹ Dworkin has expressly argued that the latter right does exist. See Ronald Dworkin, *The Right to Ridicule*, N.Y. REV. BOOKS, Mar. 23, 2006, at 44. Yet if, as seems clear, a good-faith construction of the two principles of human dignity could be advanced that would justify the contrary conclusion, then the "right to ridicule" cannot, according to Dworkin's account, be a (moral) human right.

⁴² See International Covenant on Civil and Political Rights arts. 1 (self-determination of peoples), 27 (linguistic and religious rights for minorities), Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR]. See generally KYMLICKA, *supra* note 13 (arguing that the traditional liberalism, despite its focus on the individual, can and should accommodate certain group rights).

⁴³ Sloane, *supra* note 12, at 568 ("It is clear, for example, that 'due process' under international human rights law does not demand the Anglo-Saxon 'adversarial' as opposed to the Continental 'inquisitorial' model, or vice versa. Functionally equivalent safeguards in each system can independently satisfy its requirements.").

treaty framework,⁴⁴ a “margin of appreciation” within which to implement or interpret human rights in ways that may be sensitive or responsive to prevailing social, cultural, and other norms within their polities.⁴⁵

But the virtue of Dworkin’s account goes too far; it becomes a vice. It is not just that we may be epistemically unable to answer hard questions about human rights (such as the existence *vel non* of a human right to health or the scope of the right to freedom of expression); it is that, according to the theory set forth in *Justice for Hedgehogs*, in the realm of moral human rights, there *is* no right answer to these questions. Given Dworkin’s theory of adjudication, it follows that, in hard cases, there is also no legal right answer: for once decisionmakers⁴⁶ exhaust the dimension of fit with the relevant institutional history, they must decide which of several competing moral principles best explains and justifies the right in question. By hypothesis, however, multiple bona fide interpretations of the two principles of human dignity may be plausible in this regard. Some might affirm the right at issue. Others might not. Still others might affirm it but construe it more or less narrowly or broadly. According to *Justice for Hedgehogs*, respect for human rights does not compel one such interpretation over another, provided only that each qualifies as a good-faith interpretation. Human rights therefore stand out in Dworkin’s theory of jurisprudence as a curious exception to the “right answer” thesis.

Take one concrete example: In *Flores v. Southern Peru Copper Corp.*,⁴⁷ the plaintiffs, residents of Peru, brought an action under the Alien Tort Claims Act (“ATCA”).⁴⁸ The district court dismissed it for, among other reasons, lack of subject matter jurisdiction.⁴⁹ The plaintiffs had alleged that the Southern Peru Copper Company (“SPCC”), a U.S. company, had violated their human rights to life, health, and sustainable development by “mining, refining, and smelting operations,” which had emitted pollutants into the local air and water supply, causing them or their decedents to develop lung cancer and other serious respiratory diseases.⁵⁰ *Flores* raised diverse questions of substance and procedure, but as relevant here, it required a federal court to decide whether the

⁴⁴ European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

⁴⁵ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

⁴⁶ The term “decisionmakers” is preferable to “judges” in this context. In the field of international human rights, institutional actors will more often than not be officials other than judges, acting in fora other than courts – for example, a member of the Human Rights Committee, reviewing a state’s report on its compliance with the ICCPR.

⁴⁷ 414 F.3d 233 (2d Cir. 2003).

⁴⁸ 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

⁴⁹ See *Flores*, 414 F.3d at 236-37.

⁵⁰ *Id.* at 235-37.

cited rights were, in fact, international human rights and, if so, whether SPCC's conduct conceivably could have violated them, such that the defense's motion to dismiss should have been denied.⁵¹ After a searching analysis of the evidence of state practice and *opinio juris* (the textbook components of custom) on which the *Flores* plaintiffs relied, the Second Circuit agreed with the district court that customary international law did not, at least not in the particular factual context of *Flores*, recognize the rights to life, health, and freedom from intranational pollution.⁵²

As a matter of positive law, especially given the threshold articulated by the Supreme Court the following year in *Sosa v. Alvarez-Machain*,⁵³ the Second Circuit almost surely resolved this motion correctly: the plaintiffs failed to adduce adequate evidence to establish that the rights on which they sought to rely reflected customary norms "accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms" cited in *Sosa*, in particular, "violation of safe conducts, infringement of the rights of ambassadors, and piracy."⁵⁴ But of course, the preceding quoted language establishes a standard intended only to delimit the realm of legal, not moral, human rights – and only those that a U.S. court should recognize under a particular federal statute. *Justice for Hedgehogs* aspires to answer a distinct question: do the putative rights to life, health, and sustainable development qualify, *morally*, as international human rights, even if the *Flores* court correctly declined to recognize them as actionable under one particular statute in one particular legal system?⁵⁵ To answer *that* question, we do not consider arguable analogies to the international torts mentioned in Blackstone's *Commentaries*;⁵⁶ rather, we ask whether SPCC's treatment of the plaintiffs must be deemed "so plainly inconsistent with one or another of the two principles of human dignity that [it] cannot be understood as expressing a good faith attempt to respect people's dignity."⁵⁷

Yet the two principles of human dignity offer scant guidance to help answer this paramount question. In the first place, given the account of human rights in *Justice for Hedgehogs*, it is unclear that a non-state actor, such as SPCC,

⁵¹ *Id.* at 254.

⁵² *Id.* at 254-66.

⁵³ 542 U.S. 692 (2004).

⁵⁴ *Id.* at 715; *see also Flores*, 414 F.3d at 242-43.

⁵⁵ *Cf.* DWORKIN, *DEMOCRACY*, *supra* note 2, at 29 ("So even if the Bush administration were right in its legal opinion that the Geneva Conventions and other treaties technically do not apply to the Guantánamo detainees, the moral question would still remain whether our policies there and elsewhere do violate the detainees' underlying human rights, rights that the United States would act immorally, even if not illegally, in violating.").

⁵⁶ *See Sosa*, 542 U.S. at 724 (discussing Blackstone's paradigms of international torts to help define those international norms that may today give rise to actionable violations of human rights under the ATCA).

⁵⁷ DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 212).

even *can* violate human rights. *Justice for Hedgehogs* characterizes human rights as continuous with political rights, which it describes, in turn, as “rights against some government.”⁵⁸ The difference, again, is that human rights reflect the two principles of human dignity at a far more abstract level. In concrete terms, this tends to yield a conservative and, indeed, anachronistic conception of human rights. In the modern era, international human rights abuses no longer require state action (or even color of state law) in every case. Contemporary international law recognizes that non-state actors, including multinational corporations,⁵⁹ can violate human rights under certain circumstances.⁶⁰ But it would be strange if the domain of moral human rights turned out to be *more* limited than that of legal human rights – for *Justice for Hedgehogs* describes human, political, and legal rights alike as subsets of the omnibus domain of moral rights. On the other hand, if Dworkin would agree that corporate actors such as SPCC can violate human rights under some circumstances, does that mean that they, too, must adopt a favorable attitude toward, and try in good faith to respect and implement, the two principles of human dignity? Either an affirmative or a negative answer to this question seems problematic in some respect.

A negative answer, as the preceding paragraph suggests, would render Dworkin’s account of human rights underinclusive and anachronistic. It would yield an unduly circumscribed list of human rights, all of which, in order to qualify as genuine human rights, must be rights against the state. But perhaps that is not an accurate reading of *Justice for Hedgehogs*. The manuscript is unclear on this particular point. It focuses on states but at times refers more generically to the human rights obligations of “those with power.”⁶¹ In context, this seems to be a reference to states and their officials. But it may also be read to refer to cognate collective entities that exercise power over human beings. The trouble with this alternative reading of “those with power” is that it creates a converse problem: it makes the realm of human rights overinclusive. Power is an ineluctable and pervasive feature of every society, and power dynamics operate at multiple levels within each. It surely cannot be the case that anyone, or any collective entity, with power over human beings, just for that reason, has a human rights obligation to treat them according to a good-faith conception of the two principles of human dignity.

To make sense of human rights, we need a limiting principle: the thug who steals my car at gunpoint has not violated my human rights; he has perpetrated a crime. But if the state arbitrarily and without compensation confiscates my

⁵⁸ *Id.* (manuscript at 210).

⁵⁹ See, e.g., *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007). See generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443 (2001).

⁶⁰ *Kadić v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995).

