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INCOMMENSURABILITY, SOCIAL PRACTICES AND MORAL DILEMMAS: A REJOINDER TO HEIDI HURD'S ANTI-PERSPECTIVALISM*

INCONMESURABILIDAD, PRÁCTICAS SOCIALES Y DILEMAS MORALES: UNA RÉPLICA AL ANTI-PERSPECTIVALISMO DE HEIDI HURD

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Resumen:

El documento critica el rechazo de Hurd al perspectivalismo relacionado con los roles sobre los deberes morales. La noción de incomensurabilidad de valores de Raz se utiliza para desafiar la tesis de la correspondencia, según la cual la justificación de una acción determina la justificación de permitir o impedir esta acción. En contra de la reconstrucción hohfeldiana de Hurd de elecciones inconmensurables como "libertades" que "carecen de cualquier tipo de valor moral", el argumento destaca el significado moral del hecho de que la elección entre opciones inconmensurables sigue siendo acción por una razón. La inconmensurabilidad se explica, pues, como consecuencia de la dependencia social de los valores con respecto a las prácticas sociales y del papel constitutivo de las convenciones en la configuración de las relaciones sociales, los proyectos personales, los objetivos y las responsabilidades que los definen. Se argumenta que la gravedad del problema del perspec-

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tivalismo para Hurd se debe a su estrecha concepción de la moral y que es superior una concepción más amplia que integre las obligaciones hacia los demás con los requisitos de la integridad personal. Los objetivos, relaciones y proyectos del agente participan en el razonamiento moral, ya que la inconmensurabilidad de valores que posibilitan es necesaria para el pluralismo de valores y la autonomía personal. El argumento concluye sugiriendo que una concepción no positivista e interpretativista de la práctica jurídica, aunque reconozca el combate moral residual, reduciría su ocurrencia y relevancia.

Palabras clave:

Inconmensurabilidad; prácticas sociales; perspectivalismo; valor; dilema moral.

Abstract

The paper criticizes Hurd's rejection of role-related perspectivalism about moral duties. Raz's notion of value incomensurability is used to defy the correspondence thesis according to which the justifiability of an action determines the justifiability of allowing or preventing this action. Against Hurd's Hohfeldian reconstruction of incommensurable choices as "liberties" that "lack moral value of any sort", the argument highlights the moral significance of the fact that the choice among incommensurable options is still action for a reason. Incommensurability is explained, then, as a consequence of the social dependence of values on social practices and of the constitutive role of conventions in shaping social relations, personal projects, goals and the responsibilities that define them. It is argued that the severity of the problem of perspectivalism for Hurd is due to her narrow conception morality and that a wider conception that integrates obligations towards others with the requirements of personal integrity is superior. The agent's goals, relationships and projects take part in moral reasoning since the value incommensurability they make possible is required for value pluralism and personal autonomy. The argument concludes suggesting that a non-positivist, interpretivist conception of legal practice, although acknowledging residual moral combat, would reduce its occurrence and relevance.

Keywords:

Incomensurability; Social Practices; Perspectivalism; Value; Moral Dilemma

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I. Introduction

Heidi Hurd's *Moral Combat* provides a substantial contribution to contemporary moral philosophy by offering a tentative solution to what she describes as a "baffling dilemma" in contemporary political theory. Such dilemma arises from the combination of three principles deeply embedded in legal practices and jurisprudential accounts of law and morality: the principles of *weak retributivism*, which "holds that individuals who are morally justified in their actions ought not to be blamed or punished for those actions"; the *rule of law*, which "requires law to conform to a set of formal values, such as generality and coherence, as a means of protecting substantive moral values like liberty and equality"; and *democracy and the separations of powers*, which "vindicates the right of majorities to be self-governing by assigning policy-making powers to a democratic legislature and restricting the executive and judiciary to the secondary task of policy implementation and application".[1]

The moral dilemma addressed in the book results from the incompatibility between the *correspondence thesis*, which Hurd regards as deriving from the principle of weak retributivism, and the belief in role-relative reasons for actions attached to the practice of legal officials. While the *correspondence thesis* holds that "the justifiability of an action determines the justifiability of permitting or preventing that action" (in such a way that "it cannot be the case that one actor may be justified in performing an act while another may be simultaneously justified in preventing that act)",[2] the argument from

[1] H. Hurd, *Moral Combat* (Cambridge 1999) 1.

