POLITICS AND JUSTICE I

IN HEDGEHOG SOLIDARITY

C. EDWIN BAKER*

* Nicholas F. Gallicchio Professor of Law and Communication, University of Pennsylvania Law School.

[*Editors' Note*: Professor Baker passed away soon after presenting this paper at the Boston University School of Law Symposium, *Justice for Hedgehogs*: A Conference on Ronald Dworkin's Forthcoming Book, September 25-26, 2009. The *Boston University Law Review* recognizes Professor Baker's contribution as a scholar and is proud to publish this Article in this Symposium devoted to *Justice for Hedgehogs.* We would like to express our gratitude to Nancy Baker and Jennifer Mathews for help in obtaining Professor Baker's revised version of this paper. We also thank Professor James Fleming and the editors and staff members of the *Boston University Law Review* for helping bring Professor Baker's important work to publication.]

INTRODUCTION

Ronald Dworkin's magisterial book presents a strongly articulated, appealing, non-metaphysical, interpretative theory of value that claims to show the unity and much of the content of ethics, morality, law, and justice. Some critics will doubt his abstinence from metaphysics, question his interpretative method, or reject his claim that this leads to the hedgehog view – a unity of value. Unsurprisingly, I am not in that group. "Unsurprisingly" not only due to the intrinsic force of his presentation, which can *justify* agreement, but also due to his great influence on my thinking since my first introduction to legal philosophy, which may partly *explain* my acceptance of so much of his approach.[1] Nevertheless, despite general agreement, I am unconvinced by the specific conceptions of equality, liberty, and democracy with which Dworkin concludes his book. How can I proceed?

One possibility is to argue like a fox – to challenge specific points in Dworkin's effort to offer a unified theory of value, that is, of individual and political morality and ethics. But like Dworkin, my inclinations are with the hedgehogs. Dworkin persuasively argues that values are interpretative and that an interpretation rests, at least partially, on its connections with interpretations of other matters. The consequence is that for an individual to find value conflicts amounts to interpretative failure. A second possibility might look to metaphysical (or religious) facts that he ignores. But Dworkin's quotidian approach, like that of H.L.A. Hart, which rejects reliance on mysterious metaphysical facts – such as "morons" – seems right.[2] Thus, given the ground we share, I must work within his general argumentative approach.

Dworkin relies on two main methods to gain acceptance of his conclusions. First, continually and famously, he draws distinctions that, even though often not intuitive before he drew them, are based in the common sense realities on which we (mostly) agree. Second, he relies on convictions – "morality is a matter of conviction all the way down"[3] – which he suggests his readers often share with him and which he shows they can hardly reject. With these two elements – distinctions and shared beliefs – he weaves a powerful argument. And in a non-metaphysical, quotidian world, this is all one can do and all one would want to do.

---

[1] My first published article, C. Edwin Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39 (1974), compared ideas stimulated by a lecture series Dworkin gave during my first year of law school with ideas stimulated by a seminar with Guido Calabresi. Since the late 1980s, I have benefitted from the NYU colloquium lead by Dworkin and Thomas Nagel. The distinction above between *explain* and *justify* is one of many that Dworkin carefully makes in the book. *See, e.g.*, RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 33, on file with the Boston University Law Review).

[2] *See* DWORKIN, *supra* note 1 (manuscript at 17).

[3] *Id.* (manuscript at 10, 18, 72).

Disagreement from a fellow hedgehog, it would seem, can take either of two forms – and I will attempt both. First, his distinctions sometimes may not cut the ice he claims or, more often, may neglect other crucial distinctions that lead to a more persuasive interpretation of our situation. Second, his repeated reliance on the Humean principle that no "ought" can be derived simply from an "is," such that individuals' convictions apparently provide the fundamental basis for the normatively salient interpretative realm, may be wrong, overstated, or misleading. His dismissal of more Archimedean points may have been too fast and leave us bereft of better critical principles. Disagreements of the first type could lead to alternative pictures of fundamental political concepts of equality, liberty, and democracy. The differing pictures might be usefully compared from a perspective of reflective equilibrium. Substantiation of the second challenge might give further grounds for accepting one or the other interpretative picture.

Thus, I will proceed as follows. I will work backwards, starting with the book's concluding discussion of political concepts and finishing with his methodology. Characteristically, in examining an *issue*, Dworkin makes a distinction between A and B and then shows why, though many people are tempted by B, in fact clarification should lead them to accept A. I generally agree that Dworkin's A is more persuasive than his opponents' B – and thus agree with most of his conclusions relevant to recently popular debates. Often, however, he ignores another distinction, between A and C. Part I offers various Cs that support different conceptions of equality, liberty, and democracy.

Dworkin's holistic approach draws considerable persuasiveness, though, not merely from interpretations in his final political chapters, but from these political concepts connection to all that came before. Thus, Part II offers more general methodological alternatives – in particular, not merely his typical contrast between objectively true and subjective projections, but also a notion of social practices that, though not entirely ignored in his hands, is often inadequately developed.[4] Here, however, I also question one of his crucial distinctions, which divides nature and science from value and interpretation. Questioning this division aims to radicalize his interpretative method. Dworkin relies heavily on Hume's principle: that an "ought" cannot be derived from an "is."[5] If the challenge to the division between science and interpretation succeeds, Hume's principle is undercut. The possibility arises for something like an (interpreted) Archimedean point for judging alternative

[4] Dworkin's divide between science and interpretation is, in part, that interpretation relates to human practices while science relates to what is true independent of such practices. *See, e.g.*, DWORKIN, *supra* note 1 (manuscript at 37). Social practices are the subject of interpretation; they also may provide a grammar; but, as facts, they do not seem to themselves provide a source of values.

[5] *See* DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1740).

conceptual interpretations of equality, liberty, and democracy. Finally, I take up his heavy reliance on what he calls Kant's principle: that "a person can achieve . . . dignity and self-respect . . . only if he shows respect for humanity itself in all its forms."[6] In the end I do not disagree with that claim. Still, I question both his argument for and, consequently, his elaboration of it.[7] Relying on a rejection of Hume's principle, I argue that presuppositions of fundamental social practices provide the proper basis to justify and elaborate Kant's principle. In sum, though I find persuasive most of what Dworkin argues, especially over the opponents he picks, my minimal but serious disagreements lead to a radically different, I argue better, holistic account of equality, liberty, democracy, interpretation, Hume, and Kant.

To avoid misunderstanding and in preview of what follows, the meaning I attribute to the hedgehog position merits comment. First, for the hedgehog to say that she tries to know "one big thing"[8] could suggest that she denies a plurality of values. That reading, I believe, misunderstands the claim. Different principles – of equality, liberty, and democracy or the two principles of dignity – are separate and do separate work. Pluralism in this sense exists. Dworkin asserts, however, that these different values do not conflict one with another, but rather are reinforcing. The consequence is that in pursuing one, a person will have no need to regret the failure to fully advance another, but rather will find that she has strengthened the force of the other. Second, the lack of conflict applies, if the hedgehog is right, most obviously at the level of non-conflicting principles that define and allocate non-conflicting moral obligations. Below, I will argue for the relevance in the political realm of a distinction that Dworkin makes under the title of a person's special responsibility for herself. As I will use the terms, "morality" encompasses purportedly universally valid norms while "ethics" applies to norms or practical content related to how I or we wish to define myself or ourselves or view my life or our lives as well lived. Obviously, no one and no society can be all that she or it could be. Consequently, in the realm of ethics there can be real conflicts in ambitions. Choices can be right or wise but still leave room for regret that other values, other possibilities, are not pursued. The hedgehog view should be that principles properly allocate different decisions to the realm of ethics and of morality or, better, will show how moral principles both require and constrain a proper realm of ethics. To the extent this effort succeeds, *moral* conflict and regret are avoided but existential ethical regret – and conflicts of ambitions – remain. Relatedly, the hedgehog need not naively deny that in our existential position, a person never faces practical decisions of what to do that will not result in a sacrifice, a failure to achieve, all that her

[6] DWORKIN, *supra* note 1 (manuscript at 16).

[7] Though the point would require more discussion of Kant than appropriate for this Paper, my argument implicitly also critiques what is generally seen as Kant's argument for and elaboration of the principle.

[8] DWORKIN, *supra* note 1 (manuscript at 7).

plurality of ethical and moral values recommend. And finally, the hedgehog need not rule out the possibility, despite the resulting interpretative failure, of the Berlin position that the best thing for her to do in some circumstances will conflict with some moral principles that she holds. The hedgehog, however, would not accept this final position easily and without struggle and would expect, given all that fits together to support the hedgehog approach, this is a rare, not our normal, condition.[9]

I.

A. *Equality*

The crucial early chapters of *Sovereign Virtue* identify "equality of concern" as the sovereign political virtue.[10] Any attentive reader realizes that not mentioned is "equality of respect," the second half of the original phrase for which Dworkin is famous: "equality of concern and respect."[11] The absence is surely not accidental. *Justice for Hedgehogs* offers two basic principles of human dignity, the first recognizes the equal and intrinsic importance of humanity in each individual life – that is, the "objective[] importan[ce] that each human life, once begun, go well" – and the second recognizes each individual's special "responsibility for identifying and pursuing value in his own life."[12] *Hedgehogs* relates each half of the famous slogan to one of these two basic principles of human dignity. It makes clear each half's different, though interpretatively interdependent, role. This relation of the original phrase of "equality of concern and respect" to his political concepts is suggested when he writes: "Coercive government is legitimate . . . only when it shows *equal concern* for the fates of all those it governs and unstinting *respect* for their personal responsibility for their own lives."[13] "Equal concern," which is the sovereign virtue, becomes the basis for distributive justice, described in Chapter 17, "Equality." Meanwhile, "equal respect" becomes the basis for individual personal and political liberties, described in the next two chapters. His argument thereby largely divides political terrain between the two concepts, with equality and liberty each reflecting one of the two principles of dignity.

Dworkin's argumentative strategy relies heavily on showing (or claiming) that his interpretation of these basic concepts clarify and help order our actual convictions. In addition, he traces equal concern and equal respect back ultimately to what he calls Kant's principle, which entails "respect for humanity itself in all its forms."[14] Combined with Kant's emphasis on

[9] The foxy Frank Michelman suggested the need for this paragraph.

[10] RONALD DWORKIN, SOVEREIGN VIRTUE 1-7 (2000).

[11] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

[12] DWORKIN, *supra* note 1 (manuscript at 11).

[13] *Id.* (manuscript at 221) (emphasis added).

[14] *Id.* (manuscript at 15).

freedom as essential to dignity, Kant's principle assertedly leads to the two basic principles of dignity and, Dworkin argues, to the corresponding principles of liberal legitimacy – first and foremost, equal concern, but in a form that shows equal respect. Dworkin concludes that the "sovereign" equal concern requires that ideally each person receive (from the legal order) an initial equality of resources plus theoretically specifiable levels and types of social insurance.