⁶¹ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 212).

car, it probably has violated my human rights.⁶² So how do we characterize the situation, in moral or legal terms, in which an “official” of the Transdniester Moldovan Republic, an unrecognized but de facto state whose economy thrives on trafficking in illicit weapons,⁶³ confiscates the automobile of a resident within its power? The point is that while a plausible account of international human rights in the modern era cannot be limited to states alone, nor can it extend without limitation to “those with power.” It must explain against whom, or against what collective entities, human rights may be asserted – and why.

Furthermore, if legal rights constitute a subset of moral rights, then, as suggested earlier, the class of moral human rights should be larger than that of legal human rights. Yet the opposite is clearly true. Human rights treaties set forth numerous (putative) human rights, and those treaties legally bind the states parties to them. But morally, according to *Justice for Hedgehogs*, the only human rights that states must respect are those that, on *any* good-faith account, constitute a *conditio sine qua non* of treatment that is consistent with the two principles of human dignity – that is, those interpretations of putative international human rights in the absence of which a state could not, with minimal credibility, claim to be trying to treat its citizens in a way that is consistent with the two principles.⁶⁴ It seems both implausible and normatively unattractive for human rights – those rights that we regard as so important that every human being must have them just because he or she is a human being – to be quite so vague and indeterminate.

Of course, indeterminacy is a problem that afflicts rights generally. The rights to private property and free speech, stated abstractly, “tell[] us very little about how to handle particular problems”⁶⁵ implicating those rights. But the level of particular problems is where human rights matter. I wrote in earlier work that “[s]hould the discourse of human rights remain in theoretical limbo, solely the subject of armchair philosophy, then the very concept of human rights law becomes quixotic.”⁶⁶ By defining human rights to require no more than a good-faith interpretation of the principles of human dignity – leaving aside, for the moment, the force and coherence of those principles – the conception of human rights in *Justice for Hedgehogs* seems likely to generate controversies that will impede the instantiation and enforcement of international human rights law.

The indeterminacy that is implicit in *Justice for Hedgehogs*’s good-faith conception of human rights also renders international human rights susceptible to a form of crude moral relativism that Dworkin critiques elsewhere. For

⁶² See Sloane, *supra* note 12, at 544 n.48 (citation omitted).

⁶³ See MOISÉS NAÍM, *ILLICIT* 57-58 (2005).

⁶⁴ See DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 213).

⁶⁵ See Cass Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 731-32 (1995).

⁶⁶ Sloane, *supra* note 12, at 530.

what strikes one official as a good faith effort to implement the two principles of human dignity, may strike another as bad faith – or vice versa. Or it may strike another official as an overly broad and generous or, conversely, an unduly narrow and restricted, interpretation. The account of human rights in *Justice for Hedgehogs* therefore not only renders those rights indeterminate in hard cases; it also means that, for any putative human right, the only obligation that is morally *incumbent* upon a state is the most restrictive, parsimonious interpretation of that right that remains consistent with a good-faith interpretation of the two principles. Simply put, “hedgehogs” have human rights to the interpretation of each human right that is identical to the least common denominator among plausible good-faith interpretations of the two principles of human dignity that could explain that right.

The good-faith account is problematic in still another respect because of the (at least superficial) tension between the two principles. Consider two fictional states: Ruritania and Azania. Ruritania decides that a good-faith effort to respect the principles of dignity requires it to recognize a right to healthcare. It reasons, consistent with the first principle, that a person’s life goes better, qualitatively and quantitatively, if he has reliable, secure access to healthcare. Azania, in contrast, decides in good faith that it would be a misguided interpretation of the two principles to recognize healthcare as a human right. It reasons, consistent with the second principle, that a right to healthcare would require too much compulsory redistribution of people’s legitimately acquired wealth, thereby unduly interfering with their special responsibility to identify and pursue what counts for them as success in their lives.

Perhaps, as *Hedgehogs* argues, this conflict is only superficial within any particular polity. Members of a polity, after all, enjoy a political right to the “*best conception*” of the two principles of human dignity.⁶⁷ For Dworkin, equality, liberty, and other political values, properly construed, do not, *pace* Isaiah Berlin, conflict. Rather, by an interpretive process, citizens in a polity can and should decide whether and, if so, to what extent, the state must guarantee a political right to healthcare, such that it optimally maximizes and reconciles the two principles of human dignity in a coherent way. One might say, then, that an appropriately limited political right to healthcare, which promotes the first principle, need not unduly interfere with the liberty required by the second principle: the latter requires only that people enjoy a degree of autonomy over their legitimately acquired wealth that suffices to enable them effectively to pursue what they have identified as important in their lives.

But this suggestion – even were it plausible, which, given the fact of value pluralism, I doubt – is unavailable in the realm of human rights as defined in *Justice for Hedgehogs*. On its account, human, unlike political, rights do not require the sort of overarching political reconciliation, whereby all values get defined such that they fit together in a coherent, integrated whole, that *Justice*

⁶⁷ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 211) (emphasis added).

for Hedgehogs contends is possible and appropriate within each polity. Rather, so long as the state adopts an attitude consistent with the principles and tries in good faith to treat people in accordance with them, it does not violate their human rights. Human, in contrast to political, rights forbid only conduct that is “so plainly inconsistent with one or another of the two principles of human dignity that [it] cannot be understood as expressing a good faith attempt to respect people’s dignity.”⁶⁸ Again, in practice, this means that for any particular human right, states must (morally) guarantee only the interpretation that reflects the least common denominator among the class of bona fide interpretations of that right that remain consistent with the two principles of human dignity.

This conclusion is troubling, particularly if Dworkin overestimates how much is “plainly inconsistent” with a good-faith effort to respect the two principles, as I believe he does. In *Aldana v. Del Monte Fresh Produce, N.A., Inc.*,⁶⁹ for example, one panel of the Eleventh Circuit affirmed the district court’s judgment that customary international law, as distinct from particular treaty obligations, does not bar cruel, inhuman, and degrading treatment or punishment (“CIDT”), at least not clearly enough to meet the standard set forth in *Sosa*.⁷⁰ The court so held even though two federal district courts within the Eleventh Circuit had previously held to the contrary.⁷¹ The plaintiffs petitioned for a rehearing en banc, which the Eleventh Circuit denied.⁷² But Judge Rosemary Barkett appended an informed dissent to the denial of the petition, arguing persuasively that customary international law does prohibit CIDT at the level required by *Sosa* to sustain a right of action under the ATCA.⁷³ Here again, the point is not who has the better of the argument under the *Sosa* standard; rather, it is that if reasonable decisionmakers can, as the federal judges in *Aldana* and prior cases on point did, disagree in good faith about whether certain conduct violates the CIDT prohibition, or whether the ban on CIDT even *is* a human right, then, according to *Justice for Hedgehogs*, it is *not* (at least not morally).⁷⁴ The two principles of human dignity do not

⁶⁸ *Id.* (manuscript at 212).

⁶⁹ 416 F.3d 1242 (11th Cir. 2005), *reh’g en banc denied*, 452 F.3d 1284 (11th Cir. 2006) (*Aldana II*).

⁷⁰ *See id.* at 1247 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004)).

⁷¹ *Id.* at 1247.

⁷² *Aldana II*, 452 F.3d at 1284.

⁷³ *See id.* at 1284-88.

⁷⁴ Other foreign and regional courts have debated similar issues and reasonably, even if controversially, arrived at a variety of conclusions about CIDT. *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 5, 67 (1978) (finding that practices such as wall-standing, hooding, and sleep and food deprivation “undoubtedly amounted to inhuman and degrading treatment, . . . [but] did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood”); HCJ 5100/94 Public Comm. Against Torture in Israel v. Israel [1999] IsrSC 46(2) 1471, 1478 (appraising the legality of the “moderate physical pressure” techniques that Israeli interrogators employed).

help to resolve the legal debate in *Aldana* between Judge Barkett, the two federal district judges, and the Eleventh Circuit majority. They tell us that if good-faith interpretations of the two principles of human dignity exist to support a conclusion one way or the other, as they did in *Aldana*, then there is no human right against CIDT. That seems doubtful – legally *and* morally.⁷⁵

The preceding analysis suggests, first, that *Justice for Hedgehogs* offers an unclear and minimalist account of human rights in the moral sense – one that tends to cast doubt on many basic human rights that contemporary international law recognizes; and second, that the good-faith inquiry recommended by *Justice for Hedgehogs* offers little guidance relative to concrete questions about the nature or scope of human rights in hard cases.