[2] Ibid 3.

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moral perspectivalism asserts the existence of *role-relative* reasons for action attached to institutional roles and specifically addressed to legal officials:

> The recognition of role-relative reasons for action puts the principle of weak retributivism in jeopardy, because it entails the indefensibility of the correspondence thesis. If morality requires conduct in accordance with the balance of reasons for action, and if that balance differs between the citizen, judge, and the institutional designer, then it appears that there may be instances in which the punishment of the justified is itself justified.[3]

If perspectivalism is correct, then morality can be contradictory and gladiatorial, inasmuch as it might imply that a person only can fulfill her moral obligations by preventing other persons to comply with theirs. On Hurd's view, the only way out of the dilemma of perspectivalism is to give up the idea of role-relative moral reasons. When considering whether or not a disobeying person deserves to be punished, it is sufficient to establish that this person is justified, and no role-relative considerations should interfere on this moral judgment. If Jane is justified in killing John to prevent him from inflicting harm on herself or another person, then Judge Smith is thereby obliged to acquit Jane no matter what the law says on the issue at stake. If systemic values such as the rule of law, democracy and separation of powers can serve as reasons for action (either to punish or to acquit Jane), it is only because these systemic values are also moral values to be weighed in the same balance of reasons as any other relevant moral consideration.

Our purpose in this article is to explore an objection to this conclusion that Hurd anticipates in the book. According to the objection, the correspondence thesis can be challenged if we are able to show that two valuable actions are of incommensurable value under certain circumstances. The present article offers an argument in support of this objection. We argue that Hurd's retort to the argument from incommensurability fails to provide a convincing ground

[3] Ibid 14 and 15.

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for rejecting the existence of role-relative reasons for action. Let us turn to the objection in the following section.

II. Incommensurability and the Correspondence Thesis

Hurd's solution to the dilemma of perspectivalism is to deny the existence of role-relative moral reasons. "If our systemic values are right-making, then they are right-making for all actors".[4] It must not be the case that Jane is justified in killing John while Judge Smith is justified in punishing Jane: "a refusal to punish those who are justified will not unduly jeopardize our systemic values, because those who violate the law do so justifiably only if their acquittal will not unduly jeopardize the protection of our systemic values".[5]

This solution can be challenged, however, if one can prove that the correspondence thesis is false. Perhaps this is the case for those who believe in the incommensurability of values: "if two apparently codependent actions are of incommensurable value, then it cannot be said that the morality of one corresponds with (or in any other way relates to) the morality of the other".[6]

Incommensurability, as Raz explains, is a failure of transitivity. Two values are incommensurable if it is the case that "it is neither true that one is better than the other nor true that they are of equal value".[7] Under incommensurable options, reason itself appears to be indeterminate. "Reason provides no better case for one alternative than the other…" and we become "free to choose which course to follow".[8]

Raz warns, however, that this sense of freedom can be misleading because the point is not that one course of action is "as good as the other…"; rather, the point is that they are not comparable: "it marks the inability of reason to guide our action, not the insignificance of our choice".[9]

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[4] Ibid 315.

[5] Ibid.

[6] Ibid 31.

[7] J. Raz, *The Morality of Freedom* (Oxford 1986) 322.

[8] Ibid 333 and 334.

[9] Ibid 334.

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According to Hurd, those who believe in the incommensurability of values might deploy two arguments to defy the correspondence thesis. First, they might claim that the incommensurability of value leads to moral relativism, and, second, they might regard incommensurability as an argument for skepticism about the correspondence thesis.[10] While the first argument is easily dismissed because "nothing in the claim that two values are incomparable suggests that their value is relative to anything…",[11] the second argument poses a more serious challenge.