Both Dworkin's justification and his interpretation of equality of concern as a requirement of legitimate government offer possible points to challenge his argument. As I explain below, given equality of concern as the mandate, I find persuasive his reasons to favor his "equal resources" interpretation over welfarist and conservative challengers. There, I mostly dwell on the initial justificatory move – is equal concern really required? My aim is to create doubt about whether equality of concern is intuitively necessary for legitimacy or political morality. I also question whether equal concern follows necessarily from, and then offer an alternative interpretation of, Kant's "respect for humanity" principle.[15] Within an appealing holistic account, the choice between these alternative interpretations may ultimately turn on if and how Kant's principle is itself justified. That matter, however, is left for Part II below.

1. Equality of Concern

Equal concern must be interpreted. *Justice for Hedgehogs* makes clear, within a holistic account, how the second principle of human dignity, people's special responsibility for their own lives, properly influences this interpretation. Care, however, is needed. Emphasizing each person's special responsibility for her own life, conservatives argue that equal concern is achieved by leaving each person to her own devices, giving government no distributional responsibilities. Dworkin shows that this is simply "silly."[16] For law simply to leave a person to her own devices is conceptually impossible. "[E]verything the government . . . does . . . affects the resources" available to a person and her success.[17] Distributions result not simply from a person's acts but necessarily from these acts' relation to laws for which government is responsible and which could have different content with different distributive consequences. But if government ultimately has at least co-responsibility for distributions, what can that government properly say to justify these distributions to a person who wants more? What else other than that the legal

[15] *See generally* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (James W. Ellington trans., Hackett Publ'g Co. 1981) (1785).

[16] DWORKIN, *supra* note 1 (manuscript at 221). "Silly" is a reoccurring characterization of misguided popular arguments. This characterization may reflect that interpretation is less a matter of logical entailment than of intuitive and clarifying persuasiveness.

[17] *Id.*

order, from which the distribution results, embodies or was designed with a concern for that person equal to that shown for all others?

Egalitarian welfarists present a more serious and activist challenge to Dworkin's interpretation. "Equal concern" should lead government to assure each an equal welfare or an equally successful life as measured by some metric, under the hypothesis that this shows an equal concern for people in respect to what they most want. The welfarist view, however, leads to absurd results – providing virtually nothing to the happy manic and an excessive amount to the depressive or anyone extremely unfortunate according to the chosen welfare criterion. More relevantly here, Dworkin shows how the second principle of dignity defeats this welfarist interpretation. The welfarist paternalistic implementation of "concern" denies a person responsibility for her choices. After a person's choices, if her life would be bad on the relevant metric, the state must provide a new equalizing distribution. In doing so, the state removes the consequences of, and thereby denies crediting a person with special responsibility for, her choices. The only way a distributive concern can be fully sensitive to a person's special responsibility – both for her actions and for her preferences that provide her internal criteria for evaluating her life – is to make the distribution ex ante her chosen actions (though in one interesting sense, ex post her preferences). Dworkin's famous hypothetical auction, which grants each shipwrecked occupant of a deserted island equal numbers of clam shells to bid on all resources, achieves a result such that, given each person's own preferences, no one envies the distribution granted to anyone else.[18] The result of this envy test is not equal welfare – some will not like their life options no matter how the auction goes. Some will also receive a much higher "consumer surplus" – which is a welfare criterion – for example, if she appreciates highly resources that no one else values much. But the auction does achieve equal resources as measured by how much each distribution is valued by *other* bidders. This imagined auction distribution is ex ante her chosen actions – though reflective of the cost her preferences imposes on others as measured by the (ex post) preferences of others within the market. The equal resource distribution gives unstinting respect to a person's special responsibility, responsibility for her choices in the auction and for her use of resources later. About later distributions, political equality has little to say beyond observing that ideally they should reflect her choices in a perfectly functioning market.

This initial distributive proposal responds only to the need to leave each responsible for her choices. Much of a person's life, however, reflects not choices but brute luck – native talents, unavoidable illnesses, genetic conditions, lightning bolts, preferences of other people, market cycles. One argument for welfare equality is that lower welfare often represents bad luck. When it does, an equality of concern purportedly requires elimination of the welfare consequences of this morally arbitrary luck. Usually, this argument

[18] DWORKIN, SOVEREIGN VIRTUE, *supra* note 10, at 162-63.

concludes, elimination requires compensatory distributions. Dworkin shows that a problem with this version of luck egalitarianism lies in its use as its measure of luck the *community's view* of what is valuable in a human life, an approach that arguably insults the person who is thereby told that her life is pitiful, has less value, due to her being blind, talented only at writing poorly compensated poetry,[19] diabetic, or lacking Einstein's insights. An equal concern that recognizes her special responsibility, rather than compensate on the basis of others' demeaning judgments, would seek to eliminate the "bruteness" of the luck. This transformation, Dworkin argues, can be achieved if brute luck can be turned into option luck. Such a transformation is the major social function of insurance. If this insurance is available, the level of insurance a person buys reflects her own valuation of the risk of these eventualities. The purchases reflect her special responsibility for her own life.

Of course, adult purchasers will not find insurance available at the price that would be charged for the preconception level of risk of now obvious unfortunate genetic attributes. Dworkin, though, asks us to try to make sense of a question: What policies would a fully informed person buy before she knows what brute luck she will have, even at birth, from an insurer who places everyone in the same risk category?[20] Given payout frequencies and levels, its cost taking into account administration and any moral hazards generated by the insurance scheme, and technologically available uses of payouts (e.g., for medical treatment), most people on reflection would insure for many but not all conditions at some but not make-whole (whatever "make-whole" might mean) levels. Given the impossibility of actual market provision of this insurance (for example, a person cannot buy before coming out of the womb), a society committed to equal concern would provide its best estimate of the insurance people would have bought, collecting the premiums through the tax system. This modeling of insurance choices provides a realistic social ideal. In contrast, compensatory *equal* welfare policies offer, at least for all those whom it would impoverish, a depressingly dismal ideal.[21]

Two observations about Dworkin's hypothetical insurance market are relevant for later remarks. First, providing against brute luck the insurance that people hypothetically would have chosen on their own (given adequate knowledge and adequate reflection, factors that often prevent people from

[19] When Dworkin claims to show the normative basis of the market system, I find it unclear whether he believes that he shows whether and what property in intellectual creations – copyrights and patents – ought, in principle, to exist.

[20] DWORKIN, *supra* note 1 (manuscript at 226).

[21] This argument for equal resources aims at a critique of equal welfare. More interesting is the possibility that Sen's equal capabilities approach in some but not other ways (it uses a collective, not individual valuation of capabilities) provides greater respect for individual responsibility. *See generally* AMARTYA SEN, INEQUALITY REEXAMINED (1992). Dworkin's insurance responds to only some of the issues that Sen raises. My (limited) critique of Sen's alternative does not serve my present purposes, so I put that discussion aside here.

buying appropriate insurance) before the bad luck became apparent is an ideal, non-paternalistic, market-failure-curing policy mechanism. It can be generically endorsed independently of Dworkin's distributive argument for an equality of resources. Nevertheless, any hypothetical market must assume, in identifying hypothetical purchases, some distribution of wealth.[22] By assuming an equal initial distribution, Dworkin gives content to the hypothetical in a manner that has generally progressive distributive implications – higher levels of social insurance. Second, his scheme is slightly embarrassed by imagining provision of the insurance that a person would "probably buy"[23] – in practice, meaning what the average or typical person would purchase. Given an individual's special responsibility for what she buys and for the conceptions of good that lead to these purchases, this responsibility should lead to different people receiving (and being charged for) insurance of differing amounts against varying forms of brute luck. For practical reasons, Dworkin consciously compromises on this ideal, biasing state insurance policy toward socially dominant attitudes about risk and dominant (majoritarian) notions of living well.[24]

2. Doubts

The primary aim here is to raise doubts about Dworkin's equal concern principle itself. First, however, his "initial equal resources" interpretation merits comment. True, it does represent equal concern for people in their special responsibility to identify and pursue value in their lives, a concern that is undoubtedly proper and respectful. But what status, what trumping power, should this interpretation have? Not only is concern for equal individual pursuit of values not the only concern that a "partnership" reasonably can have – a point developed below in connection with democracy – but it also is not the only egalitarian concern for eachother that people do or should have. People's concern for others extends to those who make stupid choices, at least retrospectively regretted or stupid-seeming choices. Emergency medical aid to a destitute person lying beside the auto crash is not withdrawn if she was drunk, at fault, and uninsured. Concern exists even for a person who squanders opportunities as a youth or who gives in to temptations as an adult –

[22] Welfare economics' standard efficiency arguments always require an assumed initial distribution of wealth. Most commonly, an existing distribution is assumed. For law and economics purposes, the trouble with this standard is that alternative choices of law could each be "efficient" on the basis of the distribution that it creates, which is why efficiency provides no determinant identification of the most efficient law. C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975).

[23] DWORKIN, *supra* note 1 (manuscript at 226).

[24] *Id.* (manuscript at 227); *see also* DWORKIN, SOVEREIGN VIRTUE, *supra* note 10, at 78, 478. Dworkin argues that this compromise is probabilistic, not paternalistic – but in any event it does not embody a person's actual exercise of her special responsibility. DWORKIN, *supra* note 1 (manuscript at 227).

for the beach bum loved by moral philosophers. If the first concern were politically sovereign, these later concerns would properly reign only in private charity or interpersonal relations. Economists long ago showed that achieving Pareto superior moves – more egalitarian distributions that *everyone* agreed were improvements – sometimes could not be achieved by charity but only by coercive state interventions (taxation to respond to hold-out and other collective action problems).[25] Their redistributive arguments, however, were limited because they accepted an assumed initial distribution. Why should not a legal order give scope to these (arguably paternalistic or, for a more appealing characterization, solidaristic) concerns for each person, not merely the concern for people's special responsibility to pursue value in their lives, in the basic legal order, in the initial creation of distributions? Certainly, some people – but not others – not only wish to live in communities that do so but also would not willingly accept principles that do not so provide. If both sets of concerns are proper, as seems intuitively the case, then maybe some but not unbridled scope should be given to initial equal resources, insurance of the type Dworkin described, and markets but should be compromised on the basis of scope given also to other "partnership" concerns, including an egalitarian concern with people's present circumstances no matter how it came about.

Put aside quibbles with Dworkin's interpretation of equality of concern. A greater concern is: Is equality of concern truly the sovereign virtue? Is it needed for the legitimacy of the legal order? As appropriate for a holistic hedgehog, Dworkin offers multiple routes to answering "yes." One is its attractiveness and purported power to explain people's intuitive views once these views are suitably crossexamined. A more schematic argument for equality of concern follows from Kant's principle, which Dworkin argues leads to the two principles of dignity: objective value of human lives and special responsibility for one's own life.[26] The step that needs more explanation is: Why, from the "fact" of people's objective importance, even their equal objective importance, does it follow that the legal order should show *equal concern* for people? I will eventually suggest equal objective importance requires that the legal order exhibit *equal respect* but that *concern*, equal or not, is often out of place, at least as a trumping moral mandate as opposed to a relevant consideration. To begin to raise doubts, consider equal objective importance in a slightly different context, one that Dworkin thinks is also ruled by the two principles of dignity: the realm of personal morality and ethics.

