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# A WITTGENSTEINIAN-BASED MORAL REALISM: DEFLATING HURD'S MORAL COMBAT ANTINOMY*

## *UN REALISMO MORAL BASADO EN WITTGENSTEIN: REDUCIENDO LA ANTINOMIA DEL COMBATE MORAL DE HURD*

Saulo M. M. de Matos**

**Resumen:**

El *Combate Moral* de Heidi Hurd puede entenderse como un intento de proporcionar una justificación moral a la autoridad política en contraste con las diversas teorías contemporáneas, que se limitan a desarrollar una concepción de la legitimidad política. Para ello, la autora explora el dilema del perspectivismo jurídico. El dilema moral está constituído por la antinomia de dos propuestas, cada una de las cuales está vinculada con una teoría sobre la justificación del uso del poder coercitivo por parte del Estado: el retributivismo débil, que sostiene que el Estado no debería normalmente castigar a las personas (inocentes) que infringen leyes injustas, y los valores sistemáticos, que sostienen que el Estado debería normalmente castigar a las personas que han infringido leyes injustas debido a la prevalencia de valores sistemáticos, como la democracia mayoritaria y el Estado de derecho. Hurd

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defiende la primacía del retributivismo débil. La tesis de este estudio es que la antinomia de Hurd depende de una concepción específica sobre la moral, que sostiene que su contenido está perfectamente determinado. La hipótesis es que, una vez aceptada esta visión de una moralidad subdeterminada y dependiente en una visión holística sobre las prácticas sociales y las formas de vida, se suele responder a la antinomia propuesta considerando los valores subyacentes al funcionamiento social de las instituciones.

**Palabras clave:**

Hurd; combate moral; Dworkin; Wittgenstein; realismo moral.

***Abstract:***

*Moral Combat by Heidi Hurd can be understood as an attempt to provide a moral justification for political authority in contrast to the various contemporary theories that are restricted to developing a conception of political legitimacy. For this, the author explores the dilemma of legal perspectivism. Such a moral dilemma is constituted by the antinomy of two proposals, each of which is linked to a theory about the justification of the use of coercive power by the State: weak retributivism, which holds that the State should not normally punish (innocent) people that break unjust laws; and systematic values, which holds that the State should normally punish people who have broken unjust laws because of the prevalence of systematic values, such as, for example, majoritarian democracy and the rule of law. Hurd defends the primacy of weak retributivism. The thesis of this study is that Hurd's antinomy is dependent on a specific conception about morality, which maintains that its content is perfectly determined. The hypothesis is that, once this view of an underdetermined and dependent morality is accepted on a holistic view on social practices and forms of life, the proposed antinomy is usually answered by considering the values underlying the social functioning of institutions.*

***Keywords:***

*Hurd; Moral Combat; Dworkin; Wittgenstein; Moral Realism.*

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## I. Introduction

Political institutions are constituted by the practice of giving and executing laws in a broad sense. They always raise the claim of having authority to give and execute such laws. The main challenge or principal question of political philosophy, of which the philosophy of law appears to be a branch, consists of justifying political authority and the binding force of their laws. Nonetheless, responses to this question seem to follow two paradigms: i) a moral theory of political authority, which seeks to substantiate whether and why political institutions have the power to give binding commands, and ii) a political theory of the legitimacy of political authority, whose core is whether and why political institutions have the right to coerce citizens into their territorial domains.[1] Most contemporary political theories follow the model of a political theory of the legitimacy of political authority, as, for example, those of Joseph Raz, Ronald Dworkin, and John Rawls.

Heidi Hurd's Moral Combat[2] can be regarded as an attempt to offer a moral justification for political authority in contrast to the dominant approach of political legitimacy in contemporary political philosophy. In order to understand the relation between political authority and moral obligation, Hurd explores the dilemma of legal perspectivalism, which arises when a citizen is morally justified in violating the law. The moral dilemma explained in the book is constituted by the antinomy between the following two propositions, which are each linked to a theory about the justification of the use of coercive power by the State:

> *Weak Retributivism*: The state should not normally punish (innocent) people who have broken unjust laws.