B. *Controversy: The Anti-Foundationalist Pedigree of Human Rights*

The moral foundationalist account of human rights in *Justice for Hedgehogs* is also problematic because it is inherently controversial. Notwithstanding the manuscript's disavowal of "morons," metaethics, and indeed the very coherence of "meta" claims in the realm of value, Dworkin emphatically *does* want to argue that his conception of human rights is objective in some philosophically meaningful sense. Other contributors to this symposium have a familiarity with the philosophical literature on point that make them better suited than this author to appraise *Justice for Hedgehogs*'s account of objectivity in the realm of value. But few, if any, have found that account persuasive to date,⁷⁶ and my concern in this section depends only on that empirical fact.

Dworkin aspires to speak to human rights activists, diplomats, lawyers, politicians, and others outside the academy. To his credit, in my view, he has insisted throughout his career that philosophy is not, or should not be, an esoteric enterprise reserved for an insular academic elite; it should inform, among many other things, our views on adjudication, legislation, and civil disobedience. But if the account of human rights in *Justice for Hedgehogs* is inherently controversial even to political liberals otherwise sympathetic to many of Dworkin's substantive views (this author among them), then we can expect that the peoples of many foreign polities – whose consciousness, beliefs, and psychosocial constitutions have been shaped by very different

⁷⁵ Of course, given his commitment to objectivity in the realm of values, Dworkin might want to say that certain people who deny the existence of a particular human right simply misconstrue what the two principles require. The point of emphasis, however, is that, except at the margins where virtually everyone agrees, the principles themselves supply no objective means to determine which interpretations should be deemed "reasonable" or "good-faith" interpretations.

⁷⁶ LEITER, *supra* note 14, at 226 ("Dworkin's extensive writings on 'external' and 'internal' skepticism about objectivity have attracted little attention Indeed, I am not aware of anyone, other than Dworkin who has found his response on this score satisfactory.").

normative environments – will be that much more unlikely to accept those views, still less to recognize them as objective. That is why it strikes me as troubling that the principal argument that *Justice for Hedgehogs* offers for the two principles of human dignity, which underwrite human rights and much else in Dworkin’s view, seems to be a form of intuitionism.

1. Appraising the Two Principles of Human Dignity

Dworkin does not always express the first principle in the same way. But to paraphrase *Is Democracy Possible Here?*, a rough formulation of the first principle is this: once a human life begins, it is objectively important how that life goes. It matters that a human life, once it starts, go well.⁷⁷ *Justice for Hedgehogs* says to similar effect that the first principle requires that we “recognize the objective importance of [our] living well, of [our lives] being a successful rather than a failed response to the challenge of living.”⁷⁸ As it is introduced, the first principle, like the second, is ethical, not moral, as *Justice for Hedgehogs* employs those terms. That is, the first principle defines what it means to live well (ethics), not how we should treat others (morals). It also focuses on a process (living) rather than an entity (human beings).

Consequently, as a matter of ethics at least, the first principle does not advance anything like the usual claim underwriting human rights: that all human beings, just because they are human beings (and not in virtue of qualities ascribed to them), possess an innate quality in equal measure that should properly be characterized as dignity. In fact, in *Justice for Hedgehogs*, Dworkin seems to be at pains to stress that the first principle, that of self-respect, “is *not* . . . the familiar and popular claim that human beings have intrinsic and equal worth.”⁷⁹ He describes that familiar claim – correctly, in my view – as implausible or false, depending on what it is supposed to mean.⁸⁰ If, he says, it is a claim about the “product value” of human beings – that is, “the value it has just as an object independently of the process through which it was created or of any other facet of its history”⁸¹ – then it is implausible: “The world does not go better when there are more human beings in it, as we might

⁷⁷ DWORKIN, *DEMOCRACY*, *supra* note 2, at 9-10 (“[Human life] has value as potentiality; *once a human life has begun, it matters how it goes*. It is good when that life succeeds and its potential is realized and bad when it fails and its potential is wasted. This is a matter of objective, not merely subjective, value; I mean that a human life’s success or failure is not only important to the person whose life it is or only important if and because that is what he wants. The success or failure of any human life is important in itself, something we all have *reason* to want or to deplore.” (first emphasis added; footnote omitted)); *see also* RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 74 (1993) [hereinafter DWORKIN, *LIFE’S DOMINION*].

⁷⁸ DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 129).

⁷⁹ *Id.* (emphasis added).

⁸⁰ *See id.*

⁸¹ *Id.* (manuscript at 124).

well think it does go better when there are more great paintings painted.”⁸² If it is rather a claim about “performance value” – that is, the value that something has because of our admiration for the creative process that brought it about⁸³ – then it is false: “Many lives have no performance value at all, and the performance value of all lives is certainly not equal.”⁸⁴

Justice for Hedgehogs thus disavows the familiar claim that all human beings have an innate and equal worth. Yet elsewhere in the manuscript, Dworkin describes the first principle – or the two principles in combination, which turn out to be moral as well as ethical – in ways that do not so obviously differ from that familiar claim. For the two principles, together, constitute a particular conception of human dignity, and it is that conception, rather than the two principles, that does the real work in justifying human rights. A great deal therefore depends on both the coherence of the principles, as a matter of ethics, and the logical force of the argument that is said to render them objective moral principles.

In *Justice for Hedgehogs*, as in Dworkin’s prior work,⁸⁵ the basic syllogism⁸⁶ behind the first principle is this: First, most of us would concede that, subjectively, we believe that our lives, objectively, have intrinsic value; and second, we can only make sense of this broadly shared intuition by concluding that everyone’s life, in equal measure, really does – objectively – have intrinsic value.⁸⁷ The derivation of the second principle of human dignity

⁸² *Id.* (manuscript at 129). Parenthetically, while I agree with Dworkin that it is not clear why or in what sense human beings have “intrinsic and equal worth,” *id.*, it is not necessarily inconsistent to ascribe product value to an object and simultaneously not to want more of that object. We might ascribe product value to trees, for example, because of the shade they provide, their critical role in the ecosystem, and so forth – none of which has anything to do with a creative process by which the trees came into existence. But it would not follow that we would necessarily want more trees, or that more trees would make our lives go better. Too many trees (which is not, alas, a problem we actually suffer from) might crowd out other forms of life, which themselves have product value, or occupy too much space, leaving us with no place to establish cities or to plant food for survival.

⁸³ *Id.* (manuscript at 124).

⁸⁴ *Id.* (manuscript at 129).

⁸⁵ DWORKIN, DEMOCRACY, *supra* note 2, at 11 (“I shall try to convince you that most people accept [“the intrinsic and objective importance of how a human life is lived”] on reflection . . . by persuading you that most people think it is intrinsically and objectively important how their own life is lived and then, second, that most people have no reason to think it is objectively any less important how anyone else’s life is lived.”).

⁸⁶ To be clear, “syllogism” is my characterization. Dworkin does not self-characterize the argument as a type of syllogism. But I do not think it is an unfair characterization of the essential logic behind the two principles of human dignity, as set out in *Democracy* and, in greater detail, in *Justice for Hedgehogs*.

⁸⁷ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 129, 164). To the same effect, Dworkin has argued elsewhere that we all think our own lives have “intrinsic” value and that if we accept this conviction relative to ourselves, “the equal objective importance of all human li[fe]” follows. DWORKIN, DEMOCRACY, *supra* note 2, at 11-16.

relies on a cognate syllogism. It begins with our supposedly strong conviction that we each have a special, non-delegable responsibility to identify and pursue what counts for us as success in our lives. It then asks (and answers in the negative) whether we have any reason to think that we *alone* have this responsibility. For each of the principles, this syllogism strikes me as a non-sequitur, and it seems to beg two questions.

First, what is the justification for reliance on “convictions” or intuitions? *Justice for Hedgehogs* places significant, indeed decisive, weight on certain convictions in the context of the two principles. Yet elsewhere *Justice for Hedgehogs* refers to convictions pejoratively or with scare quotes, presumably to indicate that, without reflection, we cannot accept them as reliable guides to truth.⁸⁸ Few would disagree. But that begs the question why we *can* rely on certain convictions – to the point of basing the most critical axioms by which we should live and treat others on them – while disdaining reliance on other convictions. What, in other words, makes our shared convictions reliable as (indispensable) premises in the syllogisms that justify the two principles of human dignity – but unreliable in other contexts? *Justice for Hedgehogs* does not, so far as I can tell, answer that question.