In its stronger form, the objection claims that incommensurability implies that a person may have a *liberty* to engage in a certain action. The word "liberty" is used here in the sense of WN Hohfeld, who distinguishes liberties and permissions as two different kinds of freedom in a wide sense. One has a *permission* if one has a right to act in a certain way, in such a way that "(*i*) others have no right that one do not do the act, and (*ii*) others have a duty not to interfere with one's doing of the act".[12] One has a *liberty* if one has merely a privilege to do an act. "When one has a privilege to do an act, others have no right that one do not do the act, but others also have no duty not to interfere with that act".[13] Hence, if incommensurability implies a Hohfeldian privilege, the correspondence thesis fails because a person might have a liberty to pursue certain value without a correlative duty of other persons to not prevent the former to succeed in such pursuit. As Hurd formulates the objection,

> …if one has a Hohfeldian privilege to do an act, then others have no right that one do not do the act. But others may still have a right to interfere with one's act, and in such cases one has no right that they do not intervene. The correspondence thesis appears to be at risk, because the liberty that licenses one to act does not imply an absence of liberty on the part of another person to prevent one's act.[14]

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[10] Hurd (n. 1) 32.

[11] Ibid 31.

[12] WN Hohfeld, *Fundamental Legal Conceptions* (WW Cook ed, Yale Univ. Press 1919) 36-39. See Hurd (n. 1) 32.

[13] Hurd (n. 1) 32.

[14] Ibid 33.

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In other words, if incommensurability entails liberties —instead of permissions— morality (or at least some moral norms) can drive us into a moral combat, in which a judge can be morally justified to punish a person who justifiably disobeyed the law, and therefore acted exactly as morality required her to act in the relevant case.

Hurd is not convinced by this argument, however, because she believes that the options generated by Hohfeld's privileges "lack moral value of any sort". Hohfeldian liberties, on Hurd's interpretation, "define areas of amoral action", in which actors "are not bound by any maxims of action" and remain "unconstrained and unprotected by morality".[15] In other words, Hurd believes that the argument from skepticism about the correspondence thesis fails because the scope of the liberty to choose from incomparable actions is beyond morality: "that their actions may conflict is thus of no normative significance", for "they are the actions of those in a moral state of nature".[16] Given that the correspondence thesis is only a thesis about the *conditions of moral action*, it is not undermined by the argument from incommensurability, understood as implying Hohfeldian liberties.[17]

Nonetheless, we are convinced that Hurd's rejoinder to the argument from incommensurable Hohfeldian liberties is based on a category mistake about the character of the incommensurable alternatives one might have. As Raz explains in an important footnote, the indeterminacy of reasons to choose between incommensurable values does not imply that this choice is amoral, but only that the reasons one may have to opt for a course of action are neither better nor worse or equal to the reasons for the alternative choice. "To be precise there are reasons for (and against) each of the incommensurate options, and these may be enough to determine their ranking as against other options".[18] When Raz argues that moral values can be incommensurable, he does not remit us to an amoral choice. Each of the choices of a morally responsive person plays a constitutive part in the authorship of her life. These choices are morally sig-

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Raz (n. 7) 334. See note 1.

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nificant because they are "responsive to reasons", as each of us sees them.[19] The reason why incommensurability is morally significant is precisely that it shows that moral considerations are not always measured by a single balance of reasons. When a person opts for one out of two incommensurable values, Raz assumes that she is still acting for a reason, although this reason is incomparable with other reasons that the same person might possess to choose a different course of action. "People endorse their pursuits, relationships, and all they care about for reasons. That is, ...they have them because of their belief in their value".[20] If the choice between these reasons is indeterminate, it is only because these [moral] reasons are also indeterminate in the following sense: "but for the fact that the project, pursuit or relationship is one the person concerned is already engaged in, if he is, the reasons for him to be engaged in it are incommensurate with reasons for him to engage in some other projects, pursuits or relationships, which are incompatible with those he has".[21]

One reason why a person is morally entitled to opt among valuable yet incommensurate goals or pursuits is the dependence of value on social forms. On Raz's account, we should avoid the "misleading picture of there being something, enigmatically, «known as value», the quantity of which is increased by people having rewarding friendships, enriching occupations, etc.".[22] Although it is true that some values and comprehensive goals are comparable to other values and goals, it is equally the case that other valuable options depend on social forms, and part of the social conventions which constitute these social forms entail the incommensurability of such options. In other words,

> ...just as the existence of valuable options depends on social forms so, up to a point, their comparative merits depend on social conventions. In practical thought…, sometimes truth depends on belief. While a person's beliefs that his goal is valuable does not make it so, the social conven-

[19] J. Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford 1999) 19.