Dworkin explains why it is useful (but hardly compelled) to investigate morality and ethics by working out the implications of both principles of dignity for individual responsibility for the practical issues a person faces – what to do – rather than by beginning with individual rights, the approach with which he explores the political sphere. The (equal objective) importance of

[25] Harold M. Hochman & James D. Rogers, *Pareto Optimal Redistributions*, 59 AM. ECON. REV. 542, 542-43 (1969); *see also* Baker, *supra* note 1, at 1.

[26] DWORKIN, *supra* note 1 (manuscript at 162).

humanity in each person, he argues, rules out actions *aimed* at harm. Or, more specifically, recognition of the other's equal worth rules out certain ways of intentionally causing harm, but not others – it is consistent, as one example, with fair competitions in sports, the market, or love, that harm the loser. Arguably, acts intentionally designed to hurt or that make *mere* instrumental use of the other as a means – for example, by throwing her in front of the trolley[27] – objectionably deny the other's intrinsic and incommensurable worth. They deny her special responsibility for choosing her own life. *If* the basis of the objective value of one's own life is the value of human life in all its forms (Kant's principle), this denial of the worth of another's life also denies the worth of one's own. Still, this argument turns on *respecting* the other, not any particular concern for her. And this respect for the value of humanity does not determine behavior but operates more as a side constraint on a person's actions. In contrast to the duty not to harm, Dworkin claims to show that an impartial general duty to aid – to treat everyone's interests the same as one's own, to show equal *concern* – does not follow from people's equal objective value. The coordinate principle of each person's primary responsibility for her own life sharply limits the behavioral implications of equal objective value. A requirement that she constantly sacrifice herself to those in dire straits violates her special responsibility for herself. Too extensive a duty to aid – to treat others with the same concern as one accords oneself – also treats the aid-giver as a mere means to improve the situation of others. That is, for the individual, acts do not need to show equal concern for each but only need to not deny the objective value of each.

Thus, in personal morality and ethics, the Kantian principle does not mandate equal concern. Showing equal concern is, of course, a possible personal self-definitional ethical choice, but unlikely except among the likes of an imagined Mother Teresa. Still, Dworkin argues, when the *costs* of aid to herself are slight, the *importance* of aid, potentially life-preserving aid, to the other is great, and when individual *confrontation* focuses these costs and benefits, failure to give aid would expressively deny serious recognition of the worth of life in each of us and, thereby, deny self-respect. The obvious question is: Why do not these arguments to limit the role of concern transfer over more completely to the political sphere? Why is not the political realm another locus where each person, now as a citizen, can properly pursue her ends as long as she does not aim at harming another and as long as she favors aid when the sacrifice of her other ends is not too great and when the benefits of aid are clear, present, and significant – like with the rescue of a trapped underground miner?

The question is: Why does the importance of life command general and equal *concern* in the political realm as opposed to only the concern contextually mandated by respect – like in the more limited circumstances in which interpersonal morality requires aid? Concern is what parents show for

[27] *Id.* (manuscript at 188).

their children when they provide opportunities for these children – an image Dworkin employs.[28] This paternalistic concern, however, is different than the discursive respect one has for an equal, one's colleagues or partners, for instance. A distributive aim naturally follows from *concern*. Equal distributions may follow from equal concern. Distributive aims, however, follow less so from the concept of *respect*. Thus, after asking "what is the point of equality," a number of commentators question the distributive focus of egalitarian theories popular during the late twentieth century.[29] Are they right – is the proper point of equality better described as equal respect for the humanity of each?

If Kant's "*respect* for humanity itself in all its forms"[30] is central for ethics and morality, go back to Dworkin's two principles of dignity to see if their only possible interpretative content in the *political sphere* includes a mandated equality of concern as well as of respect. Is it necessary, it can be asked, for the state, when confronted by a dissenter, to give as a reason that she should abide by the law that the legal order shows an "equal concern" for her (i.e., exhibits the sovereign virtue) or that it shows her an "equality of concern and respect" rather than simply that it shows her "equal respect" as a citizen? No answer will satisfy all dissenters, but does not the latter answer, as well as or better than the first two, provide what is needed for the state to justify enforcement? Kant's principle obviously – literally – requires respect. But as long as a person's individual acts are consistent with respect, Dworkin showed that equal concern for others is hardly required – her primary concerns can lie elsewhere, for example, in serving God, becoming an accomplished philosopher or yachter, or enjoying the pleasures of the mountains.

Or focus on the first of Dworkin's two principles of dignity, the one from which equality of concern most overtly derives. The first principle of dignity asserts the objective (and presumably equal) *importance* that each life goes well. This principle is inconsistent with acts aimed at preventing this objectively important result. One cannot rationally or consistently both think that a result is important (that is, presumably, is valuable) and have preventing that result as one's aim as opposed, for example, to a regrettable side effect of pursuing some other aim that is also important. For personal morality, this principle prohibits a simple aim to harm the other. For the state, this importance of each life going well would be contradicted by a policy to

[28] *See, e.g.*, *id.* (manuscript at 201); DWORKIN, SOVEREIGN VIRTUE, *supra* note 10, at 12.

[29] *See, e.g.*, Elizabeth Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 287 (1999); C. Edwin Baker, Communicative Action and Basic Equality: Universal Commitments (2009) (unpublished manuscript, on file with Nancy Baker). Samuel Scheffler describes this paternalism in the context of the legal order as adopting an administrative attitude toward citizens. Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 32 (2003). For further discussion, see also Samuel Freeman, *Rawls and Luck Egalitarianism*, *in* JUSTICE AND THE SOCIAL CONTRACT 111-42 (2007) (explaining why Rawls's argument does not lead to luck egalitarianism).

[30] DWORKIN, *supra* note 1 (manuscript at 15) (emphasis added).

subordinate a person, a policy that denigrates her value as a human, or a policy aimed at preventing her realization of value as she sees it (in line with the second principle of special responsibility for one's own life) or that rejects her success in her life as an end that counts and instead uses her merely as a means. Logically "equal importance" does not, however, necessarily require or translate into *equal* concern – it does not in the case of morality.[31] Thus, only some added argument would show that equal objective importance leads to a requirement that state policy must show equal *concern* as opposed, for example, that it must when there are no other permissible objectives at stake and that it must not show lack of concern.

Possibly the best argument here is that something about the need to justify coercive law provides a context that requires equal concern, an argument that I consider, and reject, later. Actually, my later consideration of democracy worries, at its most radical, that *mandated* equal concern is inconsistent with morally mandated equal respect. If this is so, using standard hedgehog methodology of avoiding interpretations that lead to conflicts between basic values, it provides a good reason to interpret the first principle of dignity not to require equal concern.

3. An Alternative: Equality of Respect

The above comments are not yet an argument against requiring equal concern. They aim only to open up interpretative space to consider whether legitimacy of coercive law, like personal morality, requires only *respect* for people as equals.[32] A purportedly appealing alternative interpretation of Kant's principle given below supports this possibility. Various specific features of each interpretation can be probed, but this probing is inconclusive for reasons that any hedgehog would expect. The best interpretation depends on support it receives from the most appealing conception of democracy and other political concepts. Even more fundamentally, Part II argues, it depends on understanding the *basis* for Kant's principle and Dworkin's two principles of dignity.

Arguably, the legal order exhibits proper respect for humanity if law conforms to four principles interpreting respect. The first has already been stated. State policy should not treat anyone as unworthy of respect as an autonomous agent. This requires an anti-subordination, anti-denigration principle. Likewise, respect rules out policies *aimed at* preventing a person from seeking to realize her (morally acceptable) conception of the good, from exercising responsibility for her own life. This first principle is quite analogous to morality's prohibition of intentional as opposed to competitive harms.

[31] *Id.* (manuscript at 165).

[32] In discussing democracy, Dworkin argues that dignity does not require any particular distribution of either influence or power to have impact but rather an attitude that seems much like respect. *Id.* (manuscript at 245).

Second, maybe respect requires a duty to aid to an extent necessary for people in the community to avoid overtly denying value in a person continuing to live her life meaningfully as people in the community understand it, especially if this aid does not require disabling sacrifices by anyone. Or, to put this slightly differently, people in a respectful collective enterprise – maybe styled as a partnership – would not deny to any member those resources or opportunities (or insurance responding to needs for these resources) that people in the enterprise generally treat as prerequisites to full and meaningful participation in that community, that collective enterprise. People are being inconsistent to view others as partners in a collective enterprise, to consider some resources or opportunities as essential for full participation, to be able to assure these to each but, finally, to deny some partners these resources or opportunities.

This "minimal wants guarantee" is quite analogous to the limited duty of aid that Dworkin described in respect to personal morality – not aid to the extent of impartial concern but aid necessary to avoid denying the objective value of human lives. The requirement also obviously resembles Dworkin's hypothetical insurance, but with important differences. His proposal is for insurance that a person would *probably* purchase. Its consequent reliance on the average person is a necessary practical compromise of the aim of providing the insurance each *would* purchase if markets existed and if sense could be made of that purchase question at a time before she had knowledge of her actual brute luck in matters such as her hereditary endowment. In contrast, the suggested minimal wants guarantee understands the view of others – the community or the average person or the majority – as the proper standard for identifying what people owe each other. The community's reigning conception of necessities must be provided for each in order for the community to inclusively respect the status of each as an equal member. The standard is not a compromise, but what principle requires. A second difference is that Dworkin's insurance ideal also has a theoretically precise content, dependent only on individuals' idiosyncratic preferences. In contrast, the content of what a community sees as necessary and, hence, what respect requires in principle, reflects current outcomes of the community's ongoing ethical debates.

Third, respect for each as a free person with dignity requires appropriate allowance for a person pursuing value as she sees it. This represents her special responsibility to live well even when her vision dissents from majoritarian or dominant cultural views. I put this matter aside here, however, discussing it below in relation to liberty.[33]

Finally, respect for both people's equality and their special responsibility to pursue value as they understand it should require an (equal) democratic participation right. A person does not lose her special responsibility merely because she acts politically. Acting politically – to aim at collective action – may require that a person give to the group only those reasons that she thinks

[33] *See infra* Part I.B.

others should, even if she knows others predictably will not, share. In this interpretation, elaborated later, democracy involves giving and legislating on the basis of reasons to favor various conceptions of the good or to view a compromise as fair that can be and that their advocate thinks should be, even if they are not and predictably will not be, shared. Given (reasonable) pluralism, this conception of politics inevitably means some will be losers. But nothing about the existence of losers, as long as the process is as described and the first three principles are met, denies losers equality of respect or worth or status even if the democratic choice leads to results inconsistent with most, certainly Dworkin's, distributive interpretations of equality of concern.