Second, for both principles, it is not, I think, quite so self-evident that everyone shares them. The claim that we share the convictions that justify the two principles of human dignity invites the question, “who is ‘we’?” Does *Justice for Hedgehogs* mean to argue that the two principles would be embraced by every human being, everywhere, at every time? That is doubtful. The convictions that *Justice for Hedgehogs* says we share, might well be characteristic only of contemporary political liberals.⁸⁹ Peoples acculturated elsewhere, and in traditions other than political liberalism, might not share them. In the Hindu tradition, for example, it is traditionally thought that some people should accept their social position or caste and live a commensurate life, so that they may accrue positive karma and be reborn in progressively more felicitous circumstances and ultimately be in a position to achieve union with Brahman. For a Hindu who believes this, it could be dangerous to

⁸⁸ Compare, e.g., DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 184) (disavowing the view that “our moral ‘intuitions’ are guides to truth in some way at least analogous to perceptions of the world of nature”), with DWORKIN, DEMOCRACY, *supra* note 2, at 11-14 (scrutinizing the conviction that most of us think it important that our lives go well). For analysis of the conviction that human life is sacred, see DWORKIN, LIFE’S DOMINION, *supra* note 77, at 71-81.

⁸⁹ See, e.g., DWORKIN, DEMOCRACY, *supra* note 2, at 15-16 (referring repeatedly to what most Americans “think” or “believe” or “would admit”); *id.* at 21 (“I hope you are now at least tempted to agree that Americans across the political spectrum, with relatively few exceptions, would accept that they share the conception of human dignity that I have been describing.” (emphasis added)). The repeated references to Americans in *Democracy* may reflect only the focus of that book on political discourse in the United States. If so, it is still a questionable leap of logic to go from what most Americans, in this day and age, think to what most human beings everywhere think.

embrace the second principle of human dignity, that is, to identify and pursue a self-created narrative by which he gives meaning to his life. That self-interested goal might lead to a less favorable rebirth.

Of course, we can (and should) argue with such beliefs. We might point out, for example, that, historically and anthropologically, the caste system developed as a method by which the Aryan invaders of the early Indus River Valley civilization created and preserved a system of social control. Yet that is just to say that we can offer arguments in favor of the conviction underwriting the second principle. (And I agree that we can and should.) It is not to say, as *Justice for Hedgehogs* does, that each person, on sufficient reflection, would necessarily agree that he has a special, non-delegable responsibility to identify and pursue what counts as success for him in life.

Finally, even if we assume that everyone, everywhere, at all times, does share the subjective conviction that, according to the first principle, his life has objective value, still, neither the truth of that conviction nor its equal application to all human beings follows logically.⁹⁰ There might well be an evolutionary story to tell, for example, about why most of us tend to share the conviction that our lives objectively have intrinsic value. Convictions report certain facts (about ourselves). According to the naturalistic fallacy, what Dworkin calls “Hume’s principle,”⁹¹ logic does not entitle us to infer truths about value from the existence of facts alone. The mere fact, if it is a fact, of broadly shared, robust convictions about the objective importance of our lives, or our special responsibility for identifying and pursuing what matters to us, does not compel any conclusion about the objectivity of those convictions (as true values).

Yet the preceding conclusion is indispensable to the account of human rights, among other issues, in *Justice for Hedgehogs*. In order to do the theoretical work required of them in the realm of human rights, the principles of human dignity must be moral, not only ethical. As Dworkin rightly emphasizes, there is an important distinction between the following two claims: first, the familiar claim, which he disavows, that each human being has intrinsic and equal worth; and second, the principle of self-respect: that “once a human life has begun, it matters how it goes.”⁹² A belief in the intrinsic and equal dignity or worth of all human beings is not the same – and does not have the same moral, legal, or political implications – as a belief that once a human life begins, it matters how that life goes. Nor is the former belief equivalent to the second principle: that we all have a special, non-delegable responsibility to identify and pursue what counts for us as success in our lives.

⁹⁰ See DWORKIN, DEMOCRACY, *supra* note 2, at 16.

⁹¹ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 14).

⁹² DWORKIN, DEMOCRACY, *supra* note 2, at 9.

In *Justice for Hedgehogs*, however, as in *Democracy*, the two principles merge and together constitute one particular conception of human dignity.⁹³ That conception does not so obviously differ from the familiar claim that human beings have equal and intrinsic worth. In his exposition of human rights in *Democracy*, for example, Dworkin explains that the first principle “declares the intrinsic and equal importance of every human life.”⁹⁴ It is unclear precisely how this differs from “the familiar and popular claim that human beings have intrinsic and equal worth.”⁹⁵ Perhaps Dworkin would reply that the first principle focuses on performance value (the adverbial value of living well) while the familiar claim focuses on product value (the inherent worth of human beings as corporeal entities).

But if, as Dworkin and most others define them, human rights denote the rights that human beings have just because they are human, then only the familiar claim would support them. *Justice for Hedgehogs* says, for example, that a state that discriminates based on race or practices gratuitous torture cannot plausibly “claim that it . . . embraces an intelligible conception of human dignity.”⁹⁶ Most everyone would agree. But the reason for their agreement would be a (tacit or explicit) background belief in inherent human dignity. It would not be their commitment to the adverbial value of living well or to the responsibility of all human beings to identify and pursue a narrative that defines what counts as success in their lives.⁹⁷ That may be why, even though *Justice for Hedgehogs* disavows the familiar claim that human beings have intrinsic and equal worth at one stage in the manuscript, it later advances (what appears to be) precisely that claim. Reaffirming his views in *Life’s Dominion*, Dworkin writes in *Justice for Hedgehogs* that “human life is sacred” and that “the failure of any life is a waste of a cosmically valuable opportunity.”⁹⁸ Perhaps that is so, but our intuition to that effect is a slender

⁹³ *Justice for Hedgehogs* often refers collectively to the two principles as “human dignity” or just to “dignity.” E.g., DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 212).

⁹⁴ DWORKIN, DEMOCRACY, *supra* note 2, at 37.

⁹⁵ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 129).

⁹⁶ *Id.* (manuscript at 212).

⁹⁷ That more familiar Kantian claim about the intrinsic and equal dignity of all human beings offers a plausible premise for the syllogism underlying the idea of human rights. But even apart from Dworkin’s disavowal of it, the proposition itself is no more than a dogmatic assertion and at best stands on shaky ground. Michael Perry argues that there is no intelligible secular account of the idea that human beings are innately sacred (or have equal dignity or worth). MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 11-41 (1998). I tend to agree, though for partially distinct reasons. With particular reference to Dworkin’s views, see PERRY, *supra*, at 25-29. Dworkin rejects the view that religion can supply an adequate ground for his first principle, DWORKIN, DEMOCRACY, *supra* note 2, at 14-15, or for human rights, DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 213-16).

⁹⁸ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 162).

reed on which to rest the two principles of human dignity and, as a consequence, a poor justification for international human rights.

Michael Perry, among others, has critiqued secular accounts of innate human dignity, which are by no means unique to Dworkin. According to Perry, the human rights syllogism – or the “idea” of human rights – has this underlying logical structure:

According to the first part, each and every human being is sacred – each and every human being is “inviolable”, has “inherent dignity and worth”, is “an end in himself”, or the like. According to the second part of the idea, *because* every human being is sacred (and given all other relevant information), certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.⁹⁹

Because *Justice for Hedgehogs* disavows the first part of this syllogism, that is, the claim that all human beings have intrinsic and equal worth, it may be a helpful thought experiment to consider the consequences of changing that part. Rather than make what *Justice for Hedgehogs* characterizes as the implausible or false claim that each human being has intrinsic and equal worth, we might substitute the principles of human dignity, self-respect, and authenticity: (1) once a life begins, it objectively matters how it goes; and (2) each person has a special, non-delegable responsibility to identify and pursue what counts for him as success in his life. These two principles differ from the familiar claim in that neither makes any ontological assertion about the inherent value of human life. Neither entails that human beings, just as human beings – and not in virtue of anything ascribed to them – have, in equal measure, an innate quality: sacredness, worth, dignity, inviolability, and so forth.

The problem is that, absent this latter premise, the syllogism that Perry describes as “the idea of human rights” is pathological. Accounts of human rights that derive from antecedent conceptions of human dignity, including Dworkin’s, *must* posit innate human dignity or worth. Only in that way can they introduce (one formulation of) Kant’s categorical imperative: that human beings must be treated as ends in themselves and never only as means.¹⁰⁰ But the two principles of human dignity, however attractive they might otherwise be, do not entail the categorical imperative or, for that matter, any deontological principle. Nor can they be substituted for the familiar claim (that humans possess an innate human dignity in equal measure) as a means to rehabilitate the moral foundations of human rights. For if human beings *lack* innate and equal dignity, if they need not always be treated as ends in themselves (and never only as a means), then, absent some further moral posit or argument, the two principles of human dignity do not exclude the kind of crude consequentialism that Dworkin elsewhere disavows. It is not clear, for

⁹⁹ PERRY, *supra* note 97, at 4-5.