[20] Raz, *The Morality of Freedom* (n. 7) 340.

[21] Ibid.

[22] Ibid 344.

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tions regarding the relative value of options do in part determine their value. Social conventions are contingent and finite. They are exhaustible and are bound to leave plenty of room for incommensurability.[23]

When it comes to the foundation of values, Raz believes that most values are dependent on social practices in one of the two following ways: (1) some values are specially dependent on social practices, in the sense that they "exist only if there are social practices sustaining them", and (2) most other values (those which are not specially determined by social practices) are dependent on social practices in a larger sense, "through their dependence on values" that are specially dependent on social practices in the sense of (1).[24]

In certain social relationships like friendship, parenthood or marriage, social conventions underlying and making up such relationships imply that they are incommensurable with other values: "The very relationship between spouses depends… on the existence of social conventions. These conventions are constitutive of the relationship. They determine its typical contours. They do this partly by assigning a symbolic meaning to certain modes of behavior".[25] When it comes to marriage, for instance, it is constitutive of the relationship between spouses that their union is not exchangeable for money or other valuable goods. One might think it is admissible, for Raz, to leave one's spouse for a month in order to do a job abroad and get some money. Yet it is not acceptable, for the same person and for most people who value marriage as a form of life, "to leave the spouse for the same month [only] for an offer of money, even a significantly larger sum of money".[26] The reason many people might accept the former but not the latter is that part of the symbolic meaning of marriage is, in Raz's example, that "the very judgment of companionship is incommensurable with money".[27]

Furthermore, the relationship between friends, or between a parent and a child, or between spouses, and so on, involves a capac-

[23] Ibid.

[24] J. Raz, *The Practice of Value* (Oxford 2003) 19.

[25] Raz, *The Morality of Freedom* (n. 7) 350.

[26] Ibid 349.

[27] Ibid 350.

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ity to have "interest in other people, empathy with them, and other psychological attributes".[28] Some of the central features of such relationships are that they are relationships which "carry distinct obligations" and that the participants of such relationships "are capable of having such relations".[29] Even though not all persons are either capable or willing to assume such relations, inasmuch as they might pursue some other comprehensive goals, it is a constitutive part of the value of such relationships that they are incommensurable with other goals. That is to say:

> Certain judgments about the non-comparability of certain options and certain attitudes to the exchangeability of options are constitutive of relations with friends, spouses, parents, etc. Only those who hold the view that friendship is neither better nor worse than money, but simply not comparable to money or other commodities are *capable* of having friends. Similarly, only those who would not even consider exchanges of money for friendship are capable of having friends. This is a reasoned attitude. It is based on the recognition that it constitutes a condition for a capacity for friendship.[30]

We think that the paragraphs above suffice to show that Hurd is probably incorrect to think that whenever we are at liberty to make a choice between incommensurable comprehensive goals (such as, for instance, forming special relationships) we are required to make morally insignificant options. Although some moral goals are incommensurable, a moral system which is consistent with value pluralism —*i. e.* with the existence of "various forms and styles of life which exemplify different virtues and which are incompatible", in the sense that they "cannot be normally exemplified in the same life—[31] assigns to the choice among incommensurable options a *moral significance* because a person's resolution to commit with one of these options creates for such person "new [moral] reasons which she did

[28] Ibid.
[29] Ibid.
[30] Ibid 352.
[31] Ibid 395.

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not have before".[32] The choice among incommensurable comprehensive goals is neither amoral nor normatively irrelevant. On the contrary, "the fact that goals are integrated with central aspects of our lives, that they represent what matters to us in life, makes them constitutive of our well-being".[33] The moral significance of making these options is analogous to the moral significance of promises for the promisor. As Raz explains, promises are morally important not only because they can create rights for the promisee, but also because of the promisor's *right to promise*, which is "based on the promisor's interest to be able to forge special bonds with other people".[34] Just like the right to promise, the right to choose among a range of options of comprehensive goals is part of this person's *freedom* to construct her own moral world and, as a consequence, is not devoid of moral significance. In the following section, we will dig deeper into some of the implications of the conclusions above.