[1] Mark C. Murphy", MacIntyre's Political Philosophy" in Mark C. Murphy (ed.), *Alasdair MacIntyre* (Cambridge University Press 2003) 153.

[2] Heidi M Hurd, *Moral Combat* (Cambridge University Press 2008).

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> *Systematic values*: The State should normally punish (innocent) people who have broken unjust laws because of the prevalence of systematic values, such as, for example, majoritarian democracy and rule of law.[3]

In this context, the title of the book ("Moral Combat") refers to the solution that comprises the primacy of the theory of the *systematic values* in detriment of the weak retributivism. That is to say, the citizens of contemporary societies begin to live in the midst of a moral combat, as long as, for example, a judge can have an all things considered obligation to punish someone who, in the same conditions, has the all things considered obligation to break an (unfair) law. The paradox of legal perspectivalism arises in virtue of the fact that in the current case a judge is obligated to punish a citizen who has justifiable disobeyed the law.

Hurd rejects the solution of *systematic values*. Her solution to the proposed moral dilemma is to defend the primacy of *weak retributivism*. That is, the State should not punish people who have violated unjust laws of a particular political community. On Hurd's view, our legal values are in fact moral ones. They serve as reasons for action for citizens as well as for officials. That is to say, in some abstract level of thought, a judge is not obligated to punish a citizen with justified reasons to disobey the law. Since "our rule of law values are moral ones, they serve as reasons for action for citizens as well as for officials.[4]

As a consequence, *all things considered*, if A has the faculty of φ B has no right to prevent φ, being φ the execution or not of a specific action. Such an idea depends on what Hurd calls the *correspondence thesis: the justifiability of an action makes wrong the punishment of that action* (Hurd 2008, 253). The correspondence thesis is roughly an instance of Aristotle's functionalist argument for law:[5]

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[3] Thaddeus Metz, "Book Review: Moral Combat" (2001) 110 The Philosophical Review 434.

[4] Hurd, *supra* note 2, 314 and 315.

[5] Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press 2006) and Saulo M. M. de Matos, "Aristotle's Functionalism and the Rise of Nominalism in Law and Politics: law, emotion and language" in Nuno M. M.

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*Function Argument*

P1. It is the office of Xs to φ.

P2. Only things that are Y are constitutionally able to φ.

C1. Nothing is an X unless it is Y.

In this sense, the morality of preventing one from performing a particular action exists in function of the morality of one's action. *Exempli gratia*, criminal law is the only appropriate way to prevent the exercise of a certain morally wrong action. Hurd's thesis is a moral justification of political authority, inasmuch as the claim to exercise coercive power against a citizen is justified solely on the basis of the moral fact of the content of the action; or action per se and not of conditions of political legitimacy for such exercise.

One of the major counterpoints in Hurd's book is its sociological deficit. There is no argument based on sociological data about the actual impact of the punishment of an innocent for preservation of the systematic value of laws, *vice versa*. The work, in this sense, is permeated with statements that lack of proof based on social sciences, as for example: "Hence, a refusal to punish those who are justified will not unduly jeopardized our systematic values, because those who violate the law do so justifiably only if their acquittal will not unduly jeopardize the protection of our systematic values".[6]

However, it is noticeable that the tolerance of a system in relation to the violations of its rules and values depends on historical and sociological aspects regarding the degree of acceptability of the commands of the political authority, its goals etc. In diverse historical moments, especially in cases involving amnesty laws and transitional justice negotiations, the punishment of someone —or at least the acknowledgment of their guilt— occurred due to the peacebuilding necessity.

Another problem is the absence of a more detailed explanation of *legal or constitutional perspectivism*. This article is dedicated to fill in this gap, seeking to identify what are the metaphysical and epis-

S Coelho and Liesbeth Huppes-Cluysenaer (eds), *Aristotle on Emotion in Law and Politics* (Springer 2018).

[6] Hurd, *supra* note 2, 315.