Dworkin might respond to this alternative interpretation of Kant's principle and of the two principles of dignity by emphasizing the political context. Providing for the legitimacy of coercive law, if possible at all, might create necessary hurdles beyond any that apply in private morality. This possibility is largely left for the discussion of democracy below. But here, note that calling for equality of concern's egalitarian distributive principle – according to Dworkin, initial resource equality – may turn on both how democracy and how people in their political role are conceptualized. One view conceives of citizens in their exercise of their political (positive) liberties, like in their exercise of their personal (negative) liberties, as complete persons. As political actors they should both respect the value of each person and other requirements of morality but also value and claim the right personally to live, advocate, and pursue politically their own conception of the good. In contrast, the logic of equal concern suggests viewing democracy as people acting politically in a more limited fashion. Equal concern means that a legitimate political order cannot have as one of its purposes favoring some conceptions of the good (and, thus, some people's conceptions) over others held by some people. If reliance on all particular conceptions of the good are ruled out, this absence leaves the state with little to do (in relation to conceptions of the good) other than providing equally for each the resources for her to pursue her own conception non-politically. This required "neutrality" seems to leave little basis for state action other than moral and other objective (whatever that means) values, including an equality of concern with its distributive consequences. Thus, the question arises: Is a conception of "public reason" that allows people to advocate and is a state that adopts laws that favor particular (controversial) conceptions of the good over others inconsistent with or, alternatively, required in recognizing the special responsibility of each person for living well – for pursuit of her own conception of the good?

I find appeal in the fuller conception of the person in her political role as a reason-giver.[34] Dworkin's arguments for the alternative ring in traditional liberal defenses of neutrality. His argument might reflect Kant's emphasis that dignity requires individual autonomy – being guided only by maxims, by laws,

[34] *See* C. Edwin Baker, *Rawls, Equality, and Democracy*, 34 PHIL. & SOC. CRIT. 203 (2008).

that one gives oneself.[35] Given the fact of pluralism, a requirement that *each* person be able to see herself as giving laws to herself arguably can be met but only by laws that do not reflect conceptions of the good on which people diverge. In the end, however, Dworkin's (and maybe Kant's) solution thematizes people in individual pursuit of their values while the alternative thematizes them as reason-givers in collaboration with others. Dworkin's choice honors each private person and honors her particular conceptions of the good only as she lives her life in the private sphere – swimming in her separate lane. In contrast, the alternative allows this private pursuit *plus* honoring her as a reason-giver as she fairly pursues the content of her conception of value in the public sphere – an approach that, to use one of Dworkin's favorite phrases, seems more adverbial. It requires of the collective project respect for all members but no particular level of concern. Whether dignity is best realized by one or the other of these foci is a question left for Part II. Here, I continue by examining more specifically Dworkin's interpretation of liberty and democracy.

B. *Liberty*

Dworkin rightly mocks the usefulness of a common view that understands liberty as freedom to do whatever one wants that is without restraint from humans but only from nature. Liberty under this "total freedom" view equally includes freedom to paint, communicate, or compete and freedom to rape, lie, or pillage – making liberty often unappealing as a value.[36] Unsurprisingly, Dworkin offers an alternative conception of negative liberty that is a great improvement. Still, I contend his argument has a bait-and-switch quality to it and ultimately has too limited a conception of the *force* of the liberty claim.

Dworkin's alternative appears at first to focus on behavior that the state cannot properly restrict. He characterizes (negative) liberty as "some *area* of decision and activity" or "some *range* of . . . decisions and activities"; or later, "the *area* of his total freedom that a political community does wrong to impede" or "a distinct protected *arena* of choice and activity,"[37] though with the last he adds a caveat, whose importance I note below, further limiting the scope of liberty.

Dworkin observes that Rawls too found it necessary to narrow the relevant range of liberties but that Rawls came up with a list (in response to Hart's criticism that his original view of liberty was too capacious) for which he offered only tradition as justification.[38] Dworkin argues that, instead, liberty

[35] C. Edwin Baker, Two Interpretations of Liberalism: Neutrality Versus Toleration (2009) (unpublished manuscript, on file with Nancy Baker).

[36] For similar reasons, I similarly mocked this conception of liberty in C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 SO. CAL. L. REV. 979 (1997), on which this Section relies.

[37] DWORKIN, *supra* note 1 (manuscript at 229, 231) (emphasis added).

[38] *Id.* (manuscript at 231).

should connect with principles of dignity, thereby providing a "theory not a list."[39] Then comes the bait and switch. He gives us no area or arena, no range of decisions or activities, to protect. Rather, he objects only to those restrictions made "without a proper justification."[40] Even when he turns to "one crucial set of liberties," his claim is only that a limitation is improper if the justification is illegitimate – specifically, limitations based on a "collective decision about what makes a life good or well-lived."[41]

Despite this abandonment of describing an arena or area, neither that change nor his focus on objectionable features of the government decision is exactly where I mean to differ. Rather, my concern is that Dworkin affords inadequate protection of liberty or inadequate recognition of dignity and that this inadequacy is due to his specific objections to purported governmental justifications. To provide an alternative, I need two additional distinctions.

Laws might be broadly categorized as those that *distribute* liberty and those that *prohibit exercises* of liberty. A law that identifies the person who gets to decide who drives a particular Porsche distributes liberty. A law that prohibits driving over seventy miles per hour limits everyone's liberty. Laws that outlaw rape or pillage, murder or theft, distribute liberty over bodies and property. The bulk of civil and criminal law distribute (or protect the distribution of) decision-making authority *without either increasing or decreasing the total number of decisions permitted.* Label these laws "allocation rules." My contention is, partly because they do not decrease total number of decisions that individuals can make but only determine who gets to make any decision, these laws generally do not raise questions of (negative) liberty – at least, do not unless the rationale for a particular allocation is to prevent a particular activity.

In contrast, virtually all popular objections to purportedly improper infringements of liberty involve a different type of laws. These laws prohibit anyone from making certain decisions: No one is permitted to advocate communism, read *Lady Chatterley's Lover*, engage in sodomy, refuse to salute the flag, smoke marijuana, wear an armband, drive faster than seventy miles per hour. This terrain, what I called *general prohibitions*, is where issues of liberty are seriously raised, though maybe some of these prohibitions should be permissible.[42] Though the distinction between these two types of laws is rather

[39] *Id.*

[40] *Id.* (manuscript at 232).

[41] *Id.*

[42] Care with definitions is required. The distinction between general prohibitions and allocation rules is emphatically not the distinction between criminal law and civil law. An allocation of a car to Joe is protected by property and criminal laws (against theft) and tort laws (against damage) and can be changed by contract. Joe can permit others to use the car. A law against speeding could become basis of liability in a tort suit or punishment by criminal law, but its role is to prohibit anyone from making the choice to speed.

mechanical or formal,[43] the distinction stands in for claims related to dignity. Laws properly seen to distribute could violate a proper principle of equality, but do not raise liberty issues unless they involve giving authority to another person over a person's body or use of her mind. Rather, common objections to violations of negative (formal) liberty primarily involve laws that prohibit everyone from engaging in (or requiring) certain behavior. With this distinction, it is possible to see that a useful concept of liberty relates primarily to objections only to laws that concern the exercise, not the distribution, of liberty.

Also consider a second distinction – between two ways a legal order can relate to ethical conceptions of the good. The legal order can be "neutral." Neutrality rules out any justifications based on particular conceptions of the good. This stance might be seen to combine the dignity principle of special responsibility for one's own life with a concern that each be equally supported in the exercise of this special responsibility. Alternatively, the legal order could be "tolerant." This more limited demand requires that the legal order respect individual choice by not condemning particular conceptions (except those that themselves violate moral standards) and by not having a purpose to prevent anyone's pursuit of her ethical choice – either in her public advocacy of laws that favor the choice or in her personal behavior.

Toleration is consistent with a democratic order that favors or promotes particular views of living well. For example, though the choice of public schools to focus on educators' or communities' conception of great literature might reflect merely technical judgments about simply enabling or nurturing students' linguistic or reasoning capacities or to enable later personal choice, that justification is usually a matter of bad faith. These books are chosen, as Rehnquist has noted, due to their view that these books ennoble the spirit.[44] They reflect community notions of the good. In fact, all members of the Rehnquist Court have approved the idea of schools inculcating community values. The schools' choices are not neutral but can be tolerant.[45] Censorship, on the other hand, is typically intolerant as well as non-neutral – as are laws against sodomy or use of contraceptive devices.

With these two distinctions in place, a robust alternative interpretation of negative liberty is possible. It asserts that the government acts improperly

[43] In a workshop, Bernard Williams made this objection to the distinction. Though there is force to his objection, the point is that this formal distinction usually relates to the *rationale* of identifying whether the state concern is with the distribution or liberty. Thus, the substantive concern can sometimes require reassigning some laws from that suggested by the formal categories.

[44] *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 226 (2002); Bd. of Educ. v. Pico, 457 U.S. 853, 855-56 (1982).

[45] The plurality of opinions, especially Blackmun's opinion in *Pico*, 457 U.S. at 875 (Blackmun, J., concurring), is best understood not to require neutrality, but to hold that the challenge to book removal in the school library could prevail if it showed the removal was intolerant.

when its purpose or justification for a law is to restrict liberty either out of intolerance or as a means to an otherwise legitimate end. "Allocation rules" typically raise no (negative) liberty issues but, under this alternative interpretation, liberty does object to most "general prohibitions." The alternative objects to government attempts to suppress permissible conceptions of the good but not to government attempts to promote other conceptions – though difficult categorization issues will often be presented. My claim below is that this alternative interpretation is more consistent with most liberals' reflective sense of liberty. It also puts the notion of liberty more at the core of political legitimacy. In doing so, it is in some ways more and in others less restrictive on government than Dworkin's approach. I claim that Dworkin's approach to improper justifications, honestly applied, rules out too much by requiring neutrality. To avoid this result it is at least arguable that at times he slights some implications of his argument. On the other hand, his conception of negative liberty is too meager, for example, protecting much less than does current First Amendment speech doctrine.[46] Admittedly, such claims about anyone as careful as Dworkin may reflect my own misinterpretation of his position – so I ask for clarification.

Despite some ambiguity,[47] Dworkin's stance seems to require neutrality, not merely toleration. He writes that people should get the right to make ethical choices "against a fair background that reflects equal concern for all and *no favoritism* or antagonism toward any such choice."[48] "[*T*]*he* argument for liberty," he says, appeals to the principle that "[g]overnment must not abridge [a person's] total freedom [as it would] when its putative justification relies on some collective decision about what makes a life good or well-lived."[49] I could go on with examples, but this position is hardly surprising – it follows directly from the conception of equality of concern offered in the previous chapter. Dworkin also seems to believe, though I will dissent, that neutrality follows from the best interpretation of his two principles of individual dignity.

If neutrality between conceptions of the good is required, what can be proper reasons for laws? That is, if all laws restrict total freedom,[50] according to Dworkin what are proper restrictions on total freedom? "Moral reasons" is the most obvious answer. Dworkin emphasizes that care must be taken "to distinguish the moral from the ethical issues in play."[51] Moral reasons justify

[46] *See infra* Part I.C.

[47] Dworkin agrees that society can affirmatively promote what it considers "intrinsically valuable in literature, art and music." DWORKIN, *supra* note 1 (manuscript at 237). Though he is surely right, this seems to conflict with neutrality. *But see* RONALD DWORKIN, *Can a Liberal State Support Art?*, *in* A MATTER OF PRINCIPLE 221-33 (1985).

[48] DWORKIN, *supra* note 1 (manuscript at 232) (emphasis added).