III. Narrow Morality and Personal Integrity

At the root of Hurd's suspicion about role-relative reasons lies the belief that neither on a consequentialist nor on a deontological conception of morality may individuals have a preference for their own personal goals over those of another person. Neither status-based relationships nor contractual roles can create special reasons for preferring one's own welfare or "the welfare of those who are close to them to the welfare of strangers".[35] Given that a deontological morality "proceeds from what Thomas Nagel has called the 'impersonal standpoint,' it cannot contain a selfish tipping principle that allows persons to prefer their own innocent lives to the innocent lives of others".[36] By

[32] Ibid at 386.

[33] Raz, *Engaging Reasons* (n. 19) 64.

[34] Raz, *The Morality of Freedom* (n. 7) 173. See also J. Raz, "Promises and Obligations" in PMS Hacker and J. Raz (eds.), *Law, Morality and Society – Essays in Honor of HLA Hart* (Oxford 1977) 210.

[35] Hurd (n. 1) 284.

[36] Ibid 278. On Nagel's impersonal standpoint, see T Nagel, *Equality and Partiality* (Oxford 1991) 4.

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the same token, Hurd's claim that it is possible to reconcile the correspondence thesis with a consequentialist morality entails that the right-making consequences must be universal, in the sense that "if it is right for one to do an act, it must be right for all others that one do it".[37]

There are two assumptions underlying this view, and we believe that neither should be comprised in a reasonable moral philosophy. First, it assumes that our moral theory must be confined to a "narrow morality" in the sense of Raz. Second, it presupposes a separateness of persons and a moral theory that fails to assign a proper value to personal integrity. Let us turn to these two shortcomings of Hurd's conception of moral correctness, which, again, are analyzed with the help of distinctions drawn on Raz's writings on political morality.

According to Raz, *morality in the narrow sense* "is meant to include only all those principles which restrict the individual's pursuit of his personal goals and his advancement of his self-interest".[38] Such conception of morality is indifferent to the agent's ethical choices about values and personal goals. A narrow morality "is not "the art of life", *i. e.* the precepts instructing people how to live and what makes for a successful, meaningful and worthwhile life".[39]

Raz is convinced, however, that there is a fundamental objection to the very notion of "narrow morality" presented above:

> The objection is to the notion that there is such a division at the fundamental level, that one can divide one's principles of action into those concerned with one's own personal goals and those concerned with others, in such as way that the principles are independent of each other.[40]

It is a mistake, for Raz, to assume either that one can identify our rights while ignoring what values make our own life good and

[37] Hurd (n. 1) 4.
[38] Raz (n. 7) 213.
[39] Ibid.
[40] Ibid 214.

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meaningful, or that one can understand what makes a life valuable without considering our duties to other persons.[41] It seems more attractive, therefore, to seek for a broader conception of morality, which assigns intrinsic value to some collective goods that lie at the foundation "both of personal goals and of obligations to others".[42] If this is correct, "the confrontational view of morality which pitches a person's own interests and goals as not only occasionally in conflict with his obligations to others but as deriving from independent and fundamentally different sources is essentially an individualistic conception".[43] One must avoid, therefore, both a consequentialist and a deontological morality that are entirely indifferent to one's personal goals, such as a morality that does not allow you to save your own child before saving the life of a complete stranger.

A broader and more attractive conception of morality should include, in addition to universalistic principles of right-making, a special place for the value of personal integrity. When considering this value, Raz makes reference to Bernard Williams' critique against utilitarianism, which we think deserves a literal quote:

> The point is not, as utilitarians may hasten to add, that if the project or attitude is that central to his life then to abandon it would be very disagreeable to him and a great loss of utility will be involved... [O]nce he is prepared to look at it like that, the argument in any serious case is over anyway. *The point is that he is identified with his actions as flowing from projects and attitudes his life is about*... It is absurd to demand of such a man, when the sums come in from the utility network... that he should just step aside from his own project and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his actions in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimific decision; but this is to neglect the extent to which his actions and his decisions have to be seen as the actions and decisions which

[41] Ibid.

[42] Ibid 216.

[43] Ibid.

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> flow from the projects and attitudes with which he is most closely identified. It is thus in the most literal sense an attack on his integrity.[44]

The point of this long quotation is to provide an argument against the assumption of "agent-neutrality" in the assessment of moral consequences (which is assumed by most consequentialist moral theories, including Hurd's version of consequentialism). But the same argument applies also to the definition of the universal principles that should be assumed by a purely impersonal deontological theory.

