

Staying Busy While Doing Nothing? Dworkin's Complicated Relationship with Pragmatism

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I. Introduction

When we think of Ronald Dworkin, we think of (among other things) objectivity, truth, and the insistence that there is a right answer to moral and legal problems. This seems at first glance deeply opposed to pragmatism, and indeed, Dworkin had few kind words for pragmatists such as Richard Rorty and Richard Posner.¹

For example, in 'Pragmatism, Right Answers, and True Banality',² Dworkin sums up his aims as follows:

First, I shall try to explain...why I believe that what Professor Rorty calls the "new" pragmatism has nothing to contribute to legal theory, except to provide yet another way for legal scholars to be busy while actually doing nothing. Second, I will try to explain why my view that there are right answers in hard cases is not, as it is often said to be, a daring but preposterous metaphysical claim that separates me from more sensible scholars, but an ordinary, commonsensical, extremely weak proposition of law that (as I have often said) it would be silly ever to announce if it had not been denied by so many legal philosophers.³

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1. And vice versa. Dworkin and Posner had an especially public and vicious exchange, beginning with Dworkin's review of two of Posner's books in the *New York Review of Books*: Ronald Dworkin, "Philosophy and Monica Lewinsky", Book Review of *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* and *The Problematics of Moral and Legal Theory* by Richard Posner, *The New York Review of Books* (9 March 2000), online: <http://www.nybooks.com/articles/archives/2000/mar/09/philosophy-monica-lewinsky/> [Dworkin, "Lewinsky"]. This was followed by a letter from Posner and a reply from Dworkin, also published in the *New York Review of Books*: Richard Posner and Ronald Dworkin, "'An Affair of State': An Exchange" Letters to the Editor, *The New York Review of Books* (27 April 2000), online: <http://www.nybooks.com/articles/archives/2000/apr/27/affair-state-exchange/>. Posner responded further in Richard A Posner, "Dworkin, Polemics, and the Clinton Impeachment Controversy" (2000) 94(3) *Nw UL Rev* 1023 at 1032, in which Posner refers to their "twenty years of mutual intellectual enmity". Though pragmatism is not the only issue in this exchange, it is certainly one source of disagreement.
2. Ronald Dworkin, "Pragmatism, Right Answers, and True Banality" in Michael Brint & William Weaver, eds, *Pragmatism in Law and Society* (Boulder: Westview Press, 1991) 359 [Dworkin, "Pragmatism"]. Dworkin is responding here to an essay by Richard Rorty in the same volume: Richard Rorty, "The Banality of Pragmatism and the Poetry of Justice" in Brint & Weaver, *ibid.*, 89.
3. Dworkin, "Pragmatism", *supra* note 2 at 359. My title, it should be clear, draws on this rather harsh assessment of pragmatism.

But there is a puzzle here: when we examine Dworkin's own views carefully, he seems to hold a number of deeply pragmatist commitments. In the just-quoted paragraph, the first half explicitly disclaims pragmatism, while the second half, in its opposition to metaphysics, embraces it. In a baffling way, his exchange with Rorty in this volume reads like two people playing hot potato with metaphysics: neither wants anything to do with it, but each blames the other for its presence in their debate.

This opposition to metaphysics is one of the more important pragmatist streaks present in Dworkin's work, and indeed, by the time of *Justice for Hedgehogs*,⁴ he was more explicit about his view of truth and its connections to the pragmatism of C.S. Peirce. This Peircean pragmatism differs substantially from the pragmatism of Rorty and Posner, as I will discuss below. So we can partially understand Dworkin's hostility towards pragmatism by noting these two very different strands in pragmatism, and seeing that Dworkin falls on one side of the divide, and Rorty and Posner on the other.

But once we unpack Dworkin's relationship to pragmatism, we can see that the differences between these two strands are actually much smaller than the set of commitments which unite them, and which make it sensible to call both strands 'pragmatist'. I will argue that there are important pragmatist commitments underpinning Dworkin's work, commitments that put him philosophically closer in many ways to Rorty than to the analytic legal philosophers with whom he also fought. Dworkin has long staked out a position against analytic legal philosophers that is complex and original, and in which his more pragmatist commitments play a substantial role. Legal philosophy is heavily populated with philosophers of a metaphysical realist bent, and Dworkin's real fight is with them, not with pragmatism. Seeing Dworkin's pragmatism thus helps us to make sense of the seemingly radical position he ends up with in *Justice for Hedgehogs*, and illuminates the way in which that position is opposed to the received view in analytic legal philosophy.

II. Dworkin and Pragmatism

i) Pragmatist Commitments

In Dworkin's debate with Rorty, he refers to his own views as commonsense, non-metaphysical claims, and, as noted above, this fierce disagreement with Rorty about metaphysics is in many ways mysterious, given that they seem to agree that metaphysical speculation is unproductive. I now want to unpack this more carefully. I will start by providing a brief outline of some pragmatist commitments,⁵ against the background of which we will be able to see both their similarities and their differences more starkly.

4. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011).

5. Pragmatism is a broad term for many related positions. Even one of its founders, Peirce, thought the term had been so misused that it was better to abandon it in favor of 'pragmatism', a term "ugly enough to be safe from kidnappers". Charles S Peirce, "What Pragmatism

The foundational idea of pragmatism is that truth is connected to human experience. Peirce's pragmatic maxim is as follows: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."⁶ James's more famous statement is: "Whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other's being right."⁷ We gain our knowledge through experience, through the real world as people engage with it, not via *a priori* reasoning.⁸ Hence, pragmatists are skeptical about metaphysical claims that cannot be investigated through our experience and that don't make a difference to the world as we experience it. Because truth is connected to experience, and there may always be more experiences that could shed additional light on a matter, we can never say that whatever the community happens to believe is *in fact* true—we can rarely say anything is true with any certainty. This fallibilism is a further fundamental aspect of the pragmatist outlook. We can say that the best view on the evidence we currently have points to *X*; *X* is therefore reasonable to believe. But we can't know for sure if we have ever gotten to the truth; it is a continual process of discovery. So our views remain open to revision.⁹

Finally, perhaps one of pragmatism's most important commitments is its insistence that the human perspective is the only one available. "The trail of the human serpent is...over everything."¹⁰ This is James's poetic way of expressing the idea that we inevitably interpret our experiences through a human lens. If the relevant inputs for truth are human experiences, then what we get out will necessarily be colored by a human perspective. We can't stand outside ourselves to see how things 'really are'. There is no archimedean point¹¹ that we can access in order to discover truth—all we can possibly aim at is what is within the grasp of human minds.¹² Pragmatists are thus suspicious of metaphysical absolutes, which assume that we can attain some external perspective on the way the world *really is*.

Is" (1905) 15:2 *Monist* 161 at 166. Thus, here I aim only to summarize some broad commitments that most pragmatists would share. But, as I will discuss below, there are two major strands of thinking within the pragmatist tradition. For an excellent tracing of these alternative pragmatist trajectories (roughly, the Peircean and the Jamesian), see Cheryl Misak, *The American Pragmatists* (Oxford: Oxford University Press, 2013). However, for now, I concentrate on what Peirce and James share.

6. Charles S Peirce, "How to Make Our Ideas Clear" in Vincent Tomas, ed, *Essays in the Philosophy of Science* (New York: The Liberal Arts Press, 1957) at 42.
7. William James, "What Pragmatism Means" in Bruce Kuklick, ed, *Pragmatism* (Indianapolis: Hackett, 1981) 25 at 26.
8. Against the *a priori* method, Peirce argues that "the mind can only transform knowledge, but never originate it, unless it be fed with facts of observation." Peirce, "How to Make Our Ideas Clear", *supra* note 6 at 33. *A priori* reasoning ignores experience and attends only to "that which we find ourselves inclined to believe." Charles S Peirce, "The Fixation of Belief" in Tomas, *supra* note 6 at 20. "It makes of inquiry something similar to the development of taste." *Ibid* at 23.
9. As James puts it, pragmatism "will entertain any hypothesis, she will consider any evidence." James, "What Pragmatism Means", *supra* note 7 at 38.
10. *Ibid* at 33.
11. This is Dworkin's way of putting the same idea, as I will elaborate below.
12. As Peirce writes, "nothing out of the sphere of our knowledge can be our object". Peirce, "Fixation of Belief", *supra* note 8 at 13.