[49] *Id.*

[50] Dworkin says that the purest form of liberty in a total freedom conception of liberty is to have no laws. *Id.* (manuscript at 230).

[51] *Id.* (manuscript at 237).

prohibitions on rape and murder. The best morally grounded conception of equality, he says, provides proper grounds for division of and protection for property.[52]

Somewhat more questionably, but maybe appropriately, given Dworkin's notion of (objective?) "intrinsic value," protection of wonderful natural resources, endangered species, and an artistic heritage – but not a right to have plastic flamingoes in one's front yard – involves "no favoritism or antagonism toward any . . . [ethical] choice."[53] Still, I suspect that a prominent, possibly the dominant, rationale for these laws is the view that people live better lives in environments where wonderful natural resources, pluralism of species, and artistic heritages exist, or when we live in a manner that respects these features of the world – and worse when we needlessly and intentionally destroy them. Laws on these subjects, and maybe also laws promoting particular distributions, certainly seem likely to be based on disputable – ask oil or mining company CEOs – ethical views. Even if preserving richer aspects of a community's heritage provide in essence a "language" on which both innovation and existing conceptions of the good rest such that efforts at such preservation enhance opportunities and capabilities to the purported benefit of everyone, surely the details of what to preserve and at what cost to other choices reflect different ethical views on which people diverge. Whenever a state adopts a particular tax code, in practice its subjects, exemptions, and levels will involve ethical choices (or self-interested political power). It is not clear how Dworkin's notion of equality can successfully avoid this conclusion. Consider rationales for a code that comparatively rewards lives involving financial wizardry or passive investment over to wage-labor "productivity" in choosing between lower rates for capital gain versus wages. Efficiency provides no determinative criterion. Debates comparing consumption versus income taxes are likewise groundless without consideration of ethical views about saving as compared with productivity.

Two meanings can be given to Dworkin's crucial argument that laws defining property and harm "do not threaten anyone's dignity *because they do not assume that the community has the right to make ethical choices for him*."[54] Laws that are ethically neutral in aim obviously meet this requirement – and that seems to be Dworkin's meaning in the quotation. But should or even can these laws be neutral? Property laws often favor particular uses – should these consequences be ignored when adopting the laws and can there be an adequate justification for the particular laws without such considerations? For example, depending on whether valuations for Takings Clause or tort law purposes set value at the amount that would induce one to sell or the amount she would pay, the law favors either non-exploitive uses of property or

[52] *Id.* (manuscript at 232).

[53] *Id.*

[54] *Id.* (emphasis added).

economically productive uses.[55] Can or should these considerations be ignored within a rational discussion about the choice of laws? Favoring one conception, however, is still tolerant of other views if the law does not prohibit their pursuit but allows them, for example, when those with these views pay enough for their realization. Similar points are at stake in legally defining harms. Should we have a defamation law defining some falsehoods as causing compensatable harms and, if so, which falsehoods? That is, many (but not all) laws based on ethical values can be tolerant of pursuit (maybe at a higher cost) of contrary views and dissenting practices. In this sense, the community does not make the ethical choice for the individual; but it does favor particular choices. Toleration (and equality) imposes proper limits on legislative choices but these limits cannot coherently or rationally be based on a requirement of neutrality. My claim is that limits should reflect more direct elaboration of concepts of liberty (as well as an appropriate elaboration of equality). In other words, my question is: Why does dignity require neutrality rather than toleration in order to respect people's right to make ethical choices for themselves?

There are, of course, possible answers. As reasonable for a hedgehog, the key may go through an interpretation of democracy – an answer that I consider later. Still, here the alternative of neutrality or toleration might be illustrated by what Dworkin considers the "purest example,"[56] the state's approach to religion. He argues that collective decisions "*establishing* a state religion" as well as "*forbidding* worship outside that religion . . . cannot be justified without denying that people have a right to decide for themselves what kind of life is good for them."[57] In interpreting the U.S. Constitution, the "establishing" practice presumably violates the Establishment Clause, and often the "forbidding" practice violates the Free Exercise Clause. In the terms discussed above, *forbidding* usually violates both neutrality and toleration and, thus, clearly contravenes a person's right to make her own ethical choices. On the other hand, "establishing," though violating neutrality, need not violate toleration. For that reason the toleration interpretation of respect for dignity would find most British, Scandinavian, and other countries' practices that simply support an established church acceptable even if unwise. (Though I advocate strong anti-establishment principles, my reasons are pragmatic, ethical, and contextual; they relate to an expectation that they will lead to better political and ethical communities and will even, my religious friends tell me, benefit religious communities.[58]) That is, doing without the Establishment Clause (a clause required by neutrality but not by toleration) does not

[55] Baker, *supra* note 22, at 10.

[56] DWORKIN, *supra* note 1 (manuscript at 234).

[57] *Id.* (manuscript at 233) (emphasis added).

[58] *See generally* STEVE H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS (2009).

contravene ethical independence but it does overtly allow ethics into political decision making.[59]

This evaluation of the religion clauses illustrates the toleration interpretation of liberty. *Allocating* state resources to the Anglican Church violates the establishment clause while *prohibiting* people from using their own resources for their mosque or synagogue violates the free exercise clause. As discussed above, laws can mostly be divided into two formal categories. Many allocate or distribute decision-making authority. Someone at any moment necessarily gets to control or decide whether a particular use is made of something. These laws do not decrease the total "amount" of liberty within social space but only determine whose effective liberty is most favored. Other laws deny authority to anyone to make certain decisions. They prohibit these decisions. Given a rejection of slavery and acceptance of related principles of personal "sovereignty" that require allocating authority over one's own body and mind to the person whose body or mind it is, other allocation rules typically involve matters either of equality or of ethical value. Liberty simply is not at stake. This conclusion represents the wisdom of Dworkin's rejection of the absurd thesis that liberty somehow means total absence of restraint. An anti-establishment provision, not required by this alternative conception of liberty, represents an ethical choice. Liberty is at stake, however, with general prohibitions.[60] "Free exercise" is a fundamental human right of liberty.

Dworkin's unexploited insight that liberty is involved only in certain areas or arenas can be better understood to suggest dividing not social space or types of individual decisions but types of laws. An objection exists not to all laws aiming to favor collective conceptions of the good – which are often embodied in allocation rules – but only to those laws aiming to restrict liberty. The toleration interpretation of liberty claims that Dworkin erred in two ways. His category of objectionable purposes was too broad in ruling the ubiquitous role of ethical reasons. And it was too narrow in not making restrictions on liberty central. All the typical examples that Dworkin and most other liberals give of improper or troublesome interferences with liberty involve general prohibitions where the state's purpose is not to allocate but to restrict liberty, either as an embodiment of an intolerant end or as a means to a legitimate end. The following discussion of free speech illustrates both points.

[59] Though not developed here, this discussion obviously relates to the proper form of public reason, a topic about which both Rawls and Habermas have commented. I believe both are over-influenced by the ideal of neutrality.

[60] The claim is not that all general prohibitions are objectionable. In respect to some, individual liberty may not be at stake – for example, if the general prohibition applies not to choices of individuals but choices properly attributable to artificial, state created entities such as corporations. Or maybe, in some circumstances, paternalism – overt limits on liberty – may be justified as it often is for children.

C. *An Aside: Free Speech*

Dworkin interpretatively subordinates liberty into a residual category. Limits are fine as long as they are imposed for good reasons, as long as there is a proper justification for them.[61] The task for identifying the speech right is to distinguish acceptable and unacceptable justifications. Apparently, any restriction on speech for moral reasons – for example, to save lives[62] and, presumably, to prevent some types of harms – is fine. Outside speech protected for democracy-serving (or positive liberty) reasons, Dworkin only identifies as objectionable those limits on speech that involve the collective imposing its ethical judgment about how the restricted person lives well. This single objection to restrictions leads to an under-theorized and, for free speech scholars, an inadequate understanding of free speech.[63] At least, so I claim.

Dworkin's sparse discussion here may reflect his view that the crucial reasons for protection of free speech relate to the positive liberty of self-government discussed in his chapter on democracy. Three worries about this approach can be noted in passing. First, too extensive reliance on democracy justifications for speech freedom would require nimble development to avoid jettisoning most of the U.S. Supreme Court's protection of speech.[64] Second, are the consequences for political speech of Dworkin's general approach to liberty of looking at the moral or objectionable quality of the reasons to restrict rather than elaborating the nature and content of the value of speech freedom? It also is unclear why good justifications for restricting non-political speech do not equally apply to democratic speech, leaving political speech under-protected. Third, the category of political speech and the emphasis on good reasons for restriction can lead to an awfully limited, and currently rejected as too narrow, category of protected political speech. For example, this approach to reasons suggests Learned Hand's later view (now rejected[65]) that the government can restrict speech if the speech creates sufficient risk of sufficient harms.[66] A "positive liberty" focus can easily lead to a troublingly narrow conception of protected political speech such as Hand's early view, where he accepted the propriety of putting anarchists in jail for their speech if their words "counsel or advise" the violation of law. There, he explained that such

[61] DWORKIN, *supra* note 1 (manuscript at 235).

[62] *Id.* (manuscript at 238).

[63] This criticism could be unfair. Dworkin devotes here only a few illustrative sentences to free speech. Still, my comments reflect, I believe, the basic logic of his approach to (negative) liberty.

[64] My claim is controversial and I will not try to support it here. Still, in a recent informal scholarly exchange involving Vince Blasi, Robert Post, Tim Scanlon, Seana Shiffrin, Steve Shiffrin, Eugene Volokh, James Weinstein, Susan Williams, and myself, only Weinstein and Post supported a view similar to Dworkin's.

[65] *See* Brandenburg v. Ohio, 395 U.S. 440, 454 (1969) (rejecting Judge Hand's "clear and present danger" test).

[66] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

words "cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state."[67] The same democratic, positive liberty focus also evidently explains why Justice Frankfurter thought the speech of communists who "advocate the overthrow of the Government by force and violence" "ranks low" on any scale of speech values.[68] Neither Hand nor Frankfurter considered the prohibited speech of anarchists or communists to be properly political. They both, consequently but contrary to modern doctrine,[69] would deny protection.

Dworkin, though, recognizes that protection for free speech has come to be viewed more broadly. He explains and purportedly justifies this, making two points. There is the general requirement that restrictions on liberty must always be properly justified. In addition, people's right of ethical independence means that proper reasons to restrict do not include "enforc[ing] collective ethical decisions."[70] On this basis, and given his empirical assumption that the only available argument for banning pornography is ethical, he argues to protect pornography – to allow a culture that "flow[s] from the individual decisions of unsubordinated people,"[71] which I have elsewhere advocated under the label of "behavioral voting."[72]

Many free speech advocates will find this account an awfully slender basis for protection. Most speech restrictions invalidated by the Court have as their purpose not only enforcement of ethical judgments about the good life, but also moral aims of preventing serious injuries, either immediately or ultimately, to individuals – such as, in Dworkin's example, to save lives.[73] Even the area for which he recommends protection escapes his argument. Considerable evidence indicates that at least some forms of obscenity contribute causally to criminal violence that morality rightfully condemns. This evidence provides a major justification for the restrictions.