In opposition to this picture, Raz joins Williams and Nagel in their defense of an *agent-relative* conception of political morality. A more promising moral theory, for him, should provide a "perspective of the relationship between one's own projects and the moral requirements which arise independently of them".[45] Although this theory, if obtainable, may on occasion require a great deal of self-sacrifice, even in these cases it must do so "because of considerations which chime in with one's integrity".[46] Consequentialism, for Raz, "is wrong not because it is rigoristic, but because it misperceives the relationship between morality and integrity",[47] and so is any deontological theory —we add— that misunderstands such relation in a similar way.

IV. Value Pluralism and the Possibility of Moral Conflict

The correspondence thesis, which lies at the core of Hurd's argument in the book, places a significant constraint on the possible content of morality. If the correspondence thesis is true, then morality must be such that it does not allow for the possibility of genuine moral conflicts about the punishment of a justified person. Hurd seems to deny, indeed, both the existence of agent-relative reasons for ac-

[44] J.J.C. Smart and B. Williams, *Utilitarianism: For and Against* (Cambridge 1973) 116 and 117, *apud* Raz (n 7) 284 and 285.

[45] Raz (n. 7) 286.

[46] Ibid.

[47] Ibid.

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tion and the possibility of genuine moral conflicts. Is the correspondence thesis compatible with value-pluralism? In this section we argue that it is not, and that this provides a reason against the general plausibility of such thesis.

Our argument is, again, based on Raz's account of freedom and political morality. According to Raz, moral pluralism is based on two distinct but interrelated claims. First, there must be a "plurality of incompatible but mutually acceptable forms of life". Second, these incompatible forms of life "display distinct virtues, each capable of being pursued for its own sake".[48]

In our understanding of Raz's conception of freedom, value pluralism is not only a fact which must be acknowledged by an external observer or a political theorist. More than that, it is a direct implication of some political values that we consider particularly important in a sound political community. If, for instance, the value of *personal autonomy* is considered morally justified, then our personal well-being is, to a considerable extent, dependent on our ability to be the authors of our own lives. "The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives".[49] But the value of personal autonomy only becomes attractive under certain circumstances, which must be protected in case we are convinced that it is a morally important principle. According to Raz, these circumstances might be referred to as the "conditions of autonomy", which are complex and "consist in three distinct components: appropriate mental abilities, an adequate range of options and [moral] independence".[50] Given the second condition (an adequate range of options), autonomy necessarily requires value pluralism, *i. e.* a range of incomparable yet valuable goals, options and personal projects. Autonomy is not taken seriously unless there are a wide variety of options, which might turn out to be incompatible and competitive with each other.

[48] Ibid 396.
[49] Ibid 369.
[50] Ibid 372.

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One of the consequences of personal autonomy and the variety of options required for a complete account of freedom is, according to Raz, the possibility of *competitive pluralism*. When competitive pluralism arises, there are not only "distinct and incompatible moral virtues", but also "virtues which tend, given human nature, to encourage intolerance of other virtues".[51] In other words,

> Competitive pluralism admits the value of virtues possession of which normally leads to a tendency not to suffer certain limitations in other people which are themselves inevitable if those people possess certain other, equally valid, virtues... This view presupposes a certain conception of moral conflict. It regards some conflicts as *real conflicts* between independent moral considerations, rather than as merely conflicting partial judgments which simply give way without trace to an all-things-considered judgment.[52]

As one can see, Raz's conception of autonomy and value pluralism is not unaware of the fact that morality itself can trigger moral conflicts that should be resolved by moral reasoners and political institutions. The protection of minorities against intolerance, for instance, becomes particularly relevant under conditions of competitive pluralism, and requires that some of the emotional responses to our values be curbed in order to preserve the range of options and the plurality of values which is necessary for an autonomous pursuit of a person's values.

Although competitive pluralism is not to be celebrated and promoted without a note of caution —inasmuch as it may on occasion lead to emotional reactions and intolerance that must be curbed— it seems to be a feature of communities and social forms that promote the value of autonomy and an adequate range of choices for a person's creation of her own moral world.