¹⁰⁰ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 46 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785).

example, why they would prohibit torturing the “ticking time-bomb terrorist,” given sufficient certainty about all of the contingencies that make this hypothetical situation so improbable and insidious in political discourse about torture.¹⁰¹ It is, after all, presumably more important, according to the first principle, that thousands of lives go well – indeed, that they just *go* (that is, that people survive) – than it is that one person’s life go better (insofar as a life goes better if it does not include the experience of torture). The need to avoid this kind of consequentialist reasoning may be why *Justice for Hedgehogs* tacitly reintroduces what looks like a metaphysical conception of innate human dignity. That conception renders international human rights claims intelligible but at the – presumably unacceptable – cost of adopting a claim that *Justice for Hedgehogs* describes as either implausible or false.

2. Rehabilitating International Human Rights

An alternative to the human rights syllogism that Perry critiques begins with the concession that its first premise is false, or at least insusceptible to uncontroversial proof: that is, without resorting to inherently controversial dogmatic assertions, whether theological or secular in nature, we cannot make sense of the idea that human beings, just as human beings, possess an innate quality in equal measure that is properly described as dignity. Dignity is a quality that human beings ascribe to other people or to their conduct. But that “concession,” far from undermining human rights, goes a long way toward explaining why we need them.

It is manifestly false that human beings always, or even often, *act* with dignity: human dignity is not a descriptive thesis. To be sure, “[o]n occasion, men and women behave with inspiring dignity. But that is not the same thing as saying that all human beings have an innate dignity or even a capacity to display it.”¹⁰² Often, we behave atrociously toward one another:

The Holocaust showed up the terrible insufficiency of all the supposedly natural human attributes of pity and care in situations where these duties were no longer enforced by law. Hannah Arendt argued in *The Origins of Totalitarianism* that when Jewish citizens of European states were deprived of their civil and political rights, when, finally, they had been stripped naked and could appeal to their captors only as plain, bare human beings, they found that even their nakedness did not awaken the pity of their tormenters. As Arendt put it, “it seems that a man who is nothing

¹⁰¹ See DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 209). On the “ticking time-bomb terrorist” hypothetical, see ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 131-63 (2002). On the moral, legal, and pragmatic flaws in this hypothetical, see, for example, David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1427 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1715 (2005).

¹⁰² Ignatieff, *supra* note 7, at 54.

but a man has lost the very qualities which make it possible for other people to treat him as a fellow man.”¹⁰³

That is, in a nutshell, the recognition that gave birth to the international human rights movement after World War II. Efforts to justify human rights by reference to objective moral foundations, in contrast, yield unclear and inherently controversial views that prove ill-suited to a pluralistic world public order. It is more constructive “to build support for human rights on the basis of what such rights actually *do* for human beings. People may not agree why we have rights, but they can agree that we need them.”¹⁰⁴

The idea of human rights, in other words, is a moral and political posit rooted in history and prudence. By positing human rights as the rights of all human beings, just as human beings, and by then seeking, first, to *internationalize* those rights in law, and second, to *universalize* them in morality,¹⁰⁵ the postwar generation self-consciously sought to create and secure a particular conception of human dignity. Where the post-World War I idea of minority rights had failed, the post-World War II generation hoped that the idea of universal human rights would succeed. That is why, in the immediate aftermath of World War II, international human rights, “as inalienable and undifferentiated rights that attach to the individual without regard to cultural identity, found widespread support,”¹⁰⁶ even though such rights, empirically, lacked (and continue to lack) a universal, cross-cultural moral foundation as a descriptive matter.¹⁰⁷

The drafters of the Universal Declaration of Human Rights understood this, and deliberately eschewed moral foundations. Jacques Maritain, one of the members of the drafting committee, responded to “astonishment that certain champions of violently opposed ideologies had agreed on a list of . . . rights,” by stressing that the committee could agree, to be sure – but only “*on condition that no one asks us why.*”¹⁰⁸ Rather than try to derive human rights from “violently opposed” moral and ideological foundations, the drafters therefore conceived of human rights as the minimal conditions needed for human beings to live a life of dignity as defined by the core among the diversity of ideologies, beliefs, and values represented on the drafting committee.¹⁰⁹ As the U.N. General Assembly put it in 1950, human rights define “the human

¹⁰³ *Id.* at 79 (footnote omitted); *see also id.* at 80 (“We defend human rights as moral universals in full awareness that they must counteract rather than reflect natural human propensities.”).

¹⁰⁴ *Id.* at 54-55.

¹⁰⁵ *See HENKIN, supra* note 3, at 17.

¹⁰⁶ Sloane, *supra* note 12, at 548.

¹⁰⁷ *See id.* at 550.

¹⁰⁸ Jacques Maritain, *Introduction to HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 9 (UNESCO ed. 1949).

¹⁰⁹ This core is “bounded,” to be sure, but nonetheless meaningful. *See DONNELLY, supra* note 4, at 51-53.

person whom the Universal Declaration [of Human Rights] regards as the ideal of the free man.”¹¹⁰ Historically, in short, human rights defined human dignity – not vice versa.¹¹¹ The same approach, in contrast to moral foundationalism, remains compelling today.

Dworkin seems to reject this view because, as he writes in *Justice for Hedgehogs*, it “does not redeem the phenomenology that inspires it We do create our lives, but we do it *aiming* at value, not trying to invent it. We cannot avoid the conviction of value independent of our will or fiat.”¹¹² In fact, this contention – that “[w]e cannot avoid the conviction of value independent of our will or fiat” – is not self-evident, still less a conviction that we cannot avoid: “The notion that something is valuable independently of a beneficial relation to anyone or anything . . . is perfectly opaque.”¹¹³ Value

¹¹⁰ G.A. Res. 421, ¶ E, U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Dec. 4, 1950). Although the UDHR rhetorically recognizes “the inherent dignity” of all persons, it avoids explaining the source of that dignity, except to say, in words redolent of Ignatieff’s view, that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.” UDHR, *supra* note 39, at 71. History shows, in other words, that the absence of human rights threatens human dignity.

¹¹¹ See Ignatieff, *supra* note 7, at 83 (“All that can be said about human rights is that they are necessary to protect individuals from violence and abuse, and if it is asked why, the only possible answer is historical.”).

¹¹² DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 136) (emphasis added).

Parenthetically, the mere fact that we cannot avoid a conviction does not necessarily mean it is true. We cannot avoid the perception and consequent conviction of a world characterized by time and extension (space). But that does not make our convictions about time and space true, as Albert Einstein suggested and modern quantum physics seems to corroborate. In a similar vein, Dworkin argues that we should reject a naturalistic account of free will and causation because it can only be redeemed [in the ‘physical and biological world’].” *Id.* at 145. He worries that “once we do [adopt the naturalistic account of causation,] the hope [that we have free will] becomes vulnerable to scientific discovery or metaphysical speculation.” *Id.* Yet the possibility that science might dash our hope that we have free will in a naturalistic sense offers no reason to abandon the naturalistic account of freedom of the will. It would be methodologically repugnant to adopt a particular view of free will precisely in an effort to insulate that view from scientific truth. Cf. LEITER, *supra* note 14, at 238 (“Science has earned its claim to be a guide to the real and the unreal by depopulating our world of gods and witches and ethers, and substituting a picture of the world and how it works of immense practical value.”).

Above, I say Dworkin “seems” to reject this view in the text because elsewhere in the manuscript, Dworkin locates human dignity in “the fact of our consciousness and the phenomenal world of challenge it offers – the challenge of lives to lead and thousands of decisions to make,” which “itself gives us all the dignity we need or should crave.” *Id.* at 145; see also DWORKIN, *DEMOCRACY*, *supra* note 2, at 15 (“It [‘your having a good life’] is important for no further reason than that you have a life to live.”). This strikes me as difficult to distinguish from the view quoted in the text, which Dworkin explicitly rejects.