Dworkin's methodology inspects the state's reasons for restraint and denies protection if it finds them acceptable. Interestingly, many of the Court's greatest free speech decisions do not even consider the state's justification – do not evaluate how "compelling" is the state's clearly legitimate reason or how "necessary" is the restraint to achieve that end. Rather these decisions consider only whether rationales for free speech theory cover the speech involved and,

---

[67] Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). In the case before him, Learned Hand found that such words had not been used.

[68] *Dennis*, 341 U.S. at 544-45 (1951) (Frankfurter, J., concurring in the judgment). Robert Bork took the same position for roughly the same reason in his only major pre-nomination article on constitutional law. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J 1 (1971).

[69] *See Brandenburg*, 395 U.S. 440.

[70] DWORKIN, *supra* note 1 (manuscript at 237).

[71] *Id.* (manuscript at 233).

[72] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 76-78 (1989).

[73] DWORKIN, *supra* note 1 (manuscript at 238).

if so (and only if so), invalidate the restraint.[74] For example, the Court rejected Dworkin's approach in the cornerstone case of *Brandenburg v. Ohio*.[75] Even predictably resulting criminal violence does not justify speech restraints *unless* the violence is imminent *and* is the aim of the speaker – factors invisible to a standard merely requiring a moral justification for the limit[76] but relevant, for example, in order to show that the speech should be characterized as a criminal attempt rather than merely an act of self-expression or persuasion.[77] Similarly, moral reasons can be given to protect people from serious financial, psychological, and relational injuries due to falsehoods (defamation), or from intentional and severe psychological injuries caused by indelicate mockery (intentional infliction of emotional distress)[78] – but the logical reach of speech freedom sometimes covers, and when it does, the Court protects,[79] the expression leading to these injuries. In general, allowing moral reasons to justify limits and only ruling out restrictions embodying ethical judgments leaves free speech jurisprudence in shambles. In contrast, Dworkin's focused anti-paternalism currently is most alive (but improperly elaborated) in Justice Thomas's arguments for extensive protection of commercial speech, fortunately a view that so far appears starkly only in his concurrences and dissents.[80]

---

[74] *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988); *Brandenburg*, 395 U.S. 444; N.Y. Times v. Sullivan, 376 U.S. 254 (1964). I discuss this approach and contrast it to a balancing analysis in Baker, *supra* note 36. Justice Brennan also applied this approach in *Roth v. United States*, 354 U.S. 476, 483-94 (1957), but concluded that the logic of free speech did not justify protection for the category after defining it as not including material with any redeeming social importance, presumably within a marketplace of ideas. When he eventually changed his position, it was not because he now found the state justifications less persuasive. As he moved from a truth-seeking to a liberty view of free speech, he observed that this rationale covered the speech. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 85 n.9 (1973) (Brennan, J., dissenting).

[75] 395 U.S. 444.

[76] In this respect, Dworkin's approach is more like that of the Court in *Dennis v. United States*, 341 U.S. 494 (1951), where the issue was the risk of serious (moral) evils.

[77] *See generally* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1969-1970).

[78] I put aside whether cases such as *New York Times v. Sullivan* and *Hustler Magazine v. Falwell* should be limited to being a part of political positive liberty – I believe the better arguments would show that they should not be – because even if they were, it is unclear why moral reasons should not justify limits on that positive liberty just as much – or just as little – as they justify limits on negative liberty.

[79] At least sometimes it does. Brennan rejected the Court's result in the later obscenity decisions where the Court (as Dworkin would apparently recommend) looked also at the state's justifications. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *Paris Adult Theatre*, 413 U.S. 49.

[80] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring); 4 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring). I might add, contrary to Dworkin, that I, like John Stuart Mill, argue that

A further distinction should be quite congenial to Dworkin and can support more speech-protective results, but its relevance depends on allegiance to a more robust notion of liberty or autonomy than any Dworkin offered. Acts, including speech, that cause harms due to themselves being coercive or being injurious by invading or purposefully undermining another's protected realm of decision-making autonomy can be distinguished from speech that causes harms due to other people's mental assimilation of a speaker's honestly made messages. The question is whether distinguishing these different methods of causing the same harm serves any normative purpose. Presumably a state has the same moral reason to restrain *A* either when *A* violates someone's realm of decision-making authority ("hand over your money or I will shoot," or a manipulative lie) or when, through expression of her honestly held views ("revolution is good," or a mistaken statement that "he is a thief"), she leads another to act wrongly or experience injury. In the first context but not the second, *A* is the only person to condemn. In the second context, any interference with or injury to another, whether to the listener herself or a third party, results only from a listener's mental assimilation of and subsequent response to *A*'s speech.

Dworkin's default liberty argument (preserving a person's total freedom until there is a non-ethical, for example a moral, reason to restrict it) offers no basis to distinguish between these two contexts. In contrast, existing free speech doctrine mostly allows limits only in the first. Quite obviously, the coherence of this doctrinal view depends on respecting speakers' liberty. Moral reasons to object to and, thus, to restrict speech are many. But within its rather precise scope, liberty "trumps" not only ethical but also moral reasons. In the second context, personal responsibility, a major theme for Dworkin, can be understood to leave responsibility and liability with the listener who has responsibility for how she assimilates and responds to the message. Jerry Falwell might have properly responded by intensifying his dislike of the low-life Larry Flynt and becoming a moral crusader rather than an emotional basket-case. Speech, even speech that causes harm (only) due to another's reaction, often involves a person trying to identify her conception of the good without at the same time *necessarily* harming another – any harm occurs due to reactions of others who are then the responsible agent. The question is: What argument can be advanced for this more robust liberty argument?

Consider two interpretations of Dworkin's second principle of dignity: that people have a special responsibility for living their own lives well. Under the first, this dignity principle focuses on the state. It rules out the political order

ethical rationales for restricting commercial speech are perfectly appropriate. This view is consistent with the Court's *Central Hudson* requirement that the government can regulate if it has a substantial reason. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980); *See* C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in* Nike, 54 CASE W. RES. L. REV. 1161 (2004); *see also* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009).

making (or, at least, giving legal expression to) public choices about what constitutes living well. This interpretation almost definitionally leads to "liberal neutrality" and permits Dworkin's rejection (only?) of ethical reasons to restrict liberty. A second interpretation focuses on liberty. It emphasizes a person's right to make her own choices about herself and her expression – that is, the meaning of respecting autonomy or liberty – that trumps even a (moral) concern with the well being of others.

This second interpretation is in one respect narrower than Dworkin's proposal. As long as a political order acts tolerantly, this interpretation *by itself* offers no objection to a political order basing legal policies on ethical grounds. The propriety or lack thereof of such laws must await an interpretation of democracy. Most relevantly here is that this second interpretation puts respect for autonomy or liberty at the center of the discussion. Liberty – though not "total freedom" – is protected in itself from state judgments that it should be restricted (say by general prohibitions) either as a means for the state to pursue moral concerns or out of intolerance. Consider examples: *A* attempts to circumvent democracy by counseling or recommending revolutionary (criminal) violence to various *W*s who are likely to eventually act on *A*'s advice. *A* inflicts miserable distress on *B* (or on *B*'s spouse) by telling *B* of his spouse's sexual infidelities. *A* silences *C* by belittling the capacities of *C*'s race or gender. *A* presents her artistic creation despite knowledge that it will predictably lead to copycat criminal or suicidal reenactments. *A* fails to take sufficient care to learn the falsity of her story, which, sometimes intentionally, ruins *D*'s political career or her leadership status in the community. All these speech acts *cause* (that is, are shown to be essential elements of the causal chain that leads to) serious harm about which the state can be *properly* concerned, but cause harms only because of how listeners respond. Responsibility for one's own life can be understood to leave responsibility – as current free speech doctrine mostly does – for the original speech to legally unrestrained *ethical* choices of the speaker, choices that often but not always I would condemn. Liberty trumps the state's legitimate concerns.

D. *Democracy*

Given alternative conceptions of democracy, Dworkin is surely right that the way to construct an appealing conception of democracy is to fuse it with legitimacy. He distinguishes two possibilities: a majoritarian and a partnership model. Nothing in principle favors, he argues, majoritarianism as a fair decision-making procedure. Would majority rule be better than a lottery to decide who (if anyone!) should be thrown from the fatally overcrowded lifeboat?[81] A partnership method of deciding on coercive rules, however, is fair (legitimate) if members "accept that in politics they must act with equal

[81] Dworkin, *supra* note 1 (manuscript at 243).

respect and concern . . . in the joint enterprise."[82] With equality at the center of the partnership, Dworkin then offers three interpretations of democratic equality. Each citizen should have: (i) equal influence (unappealing and impossible – we wisely want the wise to have greater *influence*); or (ii) equal impact (which differs from equal influence because influence includes persuasion while impact is simply a matter of how much weight a person's view has in determining outcomes); or (iii) equal impact unless there are reasons for having less impact than others, for example, the need for some people to hold public office, as long as these reasons do not insult a person's dignity.[83] Reasons do not have impermissible insulting implications if not premised on some group within the community, like the uneducated being inherently inferior. Thus, reasons to deviate from equal impact are consistent with both respect and concern if their rationale is not to denigrate or subordinate any group and the deviation can be believed to increase the likelihood of increasing the legitimacy of the *content* of the legal order. From this conclusion, it is a short step to see that judicial review, even though it gives judges greater power, is not in principle inconsistent with democracy.[84] Instead, it could improve democracy under certain conditions and given the correctness of various pragmatic calculations – specifically, in contexts and under circumstances where judicial review, as an epistemic device, is more likely than non-judicially challengeable majority rule to arrive at appropriate

[82] *Id.* (manuscript at 241).

[83] *Id.* (manuscript at 244). Under the influence of Dworkin (and also lectures of Laurence Tribe), I also once argued that neither equal influence, equal impact, nor the once popular process-reinforcing theory explains the Court's voting districting decisions but a formal "equality of respect" standard does. Unlike Dworkin here, however, I dismissed the equal impact argument as conceptually confused. How much actual impact a person's vote has, even when districts are numerically equal, depends both on her own values and those of others in the district. For example, even if the number of voters in two districts were the same, a reactionary conservative person may have little impact in a district closely balanced between Democrats and Republicans because candidates will likely chase the center, but she could have some real impact in a very Republican district. A moderate, though, will do better in the politically balanced district. That is, since a person's impact reflects interactions between her views and those of others in a district, impact will not be the same for different people within the same district. Nevertheless, given that government does not officially subscribe to any required conception of the good to a person by its districting, equal districts formally respect her equality or, as Dworkin argues here, her "equal standing." It does not insult dignity the way unequal population districting can. *See* C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983).

[84] Janos Kis nicely shows that representative democracy usefully provides for experts (legislators) while violating equal impact, and then shows that the democratic argument for judicial review has the same structure – an epistemic asymmetry model – as does the argument for representative democracy. Janos Kis, *Constitutional Precommitment Revisited*, 40 J. SOC. PHIL. 570 (2009).

conceptions of negative liberty, fair distributions, and political rights (positive liberty)[85] and to not create counter-balancing dangers or ill-effects.