It is probable, thus, that Hurd's intuition against moral combat is at odds with the conditions of autonomy and with the competitive pluralism that is likely to arise in a liberal form of life. Hurd's

[51] Ibid 404.

[52] Ibid.

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correspondence thesis seems to lose sight of an important aspect of morality itself, which has to do with the incommensurability of virtues and with the factual impossibility of complete realization of all virtues in a single life. The very pluralism that makes autonomy an interesting political value may, on occasion, lead to real conflicts in our moral world.

Consider the case of two people who assign different values to some of the basic forms of good that build up our current moral world. On John Finnis' account of rights, for instance, knowledge and religion are both "basic goods" which are "worthy of life-shaping devotion".[53] Suppose Mary is a biology researcher who dedicates her life to the pursuit of scientific knowledge and Jane is a religious devotee who cherishes her faith about the origin of the universe and the theological foundations of our moral goods. Are their forms of life comparable in any relevant sense? Can either of them be better or equal to its competitor in a single life? Although the answer is probably that some sort of incommensurability is inevitable, these choices are both within the range of moral options available in a community concerned with personal autonomy, although they may occasionally come to conflict. Consider, for instance, a case decided a few years ago by the Brazilian Federal Supreme Court, about the permission of scientific research with human embryos. It is a constitutive part of Mary's moral world that this kind of research is permitted and that the use of embryos to discover the cure for new diseases morally valuable. By the same token, it may as well be the case that under a certain religion it is constitutive of human respect for God and for the potentiality of human life (which is conceived of as God's creation) that certain scientific experiments with human embryos are prohibited. Is not this a real moral conflict? Should not we accept that, under certain cases, morality commits us to incommensurable yet valuable pursuits that might turn us into moral competitors? If the answer is "yes", so that moral conflicts are indeed possible, then Hurd's denial of moral combat is but a misrepresentation of the reality of our moral arguments.

[53] J. Finnis, *Natural Law and Natural Rights* (2a edn, Oxford 2011) 64.

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V. Overcoming Legal Positivism

If the argument of the previous sections is sound, then social forms, status and relationships play a constitutive part in the making of our moral world. Moral values are socially dependent and the social forms to which we appeal in order to understand moral and political values may on occasion create role obligations that are relative to certain agents. Given that some of these role-obligations are incommensurable while simultaneously valid, the correspondence thesis is flawed and moral combat might as well be possible in the adjudication of hard cases. Perspectivalism is true, and judges, lawyers and citizens should prepare themselves for moral combat. How bad is this conclusion?

As Hurd explains in the opening chapter of the book, one of the sources of the dilemma of perspectivalism is the fact that the content of the law is not "perfectly mirrored" in the content of morality, *i. e.* that legal and moral norms are not coextensive. The dilemma of perspectivalism, therefore, "is a real dilemma only if law and morality are noncongruent".[54] We think this poses a real problem if one assumes, as Hurd does throughout the book, a "fairly simplistic positivism" that understands as law "whatever a society's rule of recognition declares it to be (which, in our society, is whatever legal institutions —legislatures, courts, and constitutional conventions— formally announce)".[55] Although Hurd does not acknowledge it expressly, we believe her book implicitly takes for granted some form of exclusive legal positivism, and that this implicit assumption leads her to overstate the importance and impact of moral combat. The possibility of moral combat becomes a worry only if one accepts a strong version of the social sources thesis, which claims that "all law is source-based" and that "its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument".[56] If this is the case, then moral conflicts become

[54] Hurd (n. 1) 16.

[55] Ibid (317).

[56] J. Raz, "Authority, Law and Morality", reprinted in *Ethics in the Public Domain* (Oxford 1994) 210 and 211.

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recurrent, given that legal reasoning is not restricted to institutionalized considerations, and whenever the rules identified with the application of a non-evaluative rule of recognition conflicts with a moral principle one will be faced with a choice between following the law and complying with our moral obligation to do justice in the case at hand.