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temological assumptions of this conception of political morality. The hypothesis is that moral realism, presupposed by Hurd's work, is compatible with a view of morality as a set of underdetermined convictions and propositions, which depend on institutional practices for their correct identification. Therefore, at least in some cases, the presupposed moral dilemmas must be decided in favor os *systematic values*. This is not because of its primacy over the principle according to which we should only punish those who have committed unjust actions, but rather for epistemic reasons concerning the degree of uncertainty about the content of moral facts. In this sense, it is not about a challenge to Hurd's theory, but rather an alternative to her view of the moral justification of political authority.

The argument will be developed in two parts, in which the following two hypotheses are assessed: (a) Law as a social practice has the important function of generating cooperation schemes so that the citizens can fulfill their moral obligations; and (b) the identification of the content of the moral obligations to be fulfilled depends on an argumentative practice, under holistic criteria and based on shared forms of life.

## II. Law's Function

On Hurd's view, if we are interested in political authority, the obedience to law must focus on law's effect on people who, but for the law, would have done something other than what the law commands. As stated earlier, Hurd does not consider sociological and psychological bases of moral discussion, as *e. g*. the possibility of state coercion being indirectly employed to give prudential reasons for law enforcement, *i. e*., the idea that people comply with laws for the simple fear of sanction, as appears to be the case in the United States of America.[7] There are no doubts that such a consideration could alter the results of the debate about the prevalence of *systema-*

[7] "If those who take the very fact of law as a reason for action… are few and far between, then coercion resurfaces as the likely most significant source of law's widespread effectiveness". Frederick F. Schauer, *The Force of Law* (Harvard University Press 2015) 52.

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*tic values* thesis, based on the ethical doctrine of consequentialism, as already pointed out by Metz.[8]

On the contrary, two possibilities are discussed about the relationship between state punishment and law, which presuppose that in some way the idea that punishment will only be used in function of a moral fact, or the correction of the action itself (*weak retributivism*) or the social foundations of a given legal system (*Systematic values*). In the first case, law as a social practice is subordinated to the morality of the action per se, while in the second case the morality of the action is subordinated to the ethics of law. In both cases, however, coercion is justified when it contributes to comply with moral obligations. The significance of this way of considering the relation between punishment and law is that there is an important way for law to affect behavior with reference to morality.

According to Hurd, legal reasons cannot change the moral profile of a political community *(i. e*. the set of moral obligations, powers, claims, liberties, immunities)[9] and, as a consequence, moral reasoning or rationality is theoretical, in the sense that it is a kind of practice of discovering or shedding light on moral facts. "Theoretically authoritative utterances give us reasons to believe with antecedence of existing reasons for action generated by pre-existent moral facts, and are thus entirely content-dependent".[10] In this sense, legal methods for identifying the content of the law are, in fact, heuristic tools for identifying pre-existing moral obligations. "The point is that, like all heuristics, the only test of the value of interpretative restraints is their ability to generate insight".[11]

Another way of seeing the relation between morality and legal institutional coercion consists in this: legal reasons are regarded as a possible way to change the moral profile, and, consequently, moral reasoning or rationality should be regarded as practical, since it is understood as a practice of developing or constructing moral facts:

[8] Metz, *supra* note 3.

[9] Mark Greenberg, "How to Explain Things with Force" (2016) 129 Harvard Law Review 1932.

[10] Hurd, *supra* note 2, 154.

[11] Ibid 162.

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> Ordinary people sometimes express the idea that some acts are wrong in themselves by referring to moral facts. Trouble arrives, however, when philosophers make a meal of these innocent references by supposing them to make a further claim that adds something to the initial moral claim: something metaphysical about moral particles or properties —we might call these "morons". They therefore announce what I believe to be entirely bogus philosophical projects. They say that moral philosophy must aim to "reconcile" the moral and the natural worlds. Or to align the "practical" perspective we take when living our lives with the "theoretical" perspective from which we study ourselves as part of nature. Or to show how we can be "in touch" with the chimeras or, if we cannot, what reason we could have to think our moral opinions sound rather than mere accidents. These bogus questions and projects threaten puzzlement on all sides. Self-described "realists" try to make good on the projects, sometimes by claiming mysterious interaction between morons and ourselves…[12]
>
> On the other hand, if I am right that there are no nonevaluative, second order, meta-ethical truths about value, then we cannot believe either that value judgments are true when they match special moral entities or that they cannot be true because there are no special entities for them to match. Value judgments are true, when they are true, not in virtue of any matching but in view of the substantive case that can be made for them. The moral realm is the realm of argument, not brute, raw fact…[13]