There is much to challenge here. Issues include: Is it ever consistent with self-respect to cede a basic epistemic role in lawmaking or law-overriding to experts? Is there any basic content to be expertly found as opposed to politically (popularly) created? But these are not challenges I wish to raise. I find the general argument persuasive. But I want more from Dworkin. My question concerns further elaborations of the partnership model of democracy, in particular, how it conceives the task of democracy. What is the partnership's remit – its brief or mandate? Though that question was not Dworkin's specific concern in this chapter, he said enough to imply an answer. And since his is a holistic account, the correctness of attributing this answer to his theory can be tested by its consistency with the rest of his argument, most immediately, with the other political conceptions – and I will claim that it fits. On the other hand, alternative interpretations of equality and negative liberty (such as those that I offered above) should – and do – lead to alternative interpretations of the partnership model. Though possibly rhetorically unfair, I label the two answers as the "joint stock company" interpretation (Dworkin) and the "true partnership" interpretation (my alternative).

Start by distinguishing a robust from a conceptually very restricted role for the partnership's decision making. For both interpretations or models, the partnership must respect certain conditions of legitimacy. Democratic decisions in both models, for example, must embody respect for the equality and liberty of its members. Given the robust role, however, the partnership is a mechanism by which people collectively choose the goals and values to pursue as well as how to pursue them. Label this "choice democracy." Alternatively, the partnership's remit may be more limited – more like the corporate entity restricted to maximizing wealth for, while reducing risks to, stockholders. People's lives together, Hobbes suggested, require coercively enforced rules. Normative theorists argue that these rules should meet tests of legitimacy. Inevitable disputes break out concerning what rules best meet this standard. Under this restrictive alternative, democracy is basically limited to implementing rules that advance requirements specified by justice that are necessary for legitimacy. Democracy is the name of the mechanism that has as its goal finding the rules that best reach the outcomes required by legitimacy. Structurally, this goal may be best implemented in practice by electing representative decision makers but arguably is sometimes better implemented by *adding* judicial review over some questions. Label this interpretation, this restricted remit, "epistemic democracy."[86]

I suspect and hope that most people believe that democracy should defer to or realize certain moral rights and strive for justice. As Dworkin has taught, these moral elements are sometimes trumps. All – citizens and legislators –

[85] Dworkin, *supra* note 1 (manuscript at 250).

[86] My argument in this Part closely duplicates that made in Baker, *supra* note 34.

also have a responsibility to try to identify and follow these elements. Though the issue is subject to empirical dispute, maybe the Supreme Court is well placed to identify these requirements of legitimacy. But in a quotidian view, surely democracy is *also* about making choices about what type of community "we" want, in this respect duplicating at the collective level the role of individuals making choices in their individual lives. As a quotidian philosopher, is the consequent "choice democracy" what Dworkin has in mind? I think not.

Admittedly, there is some suggestion that he does. He talks of all-things-considered justifications and general welfare or general interest or country as a whole.[87] I am left wondering how these general welfare conclusions can be made without reference to people's conflicting conceptions of the good, a question that creates some uncertainty about the extent Dworkin seeks to prevent the exercise of coercive power from being based on ethical notions. Maybe people have a *moral right* to be part of a collective partnership that makes (some) collective decisions based on maybe majoritarian ethical views, at least when these decisions do not violate a necessarily more limited range of trumping rights – which leads to the "choice theory" of democracy. This might be Dworkin's view.

Nevertheless, many remarks suggest otherwise. After claiming "dignity requires independence from government in matters of personal ethics," Dworkin observes that the "political community must make [and enforce] collective decisions about justice and morality."[88] He argues that a person "cannot be free from coercive control in matters of justice and morality."[89] *This* need for, and hence *this* reason for, coercive laws is all that I can find that Dworkin provides as a basis for government. It has the possible implication that a person could and should be free from coercive control in matters of ethics. The inevitably contestable, even if objectively true, content of justice and morality presumably is what leads to the conclusion that "dignity requires" that a person have "a role in the collective decisions that exercise . . . control [in matters of justice and morality]."[90] It also explains limits on this participatory role, for example, if and when a Supreme Court will perform the task better. This is essentially the "epistemic theory" of democracy. The criterion for identifying properly democratic processes, possibly including judicial review as being fundamentally democratic, is their likelihood of producing substantively proper *outcomes* – the criterion is strongly "outcome sensitive."[91]

An epistemic theory of democracy is, moreover, virtually required by Dworkin's conceptions of equality and (negative) liberty. If equality really

[87] DWORKIN, *supra* note 1 (manuscript at 209-10).

[88] *Id.* (manuscript at 238).

[89] *Id.*

[90] *Id.*

[91] *Id.* (manuscript at 251).

requires equality of concern that translates into each person's just claim for an ex ante equal allocation of resources and given that virtually all legal content affects the distribution,[92] this single requirement, cabined by requirements to proceed morally and not just instrumentally, provides a theoretical (though inevitably empirically contestable) answer to all legal questions. Moreover, Dworkin argues that the second principle of dignity, each person's special responsibility for her life as represented by equality of *respect*, requires leaving to each individual choice about how to live her own life, which he apparently interprets to require that law be neutral in aim between individuals' competing conceptions of the good. Like his encompassing (one wants to say, "sovereign") view of equality, his conception of negative liberty limits democracy largely to epistemic, not choice, tasks. And, of course, this understanding explains why the debate over judicial review should turn, Dworkin says, on the comparative likelihood of it reaching an "appropriate conception of negative liberty, and of a fair distribution of resources and opportunities, as well as of . . . positive liberty"[93] – again the "outcome sensitive" point.

Which interpretation of the partnership is better? In part, the question is: How appealing or persuasive are the conceptions of equality and liberty that support each view? Do equality and liberty favor viewing the partnership as involving "choice" *as well as* "epistemic" tasks? This pushes back to understanding the two principles of dignity. Does the equal value of humans require a roughly quantitative measure of concern, or only respect? Does people's special responsibility for their own lives leave ethics to a private sphere (including voluntary associations or partnerships) or does this responsibility require that people be able to pursue their visions in all their roles, including collective governance, except when some principle imposes limits – for example, a principle that demands respect for others' ethical striving, which in turn requires tolerance? I believe Dworkin joins Rawls and many other liberals in favoring, though not always explicitly, the epistemic interpretation of democracy.[94] The metaphor of "partnership," however, certainly does not require this interpretation. A joint stock company may be limited to trying to maximize wealth within the constraint of appropriately limiting risk. In many partnerships, however, all partners have a voice about the projects or aims, the ethical visions, to pursue even if those whose views do

[92] In rejecting the "silly" conservative/Nozickian view that government should (and, implicitly, could) let distributions fall where they may, Dworkin rightly observes that "everything the government . . . does – or does not do – affects the resources that each of its citizens has." *Id.* (manuscript at 221). Any mandate for a particular distribution, even for an egalitarian ex ante or initial distribution, would in theory provide a determinative solution, unless trumped by or compromised with another demand of principle, to any question of what the government should or should not do. Dworkin illustrated this with his hypothetical auction. *Id.* (manuscript at 224).

[93] *Id.* (manuscript at 250).

[94] Baker, *supra* note 34; Baker, *supra* note 35.

not prevail are expected to go along with the deliberative decisions. Of course, even then, projects to disparage or subordinate some members are hardly consistent with a true partnership. That is, "respect" has an obvious status that "concern" does not garner, at least not without considerably more argument.

This "choice" interpretation of the partnership might be compared with the interpretation of individual ethics and morality. A *morality* based on equal worth, Dworkin persuasively argues in Chapter 13, objects to (certain) intentional harms – those acts that harmfully use another merely as a means. These intentional harms disrespect the dignity of life and hence (purportedly) violate self-respect. In contrast, morality does not require that a person's acts show an equality of concern. Aid shows concern. But morality condemns only failures to provide aid if the failure would show disrespect for life – as it would if the cost to the aid-giver would be small in providing aid to a person right before her whose need is desperate. Here, refusal contemptuously denies the worth of life, which is a foundation of morality. A person's special responsibility is to live her life well as she understands it – and thus morality – does not, however, require an impartial or an equality of concern. In fact, given an aim to lead her life well, concern for life – hers or others – is only one of a person's many concerns. Why should the same not be true for the partnership? Why is not the sovereign virtue for a partnership to be a device that enhances people's capabilities? The sovereign virtue is, thus, "respect," which Dworkin relates to autonomy or liberty, not "concern," which Dworkin translates distributionally.

A response to this question might differentiate individual from political morality by arguing the political order's employment of coercion to enforce its decisions (while we voluntarily enter into most of our partnerships), like morality's rejection of intentional harms, somehow requires a refocus on "concern" rather than merely "respect." But this requires more argument. What makes government legitimate? What is government's proper role, such that deviation undermines its legitimacy?

Alternative answers essentially diverge on whether they see legal order as a morally required or at least morally endorsed arena enhancing an individual's capacity to pursue her ethical values through collective democratic ethical choices or as an arena embodying the (epistemically found) content of morality. Respect for autonomy could recommend the creation of the arena as suggested by the first alternative. Still, it should be asked whether the fact of mandatory inclusion in the legal order, unlike private associations, or the authorization to use coercion, requires that this arena be limited to the second, merely "epistemic" role. Do these factors lead to a view that the legal order's focus must be "concern" for individual members rather than "respect" for the autonomy of striving individual members who seek to use even the legal order, their necessary partnership, for their ethical projects – their creation of unique communities?

The best answer depends first, I think, on the best concept of the person and her dignity, and those concepts ultimately relate to the source or nature of

morality. Consider two possibilities relating to dignity's implications for liberty. Dworkin frequently offers the image of swimmers normally in their separate lanes – with occasional crossovers that require special discussion.[95] Dignity exists in a person's right to make ethical choices in her private life, to use her strength and resources in her separate lane. But when her choices go beyond atomistically adding to the cultural community in which we all live (for example, by consuming pornography) to consequences involving discrete harms to others, morality provides a reason to impose limits. Moreover, equality of value of these swimmers leads to an administrative obligation to provide the lanes with equal resources for each to consume in her swimming. Freedom from constraint is not so much a value in itself. As Dworkin shows, total freedom is absurd as a value. Rather, it becomes a default position that good reasons, such as to prevent uninvited lane crossings, can justify violating. That is, morality provides good reasons for limiting freedom, which is why morality is "prior to ethics in politics."[96] Apparently, morality largely defines the lanes while ethics guides swimming within.