So, in brief, “[t]he central thought of pragmatism is that our philosophical theories must be connected to experience and practice.”¹³ Pragmatism takes seriously the fact that we are human beings, with a necessarily limited viewpoint that we cannot transcend. Experience of the world, as mediated through our senses, is all we have, and our theories must recognize that. We can’t say that something *just is* essentially a certain way.¹⁴ We must appeal to experience to explain why it is best understood in that way.

ii) *Metaphysics*

Dworkin’s main argument against Rorty and the pragmatists is that, while they claim to object to talk of the ultimate structure of reality, it is they who have created this ‘external’, metaphysical perspective. In Dworkin’s view, Rorty mistakenly distinguishes between two levels of discourse: the internal, where people talk about how things actually are, and the external, where philosophers can step outside the enterprise and make claims *about* these disciplines (such as law, science, or morality).¹⁵ Rorty, Dworkin argues, incoherently occupies the very external level that he attempts to disavow.¹⁶

In later work, still fighting over the same issue, but putting it in a different way, Dworkin says that Rorty imagines two ‘language games’: the one we normally play, and a further, archimedean language game, which asks:

not whether mountains exist, but whether Reality as It Is In Itself contains mountains. In that second game, according to Rorty, a dispute has broken out between misguided metaphysicians who say that It Does and pragmatists like him who say that It Doesn’t, that mountains exist only in the ordinary geology game that people mostly play.¹⁷

Dworkin says “pragmatists use scare-quotes and italics like confetti: They say that the bad philosophers think not just that things really exist but that they “really” or *really* exist, as if the quotes or italics change the sense of what is said.”¹⁸ He continues: “These metaphors are meant to suggest, as it were, that the bad philosophers are claiming a new, different, metaphysically special kind of reality, reality beyond the ordinary, a new, supernatural, philosophical level of discourse.

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13. Cheryl Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* (London: Routledge, 2000) at 51.
 14. “A pragmatist ... turns away from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins.” James, “What Pragmatism Means”, *supra* note 7 at 28. The pragmatic approach is an “attitude of looking away from first things, principles, ‘categories,’ supposed necessities; and of looking towards last things, fruits, consequences, facts.” *Ibid* at 29 [emphasis omitted].
 15. Dworkin, “Pragmatism”, *supra* note 2 at 361-62.
 16. *Ibid* at 362: “This is the level Rorty means to occupy: He wants to say, himself now occupying that external level, that these external claims are metaphysical, foundational, and other bad things... The difficulty with this defense, however, is that the external level that Rorty hopes to occupy does not exist.”
 17. Dworkin, *Hedgehogs*, *supra* note 4 at 60-61. A similar argument can be seen in Ronald Dworkin, “Objectivity and Truth: You’d Better Believe It” (1996) 25:2 *Phil & Pub Affairs* 87 at 95-96.
 18. Dworkin, “Pragmatism”, *supra* note 2 at 364.

But it is only the pragmatists who, in fact, ever talk that way. They have invented their enemy or, rather, tried to invent him.”¹⁹

Humorous as Dworkin’s critique here is, he misses what the pragmatist means by emphasizing such words. The emphasis on what is ‘really’ true can be understood as indicating a claim about what is essentially or necessarily the case. The question of what entities the world really contains is precisely what ontology is about. Theorists do have debates about whether *there are really tables* or whether *there are only particles arranged table-wise*.²⁰ In trying to figure out the ‘fundamental structure of reality’, the question of whether mountains *really exist* is something metaphysicians might plausibly debate.

If we see the scare quotes as indicating claims about the very nature of reality, we see that there are many people—call them metaphysical realists—who do make claims phrased just like this. Importantly for present purposes, analytic legal philosophers are especially fond of such claims. Theorists like Joseph Raz, Julie Dickson, and Scott Shapiro make claims about law’s nature, or how law necessarily is.²¹ The idea that we can know about the very essence or nature of something necessitates positing an external perspective, and arguing that from that perspective we can understand what the thing is essentially like—exactly what Rorty objects to when he criticizes theorists who speak this way. So there is a genuine difference of meaning captured by Rorty’s emphasis on *the real*.

In other words, Rorty’s objection to metaphysical realism is not an objection to some invented mode of doing philosophy. It is an objection to a kind of metaphysical realism that is widespread. It seems that Dworkin and Rorty misunderstood each other, and each assumed the other was committed to a mysterious ontology that ought to be rejected. But they both agree that it should be rejected.²² So, if the metaphysical claims are not just nonsense invented by the pragmatist, but are something some people (including analytical legal philosophers) take themselves to be engaged in, then it seems that Dworkin and the pragmatists should be united against this metaphysical project.

Posner, another frequent pragmatist interlocutor of Dworkin’s, also argues against metaphysics, saying that the pragmatism he favors “dislikes distinctions that make no practical difference—in other words, dislikes “metaphysics””.²³

19. *Ibid.*

20. In the debate about whether ordinary objects exist, which seems to be preoccupied with tables in particular, see for example Peter van Inwagen, *Material Beings* (Ithaca: Cornell University Press, 1990), denying the existence of tables, and Amie L Thomasson, *Ordinary Objects* (Oxford: Oxford University Press, 2007) arguing for the existence of ordinary objects such as tables.

21. See, e.g., Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart, 2001) at 17; Scott Shapiro, *Legality* (Cambridge: Harvard University Press, 2011) at 10-12; Joseph Raz, “Can There Be a Theory of Law?” in MP Golding & WA Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005) 324.

22. There is a sense in which Rorty is sloppy in his critique of such metaphysics. He should not say that reality *doesn’t* contain mountains—to say that is to join the metaphysical dispute he rejects. He should, like Dworkin, say that we should do away with this question altogether: we can’t have access to the essence of things. But the general tenor of his objections to metaphysical realism shows that the doing away with such questions is precisely what he is after.

23. Richard A Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990) at 28 [Posner, *Problems*].

Specifically with respect to ontological questions about law, he says that it “has no nature, no essence”.²⁴

As suggested above, this opposition to metaphysics is a core idea in pragmatism. It is worth quoting Peirce’s delightful way of putting the point: “[M]etaphysics is a subject much more curious than useful, the knowledge of which, like that of a sunken reef, serves chiefly to enable us to keep clear of it”.²⁵ Pragmatists of both strands resist metaphysical approaches that suggest that something could be true *not just because our experience shows it to be, but because the thing in itself simply is a certain way, in its essence*. Once we allow that something can be a certain way just in and of itself, without exhibiting any outward signs that experience could attend to, we are talking nonsense. Peirce expounds this through the example of the belief in transubstantiation. All we can mean by wine is that which has a particular effect on our senses. Thus, to hold that the wafer-cakes and wine are *really* something else, though they have all the outward qualities of wafer-cakes and wine “is senseless jargon”.²⁶ The idea of a thing just is, for the pragmatist, the idea of the effects it produces in us, and so we cannot speak of an essence of something that is not reflected in any difference in our experience of it. Views without any practical upshot are not eligible truth-candidates.

So although Dworkin thinks he is objecting to the pragmatists, they are really both objecting to metaphysics. It seems that on this important issue, Dworkin and his main pragmatist interlocutors were actually in agreement. But there is something about which Dworkin genuinely disagreed with both Rorty and Posner, and the next section turns to that issue.

iii) *Skepticism & Relativism*

Here is where the differences between the two strands within pragmatism become clear. Pragmatism’s close association of truth and experience raises the worry that truth cannot be objective; there is no standard beyond our subjective experiences. Some pragmatists, such as Rorty, embrace this and suggest that we should be relativists about truth.²⁷ For Rorty, there is no one way things really are, there are simply various descriptions of the world, which are more or less useful for different purposes;²⁸ the real question is not what is true, but what our peers will “let us get away with saying.”²⁹ This approach finds its ancestor in

24. *Ibid* at 226. See generally Part II: The Ontology of Law (ch 5, 6, and 7).

25. Peirce, “How to Make Our Ideas Clear”, *supra* note 6 at 56.

26. *Ibid* at 42.

27. It is worth noting that skepticism and relativism are distinct positions—skepticism insists that there is no truth of the matter, while relativism is a form of realism, in claiming that there is a truth of the matter, but it is relative to the believer. Both Rorty and Posner are sometimes inconsistent about whether they embrace skepticism or relativism about truth. Dworkin criticized Posner for this inconsistency; see *infra* note 99 and associated text.

28. “There is no activity called ‘knowing’ which has a nature to be discovered, and at which natural scientists are particularly skilled. There is simply the process of justifying beliefs to audiences.” Richard Rorty, *Philosophy and Social Hope* (London: Penguin Books, 1999) at 36.

29. Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979) at 176.

James. While James's formulation of the pragmatic maxim is similar to Peirce's, there is a significant difference between the two: "His way of distinguishing himself from Peirce is to highlight the consequence a belief might make to a *particular* individual."³⁰ This generates a theory of truth that is much more subjective: by including whatever makes a difference to any individual, it opens the door to a great deal of problematically subjective experiences. James's view, in short, is that beliefs are true if they 'pay'—if they work for us in the very broad sense that can include satisfying our desires. Posner too belongs on the relativist side of things. He argues that truth is a 'problematic concept,' and that "[t]he pragmatist's real interest is not in truth at all but in belief justified by social need."³¹

On the other hand, Peirce's brand of pragmatism is decidedly *anti-skeptical*. He insists that we must start from where we find ourselves; we cannot doubt everything all at once. We must never claim to be too certain, but we cannot doubt everything—universal, Cartesian doubt is unpragmatist in denying a huge swathe of our everyday experiences. For Peirce, there must be "real and living doubt".³² It is not that anything is in principle immune from doubt—we must remember our fallibilism—but that we cannot doubt everything at once. Starting from this anti-skeptical position, and holding onto the commitment to prioritizing experiences that are accessible to all, Peirce builds a more objective theory of truth. On Peirce's view, there is an objective truth out there toward which we aim. Seeking truth and settled beliefs is a process he terms "Inquiry".³³ Inquiry aims at settling beliefs, and we obviously prefer true beliefs, as they are more reliable for getting us what we want.