Dworkin's main concern in refuting the idea that moral discourse can properly be represented as a debate about the correspondence between moral judgments and moral facts seems to be to dismiss the notion that theoretical rationality can be the basis of this discourse. This is because the theoretical rationality is based on the idea of evidence or discovery, which is not available in the field of moral and legal discourse, based on a process of justification.

There are different ways to present this divergence between Hurd and Dworkin on legal reasoning as theoretical or practical rational-

[12] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 9.

[13] Ibid 11.

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ity. I am interested in pointing out how it is possible to combine, in a metaphysical and epistemological level, moral realism —in the sense claimed bellow— and interpretativism,[14] that is to say, a discourse on moral facts on the basis of values and argumentative practice for constructing moral facts. If one accepts the non-positivist approach to political authority, I believe the latter is the best model and method for combining values and standards of behavior, since it gives no place for brute insights on moral facts.

The model of the facts goes back to a specific tradition of analytic philosophy. F. H. Bradley, in his work *Appearance and Reality* (1893), already defended the thesis that facts form the immediate unity of our knowledge of appearances.[15] Similarly, Bertrand Russel, in several texts such as *Theory of Knowledge, Our Knowledge of the External World as a Field for Scientific Method in Philosophy and Philosophy of Logical Atomism*, stated that the word contains facts and that there are also beliefs, which have reference to facts. The meaning of judgments, for Russell, is not determined by the value of truth, as it is in Frege, but by facts. Finally, Wittgenstein in his Tractatus logico-philosophicus reaffirms this tradition to announce that "1.1. The world is the set of facts, and not of things".[16]

Elizabeth Anscombe, in her masterpiece *Modern Moral Philosophy*, was perhaps the one who most contributed to the construction of a language of moral facts in the field of practical philosophy. It proposes a relationship between our normative language —based on deontic categories of the "allowed" and "forbidden"— and facts. In the background, there is a debate about which final elements are decisive for the constitution of moral or normative facts. A moral or normative fact consists in the existence or content of a given normative system. Therefore, it is a moral or normative fact that there is a

[14] Nicos Stavropoulos, "Legal Interpretivism". Organizado por Edward N. Zalta. *The Stanford Encyclopedia of Philosophy* (Spring edn 2014). Available in: <https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/> Accessed 10 August 2019.

[15] Dietmar von der Pfordten, "Moralische Tatsachen?" in Dietmar von der Pfordten (ed.), *Moralischer Realismus?: zur kohärentistischen Metaethik Julian Nida-Rümelins* (Mentis 2015) 136 and 137.

[16] Ludwig Wittgenstein, *Tractatus logico-philosophicus* (Suhrkamp 2016).

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normative system in Brazil, just as it is a moral or normative fact that we are obliged to give aid to those in need.

In the wake of a series of mental experiments, Anscombe[17] examines our normative or moral language through a seemingly self-evident everyday fact. Imagine that I tell the baker that "Truth consists either in relationships between ideas, as, for example, 4 + 4 = 8, or in a matter of facts, such as, for example, that I ordered potatoes, you gave me the potatoes and you sent me an account. That is, the truth does not apply to propositions such as «I owe you a certain amount»". Considering that the world consists of a set of states of thing or facts, the great difficulty in the field of normative language is how to justify the passage from a set of crude facts such as "I ordered potatoes" or "You gave me the potatoes" to a fact of the type "I owe you a certain amount". In other words: How can we trace a true relationship between a gross fact (my order or the delivery of my order) and a normative fact (obligation)? On a very crude and general view, Anscombe[18] states that the connection between brute facts and normative facts depends on values, purposes or function.