¹¹³ PERRY, *supra* note 97, at 26.

may be intrinsic (in the sense that we seek it for its own sake), or value may be instrumental (in the sense that we seek it, not for its own sake, but because it facilitates or helps us to realize a further, intrinsically valuable objective). But there is no coherent notion of value without an evaluator.¹¹⁴

Yet nothing about the validity or normative force of human rights need depend on resolving esoteric debates in metaphysics or metaethics (or even on the intelligibility of inquiry into these “meta” fields, which *Justice for Hedgehogs* characterizes as incoherent). While Perry may well be correct that the idea of innate human *dignity* (apart from what we ascribe) lacks an intelligible secular basis, it does not necessarily follow that the distinct idea of human *rights* is religious. Perry writes: “The conviction that every human being is sacred is, in my view, inescapably religious – and the idea of human rights, *therefore*, ineliminably religious.”¹¹⁵ But logic does not compel the “therefore” unless human rights can only be justified on the basis of some antecedent view about human dignity. That is not the case.

The absence of an objective, secular basis for the belief that human life is sacred could, of course, lead to the Benthamite conclusion that human rights (like all rights) amount to “nonsense upon stilts.”¹¹⁶ But it could also lead us to inquire into the sociopolitical, historical, and phenomenological origins of human rights, which are, after all, a peculiarly modern invention. Before 1945, and for the most part before World War II, human rights existed, if at all, only in theological writings and international rhetoric.¹¹⁷ In law, international human rights were self-consciously created in response to the atrocities of Nazi Germany, the perceived failure of prewar minority-rights regimes, and other comparatively recent historical events.¹¹⁸

Justice for Hedgehogs defends the unity and objectivity of value, and it is therefore understandable for the manuscript to locate human, like political and legal, rights in an antecedent conception of human dignity based on an avowedly objective morality.¹¹⁹ This approach also, concededly, aptly captures the characteristic rhetoric of international human rights instruments.¹²⁰

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 5 (emphasis added).

¹¹⁶ JEREMY BENTHAM, ANARCHICAL FALLACIES 489, 501 (1824).

¹¹⁷ *See, e.g.*, Jack Donnelly, *Human Rights and Asian Values: A Defense of “Western” Universalism*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 60, 62-69 (Joanne R. Bauer & Daniel A. Bell eds., 1999). Slavery may be an exception. *See* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 552 (2008) (observing that international antislavery courts established between 1817 and 1871 “were the first international human rights courts”).

¹¹⁸ Sloane, *supra* note 12, at 548.

¹¹⁹ *Cf.* DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 210) (“Dignity is . . . the foundation of all political rights.”).

¹²⁰ *See, e.g.*, International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; UDHR, *supra* note 39, at 71 (recognizing “the inherent dignity and . . . the equal and inalienable rights of all members of the human

But as I have briefly suggested, it reverses matters: we need human rights because there is no objective, uncontroversial basis for the belief that human beings, just as human beings, possess in equal measure an innate quality, dignity, that compels respect from those with power, typically state officials – but, in the modern era, also private armies, clans, militias, and other non-state actors. “We defend human rights as moral universals in full awareness that they must counteract rather than reflect natural human propensities.”¹²¹

An indispensable premise of this alternative approach to human rights, however, is the fact of value pluralism. In previous work, I tried to defend the normative universality of international human rights against cultural relativism based on traditional liberal views, including value pluralism.¹²² By appealing to the fact of value pluralism and its analogue at the international level, cultural pluralism,¹²³ as well as its traditional corollaries in the liberal tradition – reasonable tolerance, a political conception of the self as an agent, and the imperative to afford all people genuine, informed autonomy – I argued, in part, that cultural relativists cannot object to the “imposition” of universal human rights while simultaneously insisting on international tolerance of practices that offend those rights: international tolerance, in other words, of intolerance. Paradoxical though it may seem at first blush, international human rights law merits universal allegiance because it “is animated by the distinctively liberal presumption of reasonable value pluralism.”¹²⁴ The Western focus on the individual that is evident in the concept of human rights – as well as the possibility, and even desirability, of competing conceptions of the good – is not a matter for apology.¹²⁵

I will not reiterate these arguments, but in the context of this Essay, it is necessary to defend their premise: the empirical fact of value pluralism. For as

family”); World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, pmbl., U.N. Doc. A/CONF.157/23 (July 12, 1993) (“Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person . . .”).

¹²¹ Ignatieff, *supra* note 7, at 80.

¹²² Sloane, *supra* note 12, at 587-92.

¹²³ JOHN RAWLS, *THE LAW OF PEOPLES* 11 (Harvard Univ. Press 1st paperback ed. 2001) (“In the Society of Peoples, the parallel to reasonable pluralism is the diversity among reasonable peoples with their different cultures and traditions of thought, both religious and nonreligious.”).

¹²⁴ Sloane, *supra* note 12, at 592. Value monism, in contrast, must insist that all values can be harmoniously reconciled; “it cannot accommodate fundamentally divergent basic models and values capable of irreconcilable conflict.” Avery Plaw, *Why Monist Critiques Feed Value Pluralism: Ronald Dworkin’s Critique of Isaiah Berlin*, 30 *SOC. THEORY & PRAC.* 105, 106 (2004).

¹²⁵ Ignatieff, *supra* note 7, at 74-75 (“There is no reason to apologize for the moral individualism at the heart of human rights discourse: it is precisely this that makes it attractive to dependent groups suffering exploitation or oppression.”); *see also* HENKIN, *supra* note 3, at xi; *cf.* Donnelly, *supra* note 117, at 77-78.

the ancient metaphor about the fox and the hedgehog that inspired the manuscript's title implies, *Justice for Hedgehogs* is in one sense an extended argument against value pluralism.

II. VALUE PLURALISM AND THE (IR)RELEVANCE OF OBJECTIVITY

Value pluralism animates much of the most influential work in modern liberal political and legal thought. It is the paramount reason that John Rawls found his initial and hugely influential thesis in *A Theory of Justice*¹²⁶ unsatisfactory.¹²⁷ It is also, as especially relevant in the context of this Essay, the assumption on the basis of which he later sought to develop an account of justice appropriate for international law.¹²⁸ While value pluralism plays a particularly prominent role in Rawls's views, its influence is not, of course, so limited. Most other liberal theorists share this presumption. In fact, it is probably not an overstatement to say that "liberal theories presuppose . . . reasonable value pluralism, the assumption that individuals reasonably conceive different and conflicting values."¹²⁹ Dworkin, as a liberal theorist who insists on value monism, is a rare exception in this regard.

Value pluralism has prominent antecedents in political thought.¹³⁰ But it owes its postwar grip on liberal theory to one philosopher more than any other: Isaiah Berlin. Berlin's views have therefore been a frequent target of Dworkin's work, not only in *Justice for Hedgehogs*, which takes its title from one of Berlin's essays,¹³¹ but throughout Dworkin's career.¹³² As early as

¹²⁶ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

¹²⁷ JOHN RAWLS, *POLITICAL LIBERALISM*, at xvii (1993) ("The fact of a plurality of reasonable but incompatible comprehensive doctrines – the fact of reasonable pluralism – shows that, as used in *Theory*, the idea of a well-ordered society of justice as fairness is unrealistic."); see also *id.* at 36 ("[T]he diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.").

¹²⁸ See RAWLS, *LAW OF PEOPLES*, *supra* note 123, at 11-12.

¹²⁹ DAVID JOHNSTON, *THE IDEA OF A LIBERAL THEORY* 26 (1994) (emphasis omitted).

¹³⁰ For example, in the *Federalist Papers*, James Madison ascribed the inevitability of factions within free polities to value pluralism, which he saw as the natural consequence of man's self-love, passions, the fallibility of his reason, and a consequent "zeal for different opinions concerning religion, concerning Government and many other points." THE FEDERALIST NO. 10, at 58-59 (James Madison) (Jacob E. Cooke ed., 1961). In the nineteenth century, John Stuart Mill located value pluralism at the center of the proper conception of the nature and limits of political freedom in a true liberal polity. See JOHN STUART MILL, *ON LIBERTY* 11-12 (Elizabeth Rapaport ed., 1978) (1859).

¹³¹ See ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX* 1 (1953) ("There is a line among the fragments of the Greek poet Archilochus which says: 'The fox knows many things, but the hedgehog knows one big thing.'" (citation omitted)).