These same skeptical and relativistic tendencies manifest with respect to questions of moral truth. Both Posner and Rorty believe that there is no objective truth about moral value. They argue that, given this, we should simply push and hope for change on the basis of 'human needs' or 'desires'. Rorty has at times described himself as a relativist or as an anti-foundationalist.³⁴ For Rorty, the idea "of 'clarifying our unconditional moral obligations'" is objectionable to pragmatists, because it presupposes "the existence of something nonrelational, something exempt from the vicissitudes of time and history, something unaffected by changing human interests and needs."³⁵ Rorty argues that we should understand moral progress not as a matter of transcending appearance to access reality, but as "a matter of wider and wider sympathy",³⁶ or greater sensitivity.³⁷ He often says things like "A liberal democratic utopia, on the pragmatists' view, is no

30. Misak, *The American Pragmatists*, *supra* note 5 at 58 [emphasis in original].

31. Posner, *Problems*, *supra* note 23 at 464. See also *ibid* at 28, where Posner says that pragmatism "is doubtful of finding "objective truth" in any area of inquiry".

32. Peirce, "Fixation of Belief", *supra* note 8 at 13. Against skeptics who suggest we begin by doubting everything, he says that "the mere putting of a proposition into the interrogative form does not stimulate the mind to any struggle after belief." *Ibid*.

33. *Ibid* at 12: "The irritation of doubt causes a struggle to attain a state of belief. I shall term this struggle *Inquiry*" [emphasis in original].

34. Rorty, *Philosophy and Social Hope*, *supra* note 28 at xxxii.

35. *Ibid* at 82.

36. *Ibid*.

37. *Ibid* at 81.

truer to human nature or the demands of an ahistorical moral law than is a fascist tyranny. But it is much more likely to produce greater human happiness.”³⁸

Posner is declaredly a relativist about moral truth.³⁹ He argues that there are “rudimentary principles of social cooperation”,⁴⁰ but these are too abstract to be genuine moral standards. “If moral relativism means that the criteria for pronouncing a moral claim valid are local, that is, are relative to the moral code of the particular culture in which the claim is advanced, so that we cannot call another culture ‘immoral’ unless we add ‘by our lights,’ then I am a moral relativist.”⁴¹

The relativism and skepticism widely associated with pragmatism has seemed unsatisfactory to many people: there must be something more that can be said about a description than that it is preferable or useful, or that our community won’t challenge it. In the next section I will argue that, for this very reason, Dworkin found the skeptical brand of pragmatism unappealing, but can be understood as a Peircean pragmatist.

iv) Dworkin as an Anti-Skeptical, Peircean Pragmatist

We have seen that there are two camps within the pragmatist tradition, and that while Dworkin agreed with Rorty in his opposition to metaphysics (though he failed to realize this), they did have a genuine disagreement about skepticism, objectivity, and truth. We should put Dworkin in the Peircean camp. And indeed, this is validated by some of Dworkin’s last thinking on the matter. In *Justice for Hedgehogs*, he engages directly with the philosophical nature of truth, and in the process he endorses Peirce’s view, albeit in a somewhat limited way.

Dworkin starts by understanding truth in relation to other ideas, such as inquiry. Truth is the aim of inquiry—we always have it as our goal when we inquire.⁴² It is worth noting immediately the similarities here to Peirce, for whom inquiry and truth are deeply interwoven.⁴³

Dworkin claims that we can make sense of arguments about truth by understanding truth as an interpretive concept.⁴⁴ We treat truth and its related concepts (such as authenticity, accuracy, belief, inquiry, sincerity, etc.⁴⁵) as values. Therefore our theories of truth should be understood as attempts to interpret this practice of truth-seeking and see it in its best light.⁴⁶ For example, we would re-interpret a given theory of truth as a way of weaving together all our truth-related concepts so that it makes interpretive sense to treat truth as that theory demands.

38. *Ibid* at 270.

39. Richard A Posner, “The Problematics of Moral and Legal Theory” (1997) 111:7 Harv L Rev 1637 at 1640-41.

40. *Ibid* at 1640.

41. *Ibid* at 1642.

42. Dworkin, *Hedgehogs*, *supra* note 4 at 152.

43. See *supra* note 33 and associated text.

44. An interpretive concept is one that is shared when we understand its “correct use to depend on the best justification of the role it plays for us.” Dworkin, *Hedgehogs*, *supra* note 4 at 158. This is to be distinguished from criterial concepts and natural kind concepts, where we have to have a decisive test of application if we are to share the concept.

45. See *ibid* at 173-74, for a complete list.

46. *Ibid* at 174.

Dworkin thinks that the right approach is to develop a high-level, abstract concept of truth that would lead to different accounts of truth appropriate for different areas of inquiry.⁴⁷ Different domains, such as morality and science, have such different methods of justification that if we take a monolithic approach and say that one theory exhausts the concept of truth, we will have to conclude that some things are not truth-apt, in particular morality. This leads to the skeptical position Dworkin rejects. His strategy allows us to tailor our theories of mathematical, moral, and other truths to their respective subject matters. The abstract theory of truth would need to show us why all these different standards still count as standards of truth, and it would have to fit and justify our practices around truth and inquiry.⁴⁸

Here, in proposing his “tentative and incomplete suggestion” for such a theory, is where Dworkin engages directly with Peirce’s views:

We might build a suitable supremely abstract theory by taking inquiry and truth to be paired and interwoven concepts, so that we can usefully characterize truth, as I did in the last chapter, as the intrinsic goal of inquiry. We could offer, as our most abstract characterization, that truth is what counts as the uniquely successful solution to a challenge of inquiry.⁴⁹

Different accounts of truth for different domains would then flow from different ideas of success. Dworkin continues: “These sketchy remarks are reminiscent, at least, of much of what Charles Saunders Peirce said about truth.”⁵⁰

However, Dworkin objects to Peirce’s position, arguing that “we must not say, as Peirce once said, that truth is always or just what enables us to satisfy some desire we have.”⁵¹ It is here that we can see the impact of years of debating with Rorty and Posner on Dworkin’s conception of pragmatism; he seems to have internalized the more skeptical view that those thinkers adopt. Peirce said and believed no such thing; he does not hold Rorty’s ‘truth is whatever works’ picture.⁵² Peirce’s claim is that there is an objective truth, and that it is only by conforming to that truth that we will get beliefs that will help us satisfy our aims. Otherwise we will bump up against the hard reality that Peirce agrees with Dworkin is out there.

Peirce defines ‘the real’ as “that whose characters are independent of what anybody may think them to be.”⁵³ And what is real influences our beliefs. We seek true beliefs through the scientific method, which Peirce believes will result in us converging on an answer if inquiry is pushed far enough.⁵⁴ This leads to his definition of truth: “The opinion which is fated to be ultimately agreed to by all

47. *Ibid* at 175.

48. *Ibid* at 177.

49. *Ibid*.

50. *Ibid*.

51. *Ibid*.

52. I briefly unpack Peirce’s objective view of truth in what follows, but for an excellent and deep analysis of Peircean pragmatism and a defense of its objective character, see CJ Misak, *Truth and the End of Inquiry: A Peircean Account of Truth*, 2nd ed (Oxford: Clarendon Press, 2004).

53. Peirce, “How to Make Our Ideas Clear”, *supra* note 6 at 51.

54. *Ibid* at 53.

who investigate, is what we mean by the truth, and the object represented in this opinion is the real.”⁵⁵

When Peirce says that truth “is distinguished from falsehood simply by this, that if acted on it should, on full consideration, carry us to the point we aim at and not astray”,⁵⁶ we can see the seeds of the mainstream understanding of pragmatism. It sounds as though it rests truth on what someone might find useful to believe. But it is not right to say that Peirce holds a view according to which truth is a matter of desire-satisfaction. He identifies a strong connection between the truth and what works for us, but he articulates it thus: “It is certainly best for us that our beliefs should be such as may truly guide our actions so as to satisfy our desires; and this reflection will make us reject every belief which does not seem to have been so formed as to insure this result.”⁵⁷ Hence, what Peirce is saying is that it is good for our beliefs to “work”—we want beliefs that serve us in our various aims—but whether or not they will work is constrained by reality. This is very different from saying that whatever happens to “work” is in fact true.