In my opinion, the main divergence between Hurd and Dworkin's proposal for the relationship between morality and law consists in the degree of determinability presupposed by the content of moral obligations in both cases. For Hurd, the moral dilemma arises because of an antinomy between a *clear moral obligation* and the *legal obligations* derived from the Legal Order. In that sense, there seems to be no room for serious doubts about the practical necessity of a particular act from the perspective of morality, such as, for instance, in the case of a rape or murder. In these cases, there is no dispute about the fact that the legal order cannot allow the performance of such acts without turning itself against morality.

Dworkin's tradition follows a divergent line of reasoning, for it assumes in the first place that morality is undetermined, that is, that it has a set of general principles or values, which should guide the conduct of all, but which, at the same time, are difficult to identify and apply in the face of day-to-day dilemmas. Thus, even if there is a

[17] G. E. M. Anscombe, "Modern Moral Philosophy" (1958) 33 Philosophy 1, 4.
[18] Ibid.

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moral obligation, for example, to assist the needy, to not cause harm to others or to respect physical integrity, the contours of such obligations are in most cases uncertain, especially in complex societies like ours. Even in cases where morality points to a morally appropriate action to be performed, the identification of such action depends on a series of assumptions concerning the cognitive capacity of the agents, which can call into question the practical relevance of a moral dilemma, such as the one proposed by Hurd.[19]

Secondly, institutional practices, such as the language of rights, have the function of providing arrangements or schemes for cooperation among citizens with the aim of achieving such moral values. For example, there is a moral obligation to help the needy, but at the same time there are considerable doubts about what is the best mechanism to offer such help in politicized communities such as Brazil or the United States. Tax law, for example, offers a scheme of cooperation for the realization of this moral obligation, establishing how much each participant should contribute to building a solidarity scheme through social security. Even if such a scheme ends up being unfair, there is a moral obligation from all citizens to comply with tax laws, since without them the moral situation of society is worse, for it lacks a cooperation scheme.

Schemes generated by participation in democratic processes, although they may often culminate in obligations falling short of the obligations of morality, should nevertheless have primacy, according to this reasoning, in the way that they were generated by agreements between participants in practice, or as a promise. The idea

[19] "Given the problem of uncertainty, law can make a practical difference by informing us of the existing moral reasons, as opposed to changing them. In many situations, people are unsure of which solution is supported by the existing reasons. For example, people may be unsure which kinds of landscaping are best for conserving water. By codifying permissible kinds of landscaping, the law may not be changing the existing reasons —the landscaping that is specified to be permissible may already have been supported by the relevant reasons. But the law may affect behavior by eliminating uncertainty. Of course, in many real cases, the law may simultaneously change reasons and inform people of already existing reasons, and it may be a difficult question to what extent the law is doing each. In the text, I focus for the most part on generating moral reasons". Greenberg, *supra* note 9.

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that democratic processes can change the moral profile of what is demanded in a society can be considered a strong reason for a person to comply with the laws of the political community, insofar as the mere existence of such institutional arrangements already puts such a community in better moral situation than that offered by the uncertain or underdetermined normative content of morality.

## III. Moral Realism and Interpretativism

In this context, I think that Dworkin follows the following assumptions to defend his combination between moral facts talk (*moral realism*) and practical reasoning (*interpretativism*). These assumptions are inspired by an interpretation of Dworkin's theory of value based on a view of Wittgenstein's latest writings.[20] I will call this a Wittgensteinian-based moral realism in the sense defended by Julian Nida-Rümelin in his more recent works.[21] We can see that Dworkin's argument is based on a skepticism, on the epistemological plan, regarding the cognition of these most basic moral facts through heuristic methods of legal reasoning.

A conceptual warning, however, is necessary. Dworkin,[22] in fact, uses the terms "realism" and "anti-realism" in a way that is different from the one employed in the context of this study. For Dworkin, the debate between realism and antirealism consists in the metaphysical question about the correspondence between moral judgments and natural facts, in the wake of what is termed a naturalist thesis in the meta-ethical scope. On the contrary, in the sense used here, moral realism is an antonym of moral constructivism, that is, it con-

[20] See Ronaldo Porto Macedo Júnior, *Do xadrez à cortesia* (Saraiva 2013).