¹³² For an early critique, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 268-72 (1977); for a more recent critique, see DWORKIN, *JUSTICE IN ROBES*, *supra* note 10, at 105-

Taking Rights Seriously and continuing to the present in *Justice for Hedgehogs*, Dworkin has argued that Berlin made a fundamental mistake: he thought that equally laudable or worthy values embraced by liberal polities would necessarily, at times, conflict, and that, in the case of at least some conflicts, polities would therefore need to engage in political sacrifices and compromises. Resolving value conflicts would be necessary, but sometimes they would also be tragic or regrettable at some level. Dworkin's view, to the contrary, is that the realm of value is objective and unified such that, properly defined and construed, all values – including those that underwrite human rights – inform and reinforce one another.¹³³ Perhaps that is so, although the argument to this effect in *Justice for Hedgehogs* does not strike me as persuasive. But for international human rights, this particular argument against value pluralism is beside the point.

The fact of value pluralism, as the designation “fact” suggests, is an empirical, not a metaphysical, ontological, or interpretive proposition.¹³⁴ It is principally a descriptive thesis, that is, not a normative one.¹³⁵ Whether Dworkin regards it in this way is unclear. *Justice for Hedgehogs* does, of course, seek to defend the unity and objectivity of value against various forms of relativism and pluralism: it seeks to defend the hedgehog against many different foxes.¹³⁶ But Dworkin has made clear elsewhere that he does not deny the clear empirical fact of moral and cultural diversity: values vary as between cultures,¹³⁷ societies, epochs, polities, and people.¹³⁸ Indeed, he has expressed impatience in this regard with the failure of his perennial critic, Judge Richard Posner, to heed the distinction between issues of moral philosophy, on the one hand, and those of moral sociology, anthropology, or psychology, on the other: “Do the ‘academic moralists’ on [Judge Posner’s] hit list really need to be told, or told so often, that societies, subcultures, and individuals have different moral opinions? Or that a warthog, if capable of such thoughts, might think another warthog beautiful?”¹³⁹ In short, Dworkin

16. See also Ronald Dworkin, *Do Liberal Values Conflict?*, in THE LEGACY OF ISAIAH BERLIN 73 (2001) (discussing Isaiah Berlin’s “ideas [about value pluralism] as a distinct and important philosophical contribution, particularly to political philosophy”).

¹³³ See DWORKIN, DEMOCRACY, *supra* note 2, at 10-11.

¹³⁴ See generally John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985) (arguing that his conception of justice – which requires diversity and plurality – is independent of philosophical and religious doctrines).

¹³⁵ Plaw, *supra* note 124, at 106. Berlin apparently also believed in the normative value of value pluralism (in contradistinction to value monism), *see id.* at 120-23, but for present purposes, that thesis is immaterial; and, at any rate, there is no evidence that Berlin believed in the metaphysically objective truth of any value, including the normative value of value pluralism.

¹³⁶ See DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 7).

¹³⁷ See *supra* note 17.

¹³⁸ See DWORKIN, JUSTICE IN ROBES, *supra* note 10, at 76-78.

¹³⁹ *Id.* at 77-78.

has rightly stressed that we must distinguish questions *of* morality from questions *about* morality.¹⁴⁰ He has said that it would be a logical error – a paradigm of the naturalistic fallacy – to infer from an anthropological platitude, the *fact* of value pluralism, the moral conclusion that no *value* can be objectively true or more persuasively justified than any other.¹⁴¹

Yet it is not apparent that Berlin drew this inference or that he regarded value pluralism as an ontological or metaphysical, as opposed to merely an empirical, proposition. Dworkin describes Berlin's view as "more complex and interesting" than the preceding anthropological platitude – which everyone, himself included, recognizes – because, he says, Berlin "believed that values are indeed objective."¹⁴² He infers this from Berlin's statement that values may clash "within the breast of a single individual."¹⁴³ This statement does not, I think, necessarily establish that Berlin believed in the objectivity of value. That values may clash "within the breast of a single individual" might imply the objectivity of value, but it might also suggest our epistemic or cognitive limits.

In *Two Concepts of Liberty*, after critiquing "rationalist metaphysician[s]" like Plato, Hegel, and Marx, Berlin writes:

if we are not armed with an a priori guarantee of the proposition that a total harmony of true values is somewhere to be found – perhaps in some ideal realm the characteristics of which we can, in our finite state, not so much as conceive – *we must fall back on the ordinary resources of empirical observation and ordinary human knowledge*. And these certainly give us no warrant for supposing (or even understanding what would be meant by saying) that all good things, or all bad things for that matter, are reconcilable with each other.¹⁴⁴

Berlin concludes that "the very desire for guarantees that our values are eternal and secure in some objective heaven is perhaps only a craving for the certainties of childhood or the absolute values of our primitive past."¹⁴⁵ It is hard to construe these and similar statements, which abound in his work, to affirm the objectivity of value in any ontological or interpretive sense. According to one Berlin scholar's analysis, Berlin "oscillates between the

¹⁴⁰ See *id.* at 77.

¹⁴¹ See *id.* at 78, 107.

¹⁴² *Id.* at 107; see also *id.* ("Berlin did not just insist, as so many writers now do, on the anthropological platitude that different societies are organized around very different values Nor does he simply combine that platitude with the further skeptical claim that it makes no sense to speak of 'objective' values at all.")

¹⁴³ ISAIAH BERLIN, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 12-13 (Henry Hardy ed., 1990); see also DWORKIN, *JUSTICE IN ROBES*, *supra* note 10, at 107.

¹⁴⁴ Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY* 213 (Henry Hardy ed., 2002) (emphasis added).

¹⁴⁵ *Id.* at 217.

subjectivist [position, which ‘holds that values are merely constructs of the human mind’] and the realist position.”¹⁴⁶ But Berlin’s insistence on a particular definition of liberty, “negative freedom,” as “the area within which a man can act unobstructed by others,”¹⁴⁷ is best understood as insistence on precision in language and meaning,¹⁴⁸ not as an assertion that this definition of liberty is objective in either a naturalistic or interpretive sense.

What Berlin himself thought, however, is a peripheral academic debate. The real question is how or why the objectivity of value even matters in the domain of international human rights, for absent a shared epistemology of value, the objectivity of values is irrelevant to the political implications that Berlin and other liberal political theorists have inferred from the empirical fact of value pluralism. Whatever else may be said about the “equilibrium epistemology of value”¹⁴⁹ proposed in *Justice for Hedgehogs*, it is neither easy to apply nor broadly shared. Quite the contrary: it is idiosyncratic. It also demands a kind of intellectual labor and idealistic Socratic reflection, which, certainly within the framework of international law and politics, seems quixotic. Jeremy Waldron has argued in a cognate context that for the objectivity *vel non* of value even to be relevant to adjudication, we would need a broadly shared epistemology of value comparable to the one that exists in the realm of the natural sciences.¹⁵⁰

In politics, morality, ethics, and law – and *a fortiori* in international law, which must handle value conflicts, not only *within* a polity, but *among* some 195 or more diverse polities – the force of Berlin’s fundamental point about the inevitability of genuine value conflicts is left intact in the absence of a shared epistemology. Even if, in theory, all values can be reconciled within a polity (through an interpretive discourse whereby citizens work out the best conception of each value), the empirical fact of value pluralism would remain unaffected; and that is the critical issue for a functional conception of international human rights. Although *Justice for Hedgehogs* generally rejects value pluralism, its conception of international human rights, not coincidentally, accommodates the empirical fact of value pluralism. It permits

¹⁴⁶ CONNIE AARSBERGEN-LIGTVOET, ISIAH BERLIN: A VALUE PLURALIST AND HUMANIST VIEW OF HUMAN NATURE AND THE MEANING OF LIFE 4 (2006). True, Berlin says, “There is a world of objective values.” BERLIN, *supra* note 143, at 11. But this is a case of imprecise word choice and a quotation taken out of context. By restoring the context, it is unmistakably clear that Berlin does not mean values exist in some ontological or metaphysical sense. In the very next sentence, he says that by “objective values,” he means “those ends that men pursue for their own sakes, to which other things are means.” *Id.* This is a description of *intrinsic* values, not objective values in the sense Dworkin has in mind.

¹⁴⁷ Berlin, *supra* note 144, at 169.

¹⁴⁸ See *id.* at 170 (“This [definition of freedom] is what the classical English political philosophers meant when they used the word.”).

¹⁴⁹ DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 260).