Dworkin is hesitant to fully embrace Peirce, and thinks pragmatism has to operate only in a more abstract role, helping us to choose our theory of truth for different domains.⁵⁸ But he need not be so tentative in his endorsement. The better way of understanding Peirce is that he holds a view very like Dworkin’s and very much opposed to Rorty’s. Dworkin is right that Rorty’s pragmatism would tell us that truth is whatever seems good to us. But when we apply Peirce’s, the story is different. Peirce’s view agrees with Dworkin’s: truth is not about what is delightful or useful. It is about, as Dworkin puts it, “the uniquely successful solution to a challenge of inquiry.”⁵⁹ We find that solution by testing what works, what guides our actions given the conditions of the external world.

Dworkin’s real concern is that adopting pragmatism will lead to skepticism, especially in the scientific realm, so he thinks he cannot fully sign on to Peirce’s account. But Peirce’s pragmatism is less skeptical than Dworkin seems to think, and Dworkin should be willing to adopt it. In light of Dworkin’s hesitance to fully embrace a Peircean pragmatist stance, and also because his comments about Peirce were limited and came at the end of a long career, I want to now spend a little time showing that they were not mere throwaway comments, and that a careful reading of Dworkin’s views throughout his career, paired with a thoughtful understanding of Peirce, validates placing Dworkin in the Peircean pragmatist camp.

Dworkin has long argued against skepticism, distinguishing between two kinds.⁶⁰ There is internal skepticism, which must be internal to morality—it

55. *Ibid* at 53-54 [footnote omitted].

56. Peirce, “Fixation of Belief”, *supra* note 8 at 30.

57. *Ibid* at 12.

58. Dworkin, *Hedgehogs*, *supra* note 4 at 177.

59. *Ibid*.

60. “Internal skepticism about morality is a first-order, substantive moral judgment. It appeals to more abstract judgments about morality in order to deny that certain more concrete or applied judgments are true. External skepticism, on the contrary, purports to rely entirely on second-order, external statements about morality. ... internal skepticism stands within first-order, substantive morality while external skepticism is supposedly Archimedean: it stands above morality

makes claims about the way things morally are (that there is *in fact* no right answer), but these are positive claims that must still rely on an anti-skeptical view further down. This is at least a coherent position, though one Dworkin argues against in the case of morality. He rejects even the possibility of the alternative—external, archimedean skepticism.⁶¹ The only question on the table is *which* moral views are right, not *whether* any can be. Any claim that there is no right answer or that there is no ‘truth of the matter’ about what is right has to be understood as a substantive claim about what we should believe, morally speaking. It must be backed by a moral argument that there is no truth of the matter. It cannot be an external moral claim about what is the case with respect to moral claims generally.

An important point to understand about Dworkin’s argument here is that it is not only an argument against the external skeptic; it is also an argument against the external realist.⁶² He objects to everyone who grounds morality on some sort of external data, either to deny its truth, or to say that we can access it. This is important: he’s denying the metaphysics of realism, not embracing moral realism. He is a moral realist in the sense that he believes there are objective truths about value, but not in the commonly understood metaethical sense of one who thinks that moral truth can be grounded by something in the world, something other than value claims. His argument distilled is this: “Philosophy can neither impeach nor validate any value judgment while standing wholly outside that judgment’s domain.”⁶³ “There is no neutral scientific or metaphysical plane on which we can stand finally to adjudicate which of different views about equal concern or liberty or democracy or any other opinion about right or wrong or good or bad is the best or true one.”⁶⁴

Dworkin’s insistence that there is no archimedean point from which to access truth is precisely the pragmatist’s view. We cannot be external skeptics, because this means stepping outside experience to talk about what can ground truth. Dworkin and the pragmatists agree that we must drop the metaphysics that most philosophers think underpins moral theory—the metaethical disagreement. Moral skepticism, then, can only be internal, and it is then itself a moral position. It makes claims that compete with other substantive moral claims. The claim that there are no reasons is itself a moral claim.⁶⁵ Dworkin’s view that there is

and judges it from outside.” *Ibid* at 31. Dworkin has made this point about skepticism consistently: see Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986) at 76-86, and his extended treatment of the issue in “Objectivity and Truth”, *supra* note 17.

61. Dworkin, *Hedgehogs*, *supra* note 4 at 25: “I insist that any sensible moral skepticism must be internal to morality.”

62. *Ibid* at 37. “I mean my arguments in the next few chapters to embrace all forms of external skepticism and, indeed, all forms of what might seem the opposite view: that we can have external, nonmoral reasons for believing that our moral opinions can be true.”

63. *Ibid*.

64. *Ibid* at 12.

65. *Ibid* at 44. CI Lewis, the heir to Peirce’s views about truth and objectivity, makes the same argument: “Those who would be serious and circumspect and cogent in what they think, and yet tell us that there are no valid norms or binding imperatives, are hopelessly confused, and inconsistent with their own attitude of assertion.” Clarence Irving Lewis, *An Analysis of Knowledge and Valuation* (La Salle: The Open Court, 1946) at 481.

no escape from the making of moral arguments, using the experiential data that we are given, embodies several pragmatist impulses—the idea that truth must be responsive to experience, the anti-archimedeanism, and the anti-skeptical stance that insists that we must start where we find ourselves.

Part of the anti-skeptical stance shared by Dworkin and Peirce is the idea that we cannot question everything at once, and so we must take for granted, at least in the course of inquiry and argument, some set of views, in order to examine a particular subset. This is Peirce's idea of 'regulative assumptions.'⁶⁶ The thought is that we need to have a belief that a truth exists, and we must proceed on the basis of what we take to be true, keeping in the background the possibility that we might be proven wrong. At one point, Dworkin makes a very similar point. He argues that truth is so important in the political realm that we cannot be value skeptics: "Politics is coercive: we cannot stand up to our responsibility as governors or citizens unless we suppose that the moral and other principles on which we act or vote are objectively true."⁶⁷ It is easy to bristle at this argument: just because it would be bad if there were no objective values doesn't mean there are any. But we must be careful: Dworkin is talking about the philosophical attitude we should take. This is a point about how humans think, not about *what there is*. We cannot be effective citizens unless we do take for granted certain things. We cannot help but suppose that there is a truth about value. Dworkin makes this kind of claim in other works, too. In *Law's Empire* he uses the famous metaphor about repairing a boat: "We can only inspect and reform our settled views the way sailors repair a boat at sea one plank at a time, in Otto Neurath's happy image. We must hold constant certain parts of our attitudes and convictions about law, as not under present study, in order to evaluate and refine the rest."⁶⁸ This reads like a restatement of Peirce's idea of regulative assumptions: we don't actually conclude that such assumptions are true; rather, since we cannot doubt everything all at once, we hold certain things steady while we examine other parts of our thought.

Dworkin has long been insistent about the objectivity of both moral and non-moral truths. One way of understanding objectivity is as a sort of externalist, god's-eye view that can see how the world really is, freed of our subjective perspectives. But if Dworkin means this kind of objectivity, it will conflict with his anti-archimedeanism, which, as discussed above, is the cornerstone of his extensive treatments of truth and objectivity over the years. So it cannot be this sort of objectivity that he insists on. Dworkin's idea of objectivity is better understood as the view that truth is independent of what people think about the matter. What is wrong does not depend on our views. When we say our moral views are objectively true, we mean to say that "[t]hey would still be true... even if no one but me thought them true—even, indeed, if I didn't think them true."⁶⁹ He says

66. See Misak's discussion in *The American Pragmatists*, *supra* note 5 at 50-52.

67. Dworkin, *Hedgehogs*, *supra* note 4 at 8.

68. Dworkin, *Law's Empire*, *supra* note 60 at 111.

69. Dworkin, "Objectivity and Truth", *supra* note 17 at 97. See also Dworkin, *Hedgehogs*, *supra* note 4 at 54. This is a Peircean pragmatist view of objectivity, a view very similar to that

that people who use the term ‘objectively’ when talking about their moral views are not positing some external realm from which we can determine objective truth, but are merely clarifying their opinions, distinguishing them from other opinions which they regard as subjective, or just a matter of taste.⁷⁰ It is a way of emphasizing that the thing in question is “just plain wrong, not wrong only because people think it is.”⁷¹ Dworkin’s objectivity preserves our ability to say, for example, that slavery was wrong even when widely practiced. But we make that claim from an internal, human perspective, not from a position of metaphysical objectivity. Dworkin’s objectivity does not depend on a god’s-eye view. It is not about a perspective beyond the human that the pragmatist would insist is inaccessible to us.