[21] According to Nida-Rümelin, we can include under the category of Wittgensteinian moral realism" authors such as Thomas Scanlon, Thomas Nagel and Charles Larmore", as well as, possibly, Ronald Dworkin". Julian Nida-Rümelin", "Moralische Tatsachen: Plädoyer für einen ontologische agnostischen, nicht-naturalistischen ethischen Realismus aus epistemischer (kohärentistischer) Perspektive", in Dietmar von der Pfordten (ed.), *Moralischer Realismus?: zur kohärentistischen Metaethik Julian Nida-Rümelins* (Mentis 2015) 53.

[22] Dworkin, *supra* note 12, 9.

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sists in the thesis that argumentation in the field of practical philosophy presupposes a theory of values to be true. In Dworkin's words:

> Rawls plainly had in mind, however, not a sociological but an interpretive search for overlapping consensus. He hoped to identify conceptions and ideals that provide the best account and justification of the liberal traditions of law and political practice. That is an important and, in my view, feasible project. But it cannot be a morally neutral project, because any interpretation of a political tradition must choose among very different conceptions of what that tradition embodies —what qualities or properties it takes "free and equal" citizens to have, for instance— that all fit the raw data of history and practice.[23]

The following sentences, which express my conclusions, provide the basis for an alternative to the account of morality offered by Hurd.

(1) The world and the reality exist independently of our representations. It may be said that certain elements of our reality exist independently of the convictions of those who participate in social practices at any given moment. Nonetheless, this simply means that social practices exist independently of individuals. Even if social practices and underlying values exist independently from those particular subjects that express them, they do not exist independently from the own idea of humanity. This reasoning provides, in my view, the basis for a realist thesis on a metaphysical dimension, *i. e*. that values have an independent existence in our social reality.[24]

(2) Moral convictions are true if they correspond to moral facts, to which they refer. If we consider our moral convictions as patterns of behavior, this means that such standards are justified with reference to more basic moral facts. This thesis corresponds to a realistic thesis on an epistemological dimension.

(3) Moral realism does not necessarily presuppose a theory of correspondence or a naturalistic interpretation of moral facts. Therefore, it does not depend on a strong natural or social ontology. The metaphysical assumption that moral facts exist in the form

[23] Ibid 66.

[24] I must now summarize what might seem philosophically the most radical view I defend: the metaphysical independence of value". Ibid 9.

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of values and the epistemic assumption that moral judgments depend on a reference to such values does not necessarily imply the assumption that such moral facts can be equated with natural facts or that the form of relationship between moral judgments and values is the same relative to descriptive or theoretical judgments and natural or descriptive facts.

(4) Moral realism, in this context, is agnostic about the epistemological point of view, insofar as it admits various forms of cognition of true moral convictions and, therefore, of moral facts. In other words, the existence of values and its relevance in the practical argumentation does not impose the adoption of naturalism or descriptivism in the field of moral philosophy.

(5) Moral realism can be developed without an ontological basis and with an optimistic epistemological perspective. Here comes one presumption linked to a Wittgensteinia comprehension and closer to Dworkin's interpretativism.[25] Epistemological optimism understands the idea that it is possible to achieve truth from the exchange of reasons in the midst of a social practice. With regards to the absence of an ontological foundation or immanentism, moral realism maintains that there is no immediate access to reality through sensory organs or brute insights.[26]

Moreover, Wittgensteinian-based moral realism maintains a coherentist theory of truth, insofar as no moral conviction can be excluded *a priori*, and the justification of moral convictions can only be realized in a network of other convictions. In this way, the objectivity of every moral judgment depends on its justification in the midst of a network of other moral judgments. This arises against a deduction of moral judgments from a priori principles, and also against an abstract test for concrete moral judgments.[27]

[25] Macedo Júnior, *supra* note 20.