One way to avoid the problems of moral combat in the adjudication of legal disputes is, therefore, to look for an alternative conception of law. Although we used Raz's insightful account of moral incommensurability to reply to Hurd's book, we learn from Hurd's formulation of the dilemma of moral combat that Raz's conception of law might also be problematic. Exclusive positivism is, in the end, part of the problem that Hurd intended to solve in the book. As Ronald Dworkin persuasively criticizes, this kind of definition of law is guilty of a "heroic artificiality" and "contradicts common sense", inasmuch as no real-world lawyer interprets law as made exclusively of non-evaluative considerations in the sense of exclusive positivism's conception of law.[57] As Gerald Postema argued in an insightful critique of Razian legal positivism, a proper account of legality should understand legal reasoning and legal practice as "continuous with and inseparable from moral reasoning".[58]

If the content of the law is dependent upon a constructive interpretation in the sense of Ronald Dworkin, who argues that law should be seen "not as separate from but as a department of morality…, as part of morality more generally understood but distinguished, with its own substance, because applicable to distinct institutional structures",[59] then the worry of incongruence between law and morality almost disappears. If, as Dworkin suggests in Justice for Hedgehogs, we place the doctrinal concept of law in a "tree structure" as a "branch, a subdivision, of political morality",[60] instead of assuming that law and morality are "different systems of norms and

[57] R. Dworkin, *Justice in Robes* (Belknap 2006) 209.

[58] G Postema, "Law's Autonomy and Public Practical Reason" in RP George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford 1996) 103 and 104.

[59] Dworkin (n. 57) 34 and 35.

[60] R. Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 405.

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that the crucial question is how they interact",[61] then the conflicts between law and morality will be confined to a set of marginal cases. As a general matter, Dworkin treats the "doctrinal" concept of law —the concept we employ when we raise or respond to arguments about what obligations we have given the fact that some institution has acted to establish a law— as "a part of political morality".[62] He rejects, therefore, the "plain-fact view", which assumes that "the law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past".[63] To understand the content of the law it is not enough to acknowledge that a given legislative event took place and to determine the meaning of the words of the authoritative enactments that stem from this legislative event, given that the content of our legal obligation is the *moral obligation* that results from the action of these institutions. The set of moral obligations that we have *in virtue of* the action of our political institutions is what we call the "law".

As we can see, if we adopt Dworkinian interpretivism and depart from the "casual" or untheorized version of legal positivism that Hurd assumed without argument in the book, we no longer need to interpret the rule of law as demanding that judges punish morally justified offenders. We cannot say that one is an offender unless one acts in a *morally* unjustified way. Even though this solution does not entirely exclude the possibility of moral conflicts, it makes them a rare and much less distressing phenomenon, which is confined to the particular cases in which it is not possible to determine the correct moral answer about what to do given the existence of past institutional acts.

For as long as we lack a decisive argument to rule out the possibility of internal skepticism about certain moral matters, we have to admit at least the possibility of there being certain cases where morality lacks a consistent solution to a practical problem. The point is not that internal skepticism is accepted by default but that there may be something in morality or some *positive* argument about an

[61] Ibid 402.

[62] Ibid 405.

[63] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 7.

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important feature of morality which renders moral conflict an actual possibility.[64] In such occasions of hard *moral* cases, our initial assumption that there is a correct moral answer within our reach will fail, and we will not be able to achieve an entirely satisfactory moral judgment. But the possibility of failure is neither a reason to give up the belief in the objectivity of morality nor to withdraw from the intellectual attitude of struggling to make the best moral case for the decision we must make.

The proper way to avoid moral conflicts in adjudication is not to ignore the impact that roles and social practices may have on values and moral obligations, but rather to construct a conception of law which does not depict adjudication and legal practice as morally incoherent. An interpretive conception of law, which attributes a legal status only to propositions that have been interpreted in the best moral sense available in the case at hand, will lead to less moral conflict and less moral combat. Dworkin's account of law seems to be very successful in this task. Even if we admit that moral conflict —including moral conflict in adjudication— is indeed a possibility, we can understand the law in a way that avoids most conflicts between law and morality. If we understand law as an interpretive concept in the sense of Dworkin, it may well be the case that moral combat in adjudication becomes so exceptional that it need not be considered a major threat to the rationality and the legitimacy of adjudication.

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[64] We are relying here on Dworkin's distinction between external and internal skepticism: while the former "claims to argue from entirely nonmoral assumptions", the latter "is internal to morality because it does not". See Dworkin (n. 60) 26.

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