Similarly, Peirce seeks a method of settling belief that is determined by something external to us, “something which affects, or might affect, every man.”⁷² This is one way in which Peirce distinguishes himself from James, who wanted to allow private experiences, such as divine revelation or mystical experiences, into the relevant category of experience on which we build our beliefs.⁷³ Peirce was a strong believer in the scientific method, and in his view, this was its core demand: we must appeal to things accessible to all in answering our questions.⁷⁴ In this sense, Peirce is deeply committed to a principle of objectivity. His method of fixing belief, he says, is the only one of those he considers that actually has an idea of right and wrong, a sense of objectivity.⁷⁵

Though objectivity of this sort implies that it is not any one person’s opinion that determines what is true, it is still in an important way tethered to the *human* perspective. “[R]eality is independent, not necessarily of thought in general, but only of what you or I or any finite number of men may think about it... though the object of the final opinion depends on what that opinion is, yet what that opinion is does not depend on what you or I or any man thinks.”⁷⁶ In other words, truth is still a matter of how humans see the world, but any given human may be mistaken. What we aim at is not some god’s-eye picture of the world—we could not possibly aim at that—but the best, most well-informed, *human* understanding of the object under consideration. In this way, pragmatism makes truth something that is at least in principle accessible to us, though we may never reach it on a given topic in our lifetimes, or even in the lifetime of the human race.

held by Peirce’s successor, Lewis. Misak traces the Peircean strand of pragmatism through Lewis, who held that “[w]hat is valuable is not equivalent to what is immediately perceived as valuable by this or that person.” Misak, *The American Pragmatists*, *supra* note 5 at 187. Put another way, “For Lewis, value ascriptions are subjective in the sense that they boil down to how human beings would experience a thing or an act. But they are not subjective in the sense that if I value *A*, then *A* is valuable or in the sense that only if I value *A* is *A* valuable.” *Ibid* at 188. This is precisely Dworkin’s objectivity.

70. Dworkin, “Objectivity and Truth”, *supra* note 17 at 98.

71. *Ibid*.

72. Peirce, “Fixation of Belief”, *supra* note 8 at 25.

73. See William James, “The Will to Believe” in *The Will to Believe and Other Essays in Popular Philosophy* (New York: Dover, 1956).

74. Peirce, “Fixation of Belief”, *supra* note 8 at 25.

75. *Ibid* at 27.

76. Peirce, “How to Make Our Ideas Clear”, *supra* note 6 at 54.

For Dworkin, the truth of a moral claim “is a matter of moral judgment and argument.”⁷⁷ He notes that most philosophers deny this: they think the truth of moral propositions is a metaphysical matter, about the presence or absence of “chimerical properties or entities ‘in the world’”.⁷⁸ We talk in an ordinary, commonsense way as though there are moral facts, he says. But when philosophers take these comments about facts to indicate some further metaphysical assertion, they invent “entirely bogus philosophical projects.”⁷⁹

Again, we should note Dworkin’s denunciation of metaphysics. These ‘bogus philosophical projects’ are the projects of the metaphysical realists, who insist we can uncover the nature of morality (or law, or tables). What Dworkin wants to defend is what he calls the “ordinary view” of moral truth: that moral opinions can be objectively true.⁸⁰ Just as with his objections to Rorty mentioned in the opening of the paper, he insists he is simply talking about truth in an ordinary sense, not a metaphysical sense. He aims to validate what seems incontrovertibly true: that there are moral truths. And he wants to do so without metaphysics. This is a Peircean pragmatist project.

Dworkin’s view of moral truth, in brief, is something like this. Moral claims are made true by good arguments for their truth. We are justified in thinking a moral judgment is true “when we are justified in thinking that our arguments for holding it true are adequate arguments.”⁸¹ This might all sound circular, he says, but it is no more so than science, in its reliance on the scientific method, a standard internal to science.⁸² All we can do is aim at a comprehensive account, and argue responsibly. The only guidelines we can provide for seeking moral truth are about the way in which we form our beliefs. We must act with moral responsibility.⁸³ This shares a deep structure with Peirce’s argument in “The Fixation of Belief”, where Peirce focuses on different methods of establishing belief, as

77. Dworkin, *Hedgehogs*, *supra* note 4 at 9.

78. *Ibid.*

79. *Ibid.*

80. *Ibid.* at 27. In his appeal to the ordinary, he is taking seriously our experience of moral reasoning and judgment. This is very pragmatist. For example, he sounds very much like Peirce insisting that we cannot be skeptical about everything when he says: “*That* there are truths about value is an obvious, inescapable fact. When people have decisions to make, the question of what decision they should make is inescapable, and it can be answered only by noticing reasons for acting one way or another”. *Ibid.* at 24. There are some ways of viewing the world that we cannot eschew just by adopting a skeptical posture.

81. *Ibid.* at 37.

82. *Ibid.* at 38.

83. *Ibid.* at 109. The project of moral responsibility is an individual work; we can only really test integrity for our own, authentic, set of views. Our encounters with others do however play a role. There is a noteworthy similarity between Dworkin and Peirce here too. Dworkin states: “Of course it should give us pause that others disagree with what we find so plain. How can I be sure that I am right when others, who seem just as intelligent and sensitive, deny that I am? But we cannot take the fact of disagreement itself to count as an argument that our moral convictions are mistaken.” *Ibid.* at 47. For Peirce, the idea is the same: “The man who adopts [the method of tenacity] will find that other men think differently from him, and it will be apt to occur to him, in some saner moment, that their opinions are quite as good as his own, and this will shake his confidence in his belief.” Peirce, “Fixation of Belief”, *supra* note 8 at 16. Just as with Dworkin, this only prompts doubt, which spurs us seek settled beliefs. It does not disprove the view.

opposed to the content of the belief in question.⁸⁴

Dworkin's approach doesn't guarantee truth. "But when we find our arguments adequate, after that kind of comprehensive reflection, we have earned the right to live by them. What stops us, then, from claiming that we are certain they are true? Only our sense, confirmed by wide experience, that better interpretive arguments may be found."⁸⁵ This is exactly Peirce's message about the distinction between truth and certainty. We can aim at objective truth, but we can never be certain that we have reached it. "The most that can be maintained is, that we seek for a belief that we shall *think* to be true."⁸⁶ This may sound like a disappointing redirection of our efforts, but careful reflection will show that it is not a redirection at all, but a more accurate description of what we in fact do: "nothing out of the sphere of our knowledge can be our object",⁸⁷ so it is plain that, given the limitations of our human minds, the most we *can* seek is what *we understand* to be true.⁸⁸

For pragmatists, truth is connected to experience, and humans are the arbiters of what is true. But the claim is not that whatever humans happen to believe is in fact true. This is a subtle point, but an important one to get right. It is that there is nothing outside of us that could be the judge: we must assess what's right and wrong, true and false, from within the human perspective. We might get it wrong for a while, perhaps forever.⁸⁹ But that is the crucial point: we might be wrong. The claim is not that whatever we happen to believe is true for that reason.⁹⁰ It is important to distinguish between truth and what is reasonable to believe. What is reasonable to believe at a given time, on the basis of the evidence so far accumulated, is relative to that evidence, and can change over time. But what is true does not change. Our only test of whether a view is wrong is if it fails to stand up to the human experiences we have so far collected. But this does not make truth relative.

So, we have seen that Dworkin rejects pragmatism in his debates with Rorty and Posner, but he rejects it only because he equates it with two claims that are

84. Peirce, "Fixation of Belief", *supra* note 8.

85. Dworkin, *Hedgehogs*, *supra* note 4 at 39.

86. Peirce, "Fixation of Belief", *supra* note 8 at 13 [emphasis in original].

87. *Ibid.*

88. If I may be permitted a speculative sociological point, I think people take issue with Dworkin's 'one right answer' claim because they confuse the idea of there being a right answer with the idea that we can be certain of what it is. We can never be certain, and in a very Peircean way, Dworkin recognizes that. But he sometimes speaks with such certainty that it can mislead his reader into thinking he means to make a stronger claim. In fact, he is clear about the lack of certainty we can assert: "Absolute confidence or clarity is the privilege of fools and fanatics. The rest of us must do the best we can: we must choose among all the substantive views on offer by asking which strikes us, after reflection and due thought, as more plausible than the others. And if none does, we must then settle for the true default view, which is not indeterminacy but uncertainty." Dworkin, *Hedgehogs*, *supra* note 4 at 95-96.

89. Peirce, "Fixation of Belief", *supra* note 8. As Peirce writes, "the true conclusion would remain true if we had no impulse to accept it; and the false one would remain false, though we could not resist the tendency to believe in it." *Ibid* at 7.

90. Dworkin makes the point that we can say that a particular political solution or scheme seems right to us for the time being, even if we lack a comprehensive theoretical backing for it. "That is not to say, however, that the particular accommodation proposed for the present case is the best one *because* it seems or feels best to us." Dworkin, "Pragmatism", *supra* note 2 at 372-73. This is a crucial distinction, and it is precisely the difference between Peirce and Rorty: where Rorty thinks that our own feelings can validate a belief, Dworkin and Peirce do not.

not obviously core tenets of pragmatism. First, the idea that it entails positing a higher metaphysical plane from which to make claims about the nature of reality. Second, a strong skepticism about truth. The former is clearly no part of any pragmatist view. The latter is part of only one tradition within pragmatist thought. Dworkin's association of skepticism with pragmatism generally is what explains his hostility to it. It is this skepticism within Rorty and Posner's strand of pragmatism that is the target of Dworkin's forceful objections.