¹⁵⁰ See Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY* 170, 173-75 (Robert P. George ed., 1992).

reasonable, good-faith disagreements, within some margin of appreciation, about how concrete human rights should be understood and applied in different polities.¹⁵¹ That is unsurprising. The second principle of human dignity tells each person to identify and pursue what counts as success in his or her life.¹⁵² As a social, anthropological, or psychological matter, the answer to this question will differ from person to person, culture to culture, epoch to epoch, and so forth. A laudable feature of the idea of human rights is that it does not insist on a single vision of what qualifies as success – or, in the lexicon of modern liberal political theory, a single “conception of the good.”¹⁵³

III. SOVEREIGNTY AND HUMAN RIGHTS

A final critique of the account of human rights in *Justice for Hedgehogs* will be familiar, even banal, to many contemporary international lawyers. But it bears emphasis because it reflects, I think, a general misconception in the manuscript about the nature and enforcement of human rights. *Justice for Hedgehogs* argues that human, like political and legal, rights operate as “trumps over some background justification for political decisions that states a goal for the community as a whole.”¹⁵⁴ It distinguishes human rights from political rights, not only in terms of their degree of abstraction, but in that they “do not merely trump collective goals. They also trump another principle prominent in international law: sovereignty.”¹⁵⁵ Dworkin seems to have in mind the rare circumstances in which widespread or systematic human rights atrocities, such as a genocide, arguably justify humanitarian intervention.¹⁵⁶ That is a small, and deeply controversial, part of the law and morality of human rights.

Still, in this and other passages, Dworkin associates the violation of human rights with a right of military intervention. He is correct, of course, to say that it would be absurd “to suppose that the . . . United Nations might authorize an invasion of America to install a government that would provide universal health care there or an invasion of Germany to free prisoners convicted of denying that the Holocaust took place.”¹⁵⁷ Such absurdities, I think, in part animate his conception of international human rights as requiring only a good-faith interpretation of the two principles of human dignity; otherwise, military intervention to halt or remedy human rights violations would seem to be

¹⁵¹ See DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 215).

¹⁵² See *id.* (manuscript at 11).

¹⁵³ See *supra* text accompany notes 115-125.

¹⁵⁴ Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 153 (Jeremy Waldron ed., 1984).

¹⁵⁵ DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1 (manuscript at 211).

¹⁵⁶ *Id.* (“If those who claim authority over some territory violate the human rights of those in their power, then other nations are permitted to attempt to stop them if other conditions are met.”).

¹⁵⁷ *Id.*

authorized (at least morally) quite often. But this line of argument betrays a misconception about human rights: while severe and systematic, human rights abuses may justify humanitarian intervention (morally, if not necessarily legally), the mark of a human right is certainly not whether its violation confers on other states, or a coalition of them, a legal right to coerce compliance by violence. Force is a small part of human rights enforcement.

In fact, the best guarantee of human rights is not international law and institutions; it is a well-functioning state, that is, the modern “sovereign” itself.¹⁵⁸ To similar effect, Louis Henkin wrote that

[i]n the ideology of rights, human rights are [“upon society,”] not “against society,” against the interest of society; on the contrary, the good society is one in which individual rights flourish, and the promotion and protection of every individual’s rights are a public good. There is an aura of conflict between individual and society only in that individual rights are asserted against government, against those who represent society officially, and because the human rights idea often requires that an individual’s rights be preferred to some other public good. But this apparent conflict between individual and society is specious; in the longer, deeper view, the society is better if the individual’s rights are respected.¹⁵⁹

After World War II, international law reconceptualized sovereignty: “International law still protects sovereignty, but – not surprisingly – it is the people’s sovereignty rather than the sovereign’s sovereignty.”¹⁶⁰ I will not belabor this point, which has been debated elsewhere,¹⁶¹ except to say that the conceptual conflict *Justice for Hedgehogs* posits between sovereignty and human rights, whereby human rights must sometimes trump sovereignty, seems not only anachronistic, but incongruous in the context of the manuscript as a whole. The gravamen of the argument in *Justice for Hedgehogs* is the unity of value.¹⁶² Hence, for example, liberty and equality, according to

¹⁵⁸ See MICHAEL IGNATIEFF, WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS 19 (1999).

¹⁵⁹ HENKIN, *supra* note 3, at 5.

¹⁶⁰ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 866-67, 869 (1990); see also *id.* at 872 (“International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.”). For additional discussion, see ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 56 (2004).

¹⁶¹ See generally DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS (Harold Hongju Koh & Ronald C. Slye eds., 1999); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

¹⁶² DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 7).

Justice for Hedgehogs, would best be defined such that each informs and circumscribes the other – and similarly with other presumed conflicts of value, such as the idea that constitutional rights in the United States should be conceived as trumps on majority rule, which, while perhaps necessary, often impose a moral cost to democratic values that must be regarded as regrettable in a certain sense.¹⁶³ In *Freedom's Law*, as in *Justice for Hedgehogs*, Dworkin rejects that view, arguing that constitutional rights reinforce rather than conflict with core democratic values, properly understood. Why, then, when it comes to the concepts of sovereignty and human rights, as objective ideals, does *Justice for Hedgehogs* see a conflict requiring the latter to trump the former?

CONCLUSION

In the course of defending the normative universality of international human rights law in earlier work, I wrote that

[w]e live in a world, not of competing relativisms – “these values embody the good for a circumscribed set of persons leading lives in this particular cultural context” – but of competing universalisms – “these values embody *the* good.” Paradoxically, then, the feature of comprehensive “conceptions of the good” that proves most adverse to an international order structured by respect for universal human rights is dogmatic universalism – the claim that one system of values prescribes what “is right” for everyone and can therefore be justifiably imposed, through violence if necessary, on others.¹⁶⁴

In other words, at an abstract level, it is value monism, not value pluralism, that poses the greater threat to human rights. If that is so, however, and if *Justice for Hedgehogs* defends value monism (the unity and objectivity of value), why does its account capture many of our basic intuitions about human rights?

The answer, I think, is that the two principles of human dignity posited in *Justice for Hedgehogs* aptly capture core ideas in the liberal political tradition. The first principle, self-respect, essentially affirms one formulation of Kant's categorical imperative: to say that it is a matter of objective and intrinsic importance that each human life go well is one way of expressing the view that human life must always be treated as an end in itself and never as a means only.¹⁶⁵ The second principle, authenticity, essentially affirms the liberal conception of the self: to say that all human beings have a special, non-delegable responsibility to identify and pursue what counts as success in their lives is to affirm, among other things, the traditional liberal conception of the self as, to quote Robert Nozick's summary, “sentient and self-conscious;

¹⁶³ See RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION* 1, 16-17, 21-31 (1996).

¹⁶⁴ Sloane, *supra* note 12, at 591 (footnote omitted).

¹⁶⁵ See KANT, *supra* note 100, at 55-56.

rational (capable of using abstract concepts, not tied to responses to immediate stimuli); possessing free will; being a moral agent capable of guiding its behavior by moral principles” and therefore an agent that is able “to regulate and guide its life in accordance with some overall conception it chooses to accept.”¹⁶⁶ Compare this to the view expressed in *Justice for Hedgehogs* that human dignity resides in “the challenge of lives to lead and thousands of unscripted decisions to make [W]e must struggle to choose and we can create value – the adverbial value of living well – through our choices.”¹⁶⁷

In short, Dworkin’s account of the moral foundations of human rights offers an apt and succinct way to capture some of our (where “our” refers to contemporary political liberals) core intuitions about human rights. But the reason is not that the two principles of human dignity in *Hedgehogs* describe objective values; it is that they reflect a politically defensible liberal tradition. That tradition includes recognition of the fact of value pluralism, a conception of the self as an agent, a stress on choice as the vehicle by which human beings invest their lives with value, and therefore a commitment to reasonable tolerance of diverse conceptions of the good.

Many of the worst human rights tragedies in modernity – from the Holocaust to Stalin’s purges to Pol Pot’s Cambodia to ethnic cleansing in the former Yugoslavia to the Rwandan genocide to the terrorist attacks of September 11, 2001 – have been carried out by those who thought they knew, like the metaphorical hedgehog, “one big thing” that tied together all seemingly discordant values. As Berlin wrote in a famous passage:

One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals – justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution. This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another.¹⁶⁸

I emphatically do not mean to suggest that Dworkin’s particular version of value monism – which embraces and, in the second principle of human dignity, even, in a particular sense, encourages value pluralism – belongs in this company. But it is far from clear that, as he asserts in *Justice in Robes*, value

¹⁶⁶ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 48-49 (1974).

¹⁶⁷ DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 145).

¹⁶⁸ BERLIN, *supra* note 144, at 212.

pluralists have been responsible for human rights atrocities as often as have the value monists against whom Berlin warned.¹⁶⁹

¹⁶⁹ DWORKIN, *JUSTICE IN ROBES*, *supra* note 10, at 106.