[26] Ibid 9. In the field of Dworkin's work this premise comprehends to what he calls of realism.

[27] "A true interpretative claim is true because the reasons for accepting it are better than the reasons for accepting any rival interpretative claim. That is why, when we reconstruct the reasoning of a great critic, we must speak of a web rather than a chain of value". Ibid 154; "The active holism of interpretation means, on the contrary, that there is no firm ground at all, that even when our interpretative con-

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(6) To avoid, however, the possible relativism derived from coherentism, the Wittgensteinian-based moral realism adds that moral justifications have an unfounded end, *i. e.* a place from which you can no longer question. In other words, it assumes a final place in which participants share almost indubitable convictions. These beliefs, which form our form of life, can, however, be considered false throughout the practice of understanding morality on the basis of argumentation.

This is an important argument, which presupposes that social practices have certain insurmountable assumptions about which there can be no serious rational disagreement. An individual who does not share this set of beliefs, which embodies our shared way of life, has a limiting case of rationality. There are countless images of this idea. Wittgenstein,[28] for example, creates the figure of a king who believes that the history of mankind begins at the time of his birth. Bernard Williams[29] associates this idea with psychopathy, when he speaks of the amoral subject, and Robert Alexy[30] talks about an existential limit, close to this idea of a form of life, to the objectivity of human rights.

(7) Form of life in the sense of unjustified end is filled by a robust realism of shared convictions, which cannot be relativized by philosophical theories. Scientific and philosophical theories find their ultimate foundation in this shared way of life, and not in some kind of correspondence to brute facts. In my view, the great difficulty in understanding this moral realism from the concept of the form of life as an unjustified end of moral facts consists precisely in the difficulty of justifying the idea of sharing form of life or, in other words, "we" or "ours", as Elizabeth Anscombe precisely pointed out in her previously mentioned study.[31] There is, therefore, a kind of initial appeal to intuition as a possibility for the practice of morality.

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clusions seem inescapable, when we think there really is nothing else to think, we are still stalked by the ineffability of that conviction". Ibid 155.

[28] Ludwig Wittgenstein, *Da certeza* (Edições 70 2012).

[29] Bernard Williams, *Morality: An Introduction to Ethics* (Cambridge University Press 2015).

[30] Robert Alexy, "Law, Morality, and the Existence of Human Rights" (2012) 25 Ratio Juris 2.

[31] Anscombe, *supra* note 17.

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I believe it is not impossible to make Hurd's robust moral realism compatible with the above principles of metaphysics and moral epistemology. Nevertheless, this way to see moral facts as relatively necessary, or dependent from sharing a form of life, is an interesting solution for seeing moral facts with necessary reference to values that are always in question within an argumentative practice.

## IV. Final Remarks

My paper tried to shed light in one important aspect of Hurd's Moral Combat, that is to say, her defense of moral justification for political authority, and the role of the law as a theoretical or epistemic reasoning. Its antinomy between a *weak retributivism*, which insists that a judge should not punish people who violated the law under moral justification, and a *systematic value*, which states that the judge should punish people who have violated the unfair law because of the protection of values belonging to institutional morality, presupposes a certain view of morality, which apparently assumes a robust moral realism, according to which moral facts are determined and knowable.

I have tried to present an alternative view of this conception of morality in order to defend the hypothesis that the content of morality is underdetermined and that the task of law consists above all in offering institutionally schemes of cooperation so that moral values can be followed and determined in the context of social practices. Hurd and Dworkin agree with this view of the function of law and therefore understand that the use of coercion by the state depends on a moral justification and not merely on formal criteria of legitimacy. However, the divergence arises as to what a moral justification for the two theories means.

Dworkin's conception of morality was called as *Wittgensteinian-based moral realism*. This position comprises seven metaphysical and epistemological theses about moral justification. I understand that this way of looking at morality can influence the way in which the antinomy, as proposed by Hurd, is solved, insofar as the criteria for the moral legitimacy of a magistrate's decision under such a per-

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spective depends on a theory of values, which in turn depends on social practices and a shared way of life.

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