But I have argued that Dworkin's views share a great deal with pragmatism, in particular Peircean pragmatism. I think it is plausible to call Dworkin a Peircean pragmatist.⁹¹ The Peircean pragmatist shares his objections to both the 'gods-eye view' and to skepticism about truth. As I have shown, Dworkin is deeply committed to taking experience seriously. Experience is the only thing to which we can appeal in deciding what is true or right. But that is the crucial point: we appeal to it in search of truth, not to vindicate our own preferred stance, as the more relativistic pragmatist might think.

I have also tried to demonstrate that Dworkin's pragmatist commitments are not just passing remarks, but are deeply held views, and are part of his position throughout his career. These same ideas were fundamental in his other disagreements, with analytic legal philosophers. Once we see the centrality of his anti-metaphysical views and his anti-archimedeanism, we can understand how foundational his disagreement with analytic legal positivism really was. I explore this in more depth in the final section.

IV. Implications for Legal Philosophy

Dworkin's pragmatist commitments—primarily, his rejection of metaphysics and his anti-archimedeanism—have deep and important implications for how we do legal philosophy. Here I offer a sketch of what I think are two important consequences. First, it does not mean that "legal pragmatism", as espoused by thinkers like Posner, should be accepted. Second, it may mean discarding or re-framing certain questions which have preoccupied legal theorists.

i) Legal Pragmatism

Posner thinks there are a number of consequences that flow from accepting a pragmatist approach. Some of these I am either in agreement with or ambivalent about. For example, Posner believes that pragmatism encourages us to permit free speech so as not to foreclose inquiry on a subject—it suggests that we should maintain a marketplace of ideas.⁹² And he says it encourages us to be

91. I want to note that, while I think it is appropriate to label him as such, I am uninterested in having a terminological dispute. Perhaps because of Dworkin's resistance to the narrower, skeptical subset of pragmatism, he would reject the label altogether. But in light of the arguments made above, it seems clear that he has some deeply pragmatist commitments, and it is the substance of these commitments, and their implications, that matter, not the label.

92. Richard A Posner, "What Has Pragmatism to Offer Law?" in Brint & Weaver, *supra* note 2 at 36-37.

critical of “mysterious entities” in law, such as intent, free will, and causation.⁹³ A pragmatic jurisprudence encourages us to redescribe these ideas in less mysterious ways. Neither of these are particularly objectionable conclusions, but nor are they distinctly pragmatist.

However, there is one main upshot that Posner argues is a result of his pragmatism which I strongly reject. This is his particular attitude to adjudication, which he calls pragmatic adjudication. Pragmatic adjudication counsels us to prioritize economic and utilitarian calculation in deciding cases.⁹⁴ Posner says that we should reason backwards, from what works, what is socially good or efficient, not from what rule already exists and whether it is analogous to the current situation.⁹⁵ This applies to statutory and constitutional interpretation too; pragmatists are not interested in whether something is the ‘real’ interpretation of the framers’ views. “They are interested in using the legislative or constitutional text as a resource in the fashioning of a pragmatically attractive result.”⁹⁶ Posner argues further that there is a connection between pragmatism and economic analysis of law.⁹⁷

The first point I want to make here is that, whatever we think about the merits of Posner’s view, it simply doesn’t follow from a Peircean pragmatist account of truth. One might think that metaphysics is out, and objectivity and truth are matters of human inquiry—one might adopt a wholly Peircean pragmatist stance—and yet think that the upshot of that inquiry is that, in the context of deciding cases, consequentialism and economic analysis have no priority as a way of looking at the decision at hand. So Dworkin as I have interpreted him need not adopt a pragmatic approach to adjudication.

But we can go further than that: even on the skeptical pragmatist view, it is not obvious that pragmatic adjudication of this sort follows. Indeed, Dworkin has criticized this position as internally incoherent. Posner tries to substitute consequential reasoning for moral reasoning when that itself is another form of moral reasoning, and relies on moral judgments. As Dworkin says, “Lawyers and judges must appeal to (or in any case make assumptions about) moral or political principles in order to decide whether the projected consequences of one decision are better than those of another.”⁹⁸ Both Rorty and Posner make the mistake of inconsistently embracing both skepticism (there is no moral law to appeal to) and realism (we should do what produces the most happiness).⁹⁹ Dworkin argues that Posner repeatedly appeals to moral argument in making his claims, undermining

93. *Ibid* at 37.

94. Richard A Posner, “Pragmatic Adjudication” (1996) 18:1 *Cardozo L Rev.* See also Posner, *Problems*, *supra* note 23 at 457: “We might do best to discard the term “interpretation” and focus directly on the consequences of proposed applications of statutory and constitution provisions to specific disputes.”

95. Posner, “What Has Pragmatism to Offer Law?”, *supra* note 92 at 39.

96. *Ibid*.

97. *Ibid* at 42.

98. Dworkin, “Lewinsky”, *supra* note 1.

99. See Ronald Dworkin, “Darwin’s New Bulldog” in *Justice in Robes* (Cambridge: Harvard University Press, 2006) 75 at 89-91, for a good discussion of relativism and Posner’s confused and contradictory versions of it. The point is being made against Posner but applies equally to Rorty.

his claim that morality should be rejected: “[T]hough he aims to show that both ordinary people and judges can dispense with moral theory, his own arguments again and again fall back on just such theory.”¹⁰⁰ Similar points can be made with respect to Rorty. There is no escape from making substantive moral claims. Thus, this attitude of skepticism supplemented by hope for the future and some form of consequentialist reasoning is inconsistent.

Posner’s legal pragmatism—with its insistence on consequentialist reasoning without any foundation of moral truth—is unstable and untenable. Further, it is pitched at a very different level than philosophical pragmatism as a theory of truth. Whatever we think about Posner’s pragmatic adjudication, it has no necessary relationship to philosophical pragmatism. Peircean pragmatism does not commit us to legal pragmatism, as understood by Posner, nor indeed to any particular claims about how judges ought to decide cases. It is a theory about how we establish truth, but it is open to any number of different discoveries about what is, in fact, true. Thus we cannot say in advance that any one view of what should be done flows from this framework.

ii) *Eliminativism*

A further upshot for legal philosophy is the rejection or reformulation of certain questions.¹⁰¹ I want to suggest that Dworkin’s unique outlook on legal philosophy was a result of his pragmatism, and that much of the debate between him and other legal philosophers can be understood as stemming from different ideas about what questions are answerable.

The most substantial change—or what was perceived as a change, though I will argue it was continuous with his earlier views—Dworkin introduces in *Justice for Hedgehogs* is the claim that we have to abandon what he calls the ‘two-systems view’, where law and morality are understood as separate realms, in favor of the ‘one-system view’, where law is a branch of morality. Dworkin argues that on the two-systems view, “there is no neutral standpoint from which the connections between these supposedly separate systems can be adjudicated.”¹⁰² Whether we treat the question of the connection between law and morality as a legal question or a moral one, we will beg the question in one direction or the other, by supposing that morality is in or out of the material properly appealed to. To understand this objection, we must keep in mind his arguments about truth and morality. There is no metaphysical plane we can access to see what law really, intrinsically is like, so any standpoint we take to assess it must be a human one. As Dworkin points out, the problem is that if we try to treat it as a legal question, we can’t answer it without building in positivism or non-positivism—we can’t

100. *Ibid* at 76.

101. Posner believes that his pragmatism implies that we should do away with theorizing about law’s ontology, dismissing such questions as empty. And while we can disagree with the relativistic, economic-focused project of judging that he thinks should replace these questions, it is worth exploring whether he is right about the negative point.

102. Dworkin, *Hedgehogs*, *supra* note 4 at 402-03.

interpret the legal material without a theory in hand about whether morality is in or out. We must either suppose that the material properly appealed to includes principles as well as pedigreed rules, or that it doesn't. And either way, we will beg the question in favor of positivism or nonpositivism. But turning to morality also means begging the question in the opposite way. Thus, Dworkin concludes, "The two-systems picture therefore faces an apparently insoluble problem: it poses a question that cannot be answered other than by assuming an answer from the start."¹⁰³

Thus we should shift to the one-system view, according to which: Legal rights are political rights, but a special branch because they are properly enforceable on demand through adjudicative and coercive institutions without need for further legislation or other lawmaking activity. There is nothing mysterious or metaphysical in this way of accommodating law in our structure: it supposes no emergent forces. Nor—this is crucial—does it deny the distinctness of questions about what the law is and what it ought to be.¹⁰⁴

How should we understand this 'shift' to the one-system view? Given his opposition to metaphysics, it seems clear that we should not read this as making a claim about the *true essence* of law or legal rights. It is *not* the metaphysical question Dworkin is concerned with. Indeed, the whole point of his anti-archimedeanism is to deny that such questions are answerable: there is no way to step outside of ourselves and see what law really is.

Yet Dworkin has long insisted that there are right answers about what the law is, and it would certainly seem implausible to suggest that he is denying that such truths exist. The key is to see that these truths aren't metaphysical truths—they aren't truths that demand an archimedean perspective. They are truths accessible from within our human perspective. The whole problem with the 'two-systems' view is that it requires an archimedean perspective that is impossible. So the point Dworkin is making in saying we must adopt the one-system view is that we have to frame our questions about law as questions that are answerable.

What questions does the pragmatist think are answerable? Peirce, like Dworkin, holds the view that morality is truth-apt. So there are questions of what we should do, morally speaking. And there are questions that we can understand as legal. Again, Dworkin would not want to abandon his long-held view that judges seek a right answer. They want to know what the law demands of them.

But we should think carefully about how he now frames the question of what the law demands. On the *Justice for Hedgehogs* view, he argues that law just is that which is properly enforced by courts.¹⁰⁵ 'Properly' is important here: the inquiry is a moral one. What should a judge do, given our complex political history? What matters here is the making of moral arguments in the course of

103. *Ibid* at 403.

104. *Ibid* at 407.

105. *Ibid* at 406: "Legal rights are those that people are entitled to enforce on demand, without further legislative intervention, in adjudicative institutions that direct the executive power of sheriff or police."

adjudicating a case. The moral question arises in a particular factual context, and those concrete historical and political facts influence the answer to what is the morally right action, so it is not a matter of doing morality from first principles.¹⁰⁶ But the inquiry is ultimately a moral one. The question of what is morally right in this particular political circumstance is still, at bottom, a question of what is morally right.

The question which Dworkin thought of as the reformed, one-system version of the question of the doctrinal concept of law, i.e., “Under what conditions do people acquire genuine rights and duties that are enforceable on demand in the way described?”¹⁰⁷ remains an interesting and viable question, and, as Dworkin argues, a question of normative political theory. Because it depends on answering the question of what genuine normative rights we have, it is a question of normative theory.

But not everyone has thought that legal philosophy is a matter of such internal, normative questions. Many legal philosophers see the debates in legal philosophy as questions about what law really is—as metaphysical questions. They say that they are concerned with the very nature of law, with its necessary features, with its essence.¹⁰⁸ We should recall Dworkin’s dismissiveness of the idea of truth that exists “out there” as part of the “fabric” of the universe.¹⁰⁹ He says that people do not make such claims, that the skeptic invents these terms as a straw man. But theorists who argue about law’s nature, about how law necessarily is, really are making claims of this sort. They make claims about the very essence of law. This demands an archimedean perspective, and is a claim Dworkin, with his pragmatism, should best be seen as denouncing. The theory of truth shared by Dworkin and the pragmatists thus seems to suggest a rejection of the idea that we are searching for the essential nature of law. Indeed, his position in *Justice for Hedgehogs* does seem to reject such questions.

In other words, there are no ‘taxonomical’ questions, which is one way Dworkin characterizes the concerns of analytic positivists.¹¹⁰ They are occupied with trying to draw a precise line around what properly counts as law. This, I think, is a good way to think about the analytic legal philosophers’ project: the idea that there is something that ‘properly’ or ‘really’ counts as law, divorced from experience or from normative concerns, assumes the possibility

106. There can still be room in this picture for a distinction between ‘legal theory’ and ‘moral theory’ more broadly. There are some arguments more properly suited to courts and legislatures, and we can understand legal theory as the domain of moral and political theory that is concerned with the questions about these kinds of coercive institutions and how they operate. We can do all this by appealing to a pretheoretical idea of what counts as a legal institution, and without assuming that all such institutions have an essential nature we could search for. And further, this doesn’t mean that only moral arguments will be raised: lawyers will still appeal to history and statutes and decisions, as they presently do. The key is to see that if we want to assess an argument for the relevance of a particular statute, there is at bottom some moral question about the appropriateness of consistency with past decisions, or the value of predictability, or some other normative justification for that legal claim.

107. Dworkin, *Hedgehogs*, *supra* note 4 at 406.

108. See *supra* note 21.

109. Dworkin, *Hedgehogs*, *supra* note 4 at 55.

110. Ronald Dworkin, “The Concepts of Law” in *Justice in Robes*, *supra* note 99 at 223.

of correctly mirroring an independent reality, as the metaphysical realist attempts to do.

If we are to take the pragmatic attitude seriously, we cannot understand any of Dworkin's claims—such as that we have to adopt the one-system view, or that law must be understood through the interpretive methodology—as assertions that seeing things that way somehow reflects reality as it is in its essential nature. It is not that we need to do normative inquiry to get at the essence of law.

Rather, the pragmatist methodology sees that debates about essences are unresolvable, and counsels us to reject them. When Dworkin makes claims about the one-system view, these are not claims about the essence of law, but suggestions for what we can do instead. He is making the point that normative questions are the kind of thing human inquiry, broadly construed, can in principle resolve. So we replace metaphysical questions with moral questions, some of which can be helpfully seen as 'legal', though they are still just a subset of what is really a moral inquiry. We are answering the moral questions that stem from the particular political circumstances in which we find ourselves.

This begins to look like what some have recently called "eliminativism". As Liam Murphy puts it, eliminativism is the view that we need not answer the question of 'what the law is'. Law talk "plays no important role in legal practice and social life generally—it is a wheel spinning on its own. We can get on perfectly well by discussing a range of other questions."¹¹¹ Others understand eliminativism as the view that there is no "distinctively legal domain of normativity, or even quasi-normativity."¹¹² Scott Hershovitz adds that his view is "ontologically spare",¹¹³ and refers to it as "a kind of eliminativism, since it denies the existence of an entity...that more traditional pictures presuppose."¹¹⁴ Mark Greenberg also puts forward a view that can be understood as eliminativist, arguing that "[t]he content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way."¹¹⁵ In other words, the law just is the moral upshot of the political circumstances; moral inquiry is therefore primary.

Several writers have suggested that in his later work Dworkin shifted to a more eliminativist view. Greenberg mentions in a footnote that Dworkin's *Justice for Hedgehogs* position could be read as "a version of the Moral Impact Theory that restricts legal rights and obligations to those that should be enforced by courts."¹¹⁶ Jeremy Waldron has recently given a similar interpretation of Dworkin's position: we skip any intermediate 'what is the law?' step and move directly to our moral obligations.¹¹⁷ He argues that *Justice for Hedgehogs* is more radical than

111. Liam Murphy, *What Makes Law* (Cambridge: Cambridge University Press, 2014) at 89.

112. Scott Hershovitz, "The End of Jurisprudence" (2015) 124:4 Yale LJ 1160 at 1186.

113. *Ibid* at 1193.

114. *Ibid*.

115. Mark Greenberg, "The Moral Impact Theory of Law" (2014) 123:5 Yale LJ 1288 at 1323. To clarify a terminological point, the 'moral profile' is a term Greenberg uses for all our moral obligations, powers, and privileges. *Ibid* at 1308.

116. *Ibid* at 1300, n 28.

117. Jeremy Waldron, "Jurisprudence for Hedgehogs" (2013) New York University School of Law Working Paper No. 13-45 at 13-16, online: Social Science Research Network <http://ssrn.com/abstract=2290309>.

the *Justice in Robes* position, “because Dworkin’s position now is not just that arguments and judgments in legal *theory* are moral in character, but that *legal* judgments are moral judgments and legal arguments are moral arguments.”¹¹⁸ The judge is faced with a moral question: what should I do? Morality is really the fundamental issue here. Dworkin, on this interpretation, seems to take the radical view that there are only moral questions to be answered.

As I suggested above, however, Dworkin does not want to let go of the idea that there is something called law, and we can strive towards right answers about what the law is. This may not amount to eliminativism as some people understand it, since it doesn’t involve abandoning talk of the law. But it does entail rejecting *metaphysical* talk about law, and eliminating the idea that there is a metaphysical entity called ‘law’, with an essential nature we can discover. We let go of metaphysical questions and address those remaining questions that are answerable. As Dworkin puts it: “The substance of the old confrontation between positivism and interpretivism would remain, but... in a political rather than conceptual form.”¹¹⁹ The remaining questions are moral questions, a subset of which can be understood as legal questions. If eliminativism demands that we give up on being able to identify a certain subset of our moral obligations as legal ones, then Dworkin is not an eliminativist. But if it instead asks us to reject the invented metaphysical entity of law, in favor of moral questions, some of which are ‘legal’ questions, then Dworkin is an eliminativist. I am not concerned with whether Dworkin really merits the label ‘eliminativist’. What is interesting is that he has long insisted that something that has been treated as a fundamental question in legal philosophy—the idea of searching for law’s metaphysical nature—has to be rejected.

And the fact that this is a long-standing conviction of Dworkin’s is important. I think the one-system view is not a new position for Dworkin, but just a clearer elaboration of views he had long held, but struggled to articulate in an environment fixated on conceptual analysis of the nature of law. Dworkin himself recognizes the problem when he says that he mistakenly tried to present his ideas in terms of the two-systems view.¹²⁰ However, both Greenberg and Hershovitz believe that this is a recent shift.¹²¹ Hershovitz believes that “for most of his career, Dworkin was buzzing around the fly-bottle with the rest of us.”¹²² I think this is wrong; though Dworkin may have occasionally put things in a misleading way, his impulse was always towards the anti-metaphysical, quasi-eliminativist view. As early as 1977 he said “My point was not that ‘the law’ contains a fixed number of standards, some of which are rules and others principles. Indeed, I want to

118. *Ibid* at 7 [emphasis in original].

119. Dworkin, *Hedgehogs*, *supra* note 4 at 409.

120. *Ibid* at 402. The point is not that his ideas changed, but that he needed to present them differently. I take this to be the right view, in part because of the consistency I have tried to show exists over the years in his work, and in part because this seems to be how he sees it. In a footnote to the chapter on Law, he says that it is meant to supplement his earlier works, not replace them. *Ibid* at 485, n 1.

121. Greenberg, “Moral Impact Theory”, *supra* note 115 at 1300, n 28. Greenberg sees the *Justice for Hedgehogs* position as “a very different view.” *Ibid*.

122. Hershovitz, “End of Jurisprudence”, *supra* note 112 at 1162.

oppose the idea that ‘the law’ is a fixed set of standards of any sort.”¹²³ The idea, all along, was to deny the possibility of describing law as a metaphysical entity whose nature could be captured. His denial wasn’t only of the descriptiveness of legal philosophy, but of the idea that there is any fixed entity to describe. What is interesting is how long it took for people to see the radicalness of the view; the fact that the later work is interpreted as a shift indicates the extent of the misunderstanding of Dworkin throughout his career.

We can recognize Dworkin’s eliminativism underlying earlier fights with pragmatism, too; ironically, Dworkin sounds most pragmatist and most eliminativist when he is arguing against the pragmatists. Take this quote from 1991, twenty years earlier than the ‘radical’, ‘new’, view in *Justice for Hedgehogs*:

We should now set aside, as a waste of important energy and resource, grand debates about whether law is all power or illusion or constraint, or whether texts interpret only other texts, or whether there are right or best or true or soundest answers or only useful or powerful or popular ones. We could then take up instead how the decisions that in any case will be made should be made, and which of the answers that will in any case be thought right or best or true or soundest really are.¹²⁴

This is Dworkin arguing for the abandonment of any ‘externalist’ questions—metaethical questions about the nature of morality, or metaphysical questions about the nature of law—which require an archimedean perspective that is inaccessible. We answer, instead, the genuine moral questions we are faced with. The view in *Justice for Hedgehogs*, whether or not it properly counts as eliminativism, is consistent with Dworkin’s pragmatism, and a coherent continuation of his earlier thoughts, not a radical departure.

What I want to emphasize here is the deep level at which his pragmatism operates, and the way it drives much of what he said in his debates with other legal philosophers. It has often been a struggle for people to even engage with Dworkin’s views, because they are so profoundly different from the prevailing preoccupations of legal philosophy. There has therefore been a tendency to understand him as entering the same metaphysical debate, or to see him as engaged in the limited project of developing a theory of adjudication.¹²⁵

Seeing his pragmatist commitments helps us to understand just how different Dworkin really was. He is not doing either of these two things. Rather, he has all along been calling for a different kind of philosophy: a kind that denies that we can have an archimedean perspective, and does away with any questions that demand it.

123. Ronald Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1977) at 76. I have tried to show throughout that this is not just a matter of seeing Dworkin through a pragmatist lens, or reinterpreting his work. It is a matter of taking seriously the substantial and powerful commitments he articulated across his vast body of work.

124. Dworkin, “Pragmatism”, *supra* note 2 at 360.

125. See, e.g., Kenneth Einar Himma, “Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory” (2002) 27 Okla City UL Rev 41 at 91: Himma sets up a dichotomy according to which Dworkin’s theory either “expresses validity criteria in every conceptually possible legal system,” or is just a theory of adjudication that is contingently true in some legal systems, in which case it is consistent with positivism.

V. Conclusion

Dworkin argued extensively with pragmatists like Rorty and Posner throughout his career. Yet some of his own commitments seem strikingly pragmatist. I have argued here that the answer to this puzzle can be found in understanding the different variants of pragmatism and recognizing that Dworkin did have a legitimate disagreement with those in the more skeptical camp. The prominence of the skeptical position as part of the mainstream understanding of pragmatism is a good explanation of why Dworkin so categorically rejected pragmatism. But Dworkin's pragmatism is itself foundational and important to understanding his views. Despite his differences with Rorty and Posner, what he shares with them—his opposition to metaphysics and his anti-archimedean stance—is deep and perhaps more important for understanding his views than the issues on which they disagree. I argued that understanding his pragmatist impulses helps us to understand his position in *Justice for Hedgehogs* as eliminativist (if that is taken to mean eliminativist about the metaphysical question) and as a sensible continuation of his earlier views.

Identifying Dworkin as a pragmatist and drawing out from his pragmatist views a commitment to eliminativism helps us see that the distinction between the analytic philosophers on the one hand, and Dworkin and the pragmatists on the other, is between those who think questions about the metaphysical nature of a phenomenon like law can be answered, and those who think they cannot, but that there are important normative questions that remain to be answered in legal philosophy. Dworkin is not best understood as doing the essentialist project; aiming to spell out the essential nature of law requires an external perspective that is inconsistent with his anti-archimedeanism. While analytic legal philosophers are searching for the essential nature of law, Dworkin thinks such a search is fruitless. The questions that remain instead are ones that take seriously the political practice and the facts on the ground, and we must deploy a normative framework to answer them. Legal theory is not a metaphysical search for law's essential nature. Rather, it is a politically engaged practice of determining what is the right thing to be done in light of the given history of our institutions. We have to make sense of law as it is experienced, but not as it necessarily or essentially is. We do this by constructing an interpretation of the practice that makes it the best it could be, not by fruitlessly searching for the essential nature of something which is inaccessible.

Once we see him as an eliminativist, we see that his deepest disagreement is with the metaphysical realists who are widespread within legal philosophy, and not with the pragmatists with whom he feuded for many years. Dworkin, I have argued, really does belong philosophically in the pragmatist camp, and not in the realm of analytic jurisprudence, his resistance to pragmatism as he understood it notwithstanding. His deepest and most important commitments, and the ones which separate his work from that of analytic legal positivists, are his pragmatist ones. Dworkin wants the realism without the metaphysics. This is exactly what the pragmatists want, and his way of getting it is the pragmatists' way.

Dworkin's pragmatism is perhaps most visible in the spirit in which he approaches philosophy. I will close with two quotations, one from Dworkin and one from Rorty, that beautifully illustrate this similarity in outlook. In the course of his argument that all we can do is reflect responsibly and endorse the view that seems right to us, Dworkin notes that this might seem disappointing to some, and says:

[M]y answers disappoint because the ancient questions seem to expect a different kind of answer. They expect answers that step outside morality to find a nonmoral account of moral truth and moral responsibility. But that expectation is confused: it rests on a failure to grasp the independence of morality and other dimensions of value.... Philosophers have long demanded a moral theory that is not a moral theory. But if we want a genuine moral ontology or epistemology, we must construct it from within morality. Do you want something more? I hope to show you that you do not even know what more you could want.¹²⁶

Rorty expresses a similar point about what we have been set up to expect and what philosophy is really able to offer:

Pragmatists realize that this way of thinking about knowledge and truth makes certainty unlikely. But they think that the quest for certainty—even as a long-term goal—is an attempt to escape from the world. So they interpret the usual hostile reactions to their treatment of truth as an expression of resentment, resentment at being deprived of something which earlier philosophers had mistakenly promised.¹²⁷

The similarities between these two quotations point at something deep. Dworkin had come to the same realization as the pragmatists: that many of our philosophical questions are framed in a way that sets up expectations for answers that are not, in fact, available. And yet the desire for these answers is deeply rooted in us. The anti-skeptical pragmatists, in whose numbers I include Dworkin, try to build a theory that does some justice to our desire for objectivity, while accepting the realization that truth understood in archimedean terms is inaccessible.

126. Dworkin, *Hedgehogs*, *supra* note 4 at 38.

127. Rorty, *Philosophy and Social Hope*, *supra* note 28 at 33-34.