Alternatively, rather than a lone swimmer, imagine a person as an interactive giver of ethical reasons and as a person who strives to realize in all arenas, especially including in her relations to others, those reasons she finds best. Then a person's dignity might emphasize people's reason-giving and reason-accepting capacity, explicitly including within her interactions with others with whom she is necessarily associated, hopefully as an equal partner (positive liberty), though also when making decisions for herself (negative liberty). Both the individual context and collective context, given this fuller conception of the person, equally pose the practical ethical question: What is to be done? Respect for the full person as a reason-giver is a (purportedly) moral reason that endorses the existence of a political/legal realm and requires that it be one of the many realms in which people pursue their inevitably conflicting values. "Losing" within this political realm will, of course, cause a frustration of her ambitions, but that should not be startling. Some frustration in achieving aims is inevitable in all realms (at least for most people). A person can be frustrated in her ambitions either due to nature, to an inadequate (even if a fair) quantity of individually controlled resources, or to private choices of others that determine the costs of the resources she needs and many of the opportunities she has as well by collective political choices about the best form of community. Of course, purposefully frustrating her (morally acceptable) ambitions, which nature cannot do (assuming nature has no aims), would disrespect her autonomy. Neither she (as she might if mentally ill) nor any real "partners" should have such an aim. But the conclusion is different for so-called "competitive harms."[97] When the frustration merely reflects the consequence of others', whether as individuals or partners, pursuit of

[95] *See* DWORKIN, *supra* note 1 (manuscript at 183-92).

[96] *Id.* (manuscript at 233).

[97] *Cf. id.* (manuscript at 189).

alternative aims, there is little other than ethical persuasion with which to object.

This arguably dignity-based emphasis on a person as a reason-giver who makes choices leads both to a stronger (toleration-based) valuation of negative liberty and a broader (ethical-including) interpretation of positive liberty. This alternative sees people in the partnership as trying to convince each other about, and as acting as a partnership to pursue, ethical ideals. It treats equality of respect, not equality of concern, as the sovereign virtue. Still, Dworkin's adoption, if I am right that he did, of the restricted epistemic picture of democracy may respond politically to his accurate recognition that modern democracies have acutely failed to grapple with claims of equality and that modern conservatives have recently abused the concept of positive liberty (democracy) in their critiques of judicial review. Still, further elaboration of the proposed alternative would, I believe, show that its broader interpretation of the partnership's remit would also deny any support for this failure or this abuse. This broader interpretation also may reflect a more appealing conception of the person and a more accurate, quotidian view of democracy – though adequate support for these claims goes far beyond what I can offer in this Comment. For now, Part II considers whether the arguments that Dworkin made in the first part of *Justice for Hedgehogs* provide a persuasive reason to choose the epistemic picture of the partnership.

II.

Dworkin's interpretations of equality, liberty, and democracy, like his concepts of ethics and morality, have their linchpin in people's *conviction* of the objective *truth* of the *importance of their lives*. This claim suggests the need to understand the role of conviction, the notion of truth, and, most importantly, the implications of this importance of one's life, which can be understood only as an *interpretation* – points which I will work through, mostly from last to first.

A. *Two Principles of Dignity*

Dworkin examines people's apparent self-understanding and concludes that they (typically) have, in fact can hardly avoid, an actual conviction that their life has objective value. He argues that the only value that stands up to death is the adverbial value of "living well," for which dignity and self-respect are crucial. The criterion of dignity leads to two principles, which ubiquitously become central to Dworkin's account: (i) it is objectively important that each human life go well; and (ii) each person has a fundamental responsibility for identifying and pursuing value in her own life.[98]

Stop here for a moment. Why does the first of these principles about *each* life follow from a person's self-understanding or more or less necessary

[98] *Id.* (manuscript at 12).

convictions about her life? Any single individual's self-respect or dignity may require her assumption of objective importance of her life. But does this imply the objective importance that *each* life goes well? Sure, self-respect and a person's dignity may require the second, her responsibility to make something of her own life by living well. But does it imply the first of Dworkin's two principles of dignity? I do not mean to doubt the conclusion about each life – indeed, I will later argue that it is right. Still, any move from the singular to the universal should be taken with care. In the hands of many advocates of the move, the argument merely takes the form of rhetorical questions. How can you say your life is objectively important without admitting the same for others? The hope is that such questions will, without the need for argument, silence the doubter – especially if she is a good liberal. And certainly the reverse works logically. If each life should go well, if each life should have dignity and respect, then so too should a person's own life. One trouble, however, with the move outward from the singular is that historically, many who have valued their own lives, who have even treated their life as objectively important – including many racists, modern religious people who believed in an elect group, tribal groups, industrial barons, or members of clan-based societies – have not subscribed to the first principle as stated. Their view might be labeled the "aristocratic principle," which the modern "equality principle" denies. Surely, some examination, beyond the report of convictions, of the basis of the equality principle is merited.

In addition to people's interpretatively refracted convictions, the two principles of dignity also represent a product of Dworkin's non-metaphysical interpretation of Kant, where the same problematic jump reoccurs. Dworkin labels as "Kant's principle" the proposition that "[a] person can achieve the dignity and self-respect that are indispensible to a successful life only if he shows respect for humanity itself in all its forms."[99] Or, as he presents it, Kant's "principle of humanity" is that "if you value anything . . . , then you must be treating your own life as having a fundamental, objective value" – *and* this "must be the value of humanity itself."[100] Since you must treat yourself as an end in yourself, out of self-respect and dignity, you must so treat all.[101] Again, I do not quarrel with these conclusions. Nevertheless, the argument and connectors seem absent.[102] Even if one does value – maybe must value in order to value anything – one's own life as having objective value, why does this objective value need be the value in humanity itself? Why does *self*-respect and dignity require treating all others as ends simply because you treat

[99] *Id.* (manuscript at 15).

[100] *Id.* (manuscript at 167).

[101] *Id.*

[102] Dworkin says that a moral principle reports how "people must act given the equal importance of the lives" of all, *id.* (manuscript at 67), but this seemed more definitional than an argument based on "pursuing coherence endorsed by conviction." *Id.* (manuscript at 77). Why the "given"?

your *self* as an end? How does the objective value you attribute to your own life help answer these questions? Certainly these "liberal," "egalitarian" conclusions are not logically compelled. I agree they are *possible* interpretative conclusions, but knowing more about this interpretation would be helpful. The specifics of this interpretation – and any grounds for or connecting tissue of the interpretation – become crucial for determining whether the first principle of dignity, the objective importance that *each* life goes well, means that the legal order should provide equal resources for the opportunities of each or, alternatively, should show both equal respect for a person to whom it applies.

Similarly, in Dworkin's elaboration of Kant, self-respect – not treating yourself merely as a means – requires that you treat yourself as autonomous, which matches most immediately the second principle of dignity, a person's special responsibility for her own life. But does this autonomy provide a fundamental basis for liberty, as I suggested in Part I, or only support a conclusion that each portion of total freedom is an appropriate default position but one that bears no weight against *reasons* for limitation, as Dworkin seems to argue? Remember equality of "concern" led to Dworkin's distributive principle, while equality of "respect" was at stake in default-setting interpretation of negative liberty. And does respecting this autonomy require permitting pursuit of living a good life as one understands it, while tolerating others' freedom and, when appropriate, entertaining their views, in *all* one's activities, including exercises of political liberties, or does autonomy require bracketing one's own ethical perspectives in the political realm? Knowing more about the basis of the moral principle of the objective value of one's own life, which is central for Dworkin and his elaboration of Kant, may well help answer these questions.

Thus, there are, then, two issues to consider: the heroic transition from the objective value of one's own life to the (equal) objective value of the lives of others (the first principle of dignity), and the bearing of this equal value on a person's relations to herself and others (the subject of the second principle). I will consider competing responses, the first being my understanding of what Dworkin offers and the second the beginning of a proposed alternative.

B. *From Value of Self to Relations with Others: Convictions or Grounding?*

In constructing a transition from a person's attribution of objective value in herself to the two principles of dignity, the key (emphatically non-metaphysical) element with which Dworkin gives us to work is "convictions" as the only place we are told we can stand,[103] especially those convictions about value that support interpretations and an equilibrium epistemology. Dworkin argues that morality is a matter of convictions all the way down.[104] Moreover, he argues that moral concepts are interpretative concepts, that moral

[103] *Id.* (manuscript at 41).

[104] *Id.* (manuscript at 10).

reasoning is conceptual reasoning.[105] "Interpretation," he proceeds to explain, "is . . . interpretative all the way down"[106] and "interpretation is normative all the way down."[107] Basically, morality is a matter of necessarily normative interpretation of convictions. In our quotidian non-metaphysical normative world, that is all there is to be found. Unsurprisingly, his argument for the *truth* of some normative proposition consistently depends on showing that people cannot honestly deny, that is, his readers will be unwilling to deny, the position he asserts. Constantly, when an issue arises, Dworkin asks: What do we believe? And then he tries to show how we could not – given our web of beliefs – truly believe other than as he proposes. No Archimedean point – or maybe more specifically, no "facts" about the world other than a person's convictions – provide leverage for critical argument.

The question remains for Dworkin's approach: Will convictions be enough to get to the equal value and special responsibility principles? In seeking an answer, reconsider the two principles of dignity. Two issues arise about the proposed underlying convictions, one related to their existence and the other involving their interpretative content. First, are there inevitable convictions that thwart a person from consistently and tenably denying the equal value in the lives of each person? Grant Dworkin's (and, he suggests, Kant's) initial claim that people attribute objective value to their lives. I earlier noted the heroic quality of the transition from this individualistic premise to the conclusion that the person must accord like value to all people. Is there objective value in lives that do not, maybe are not fit to, serve God? A Puritan might smile at others who think that they, too, have objective value and might, given humble uncertainty, worry about her own status and look for evidence in her worldly success. What about the emperor who caused the sacrifice of countless workers in building his tomb?

The second issue concerns the content of these convictions. Our attribution of objective value to our life may support an adverbial responsibility to live well and a related attribution of autonomy. From this, maybe a special responsibility for our own life follows. But what do our convictions – or anything we can learn from a non-metaphysical interpretation of Kant – show about the proper relation between this special responsibility and even an accepted objective value of the life of each person? This question becomes crucial for interpreting political concepts with which Dworkin ends and I began.

Also grant Dworkin's claim that a successful interpretation of guiding convictions will avoid conflicts.[108] Conflicts amount to an interpretative

[105] *Id.* (manuscript at 101).

[106] *Id.* (manuscript at 84).

[107] *Id.* (manuscript at 114).

[108] My writings on equality and liberty have always accepted this proposition as useful in providing the most insight, but contrast Frank I. Michelman, *Foxy Freedom?*, 90 B.U. L.

failure. A successful interpretation will adjudicate, will clarify and not weigh, the respective claims of the two principles of dignity. Dworkin considers this matter in many contexts. Each principle's claims were considered in relation to a person's only limited duty to *aid* but also her general obligation not to purposefully *harm*. Given the special concern for one's own life and the iniquitousness of others' needs, there cannot be a general freestanding duty to aid – it would overwhelm any scope to one's own projects. But non-aid creates no conflict. It does not deny or contradict recognizing another's similar concern for herself. In contrast, given the value of deciding for herself, intentional harm that is implicit in choosing to use the other in ways that interfere with the other's own choices implies rejection of recognizing (or, at least, giving full force to) this value of choice as valid for the other. A person's assertion of a *general* right to harm denies the equal value of the person harmed and is not necessary for the special responsibility principle. But harming another is not ruled out if it is "merely" a competitive harm or, sometimes, a harm due to reasonable neglect of the other's interests that occurs not as an aim in itself ("I want your injury") but only due to the pursuit of a person's own permissible goals ("regrettably, you were in the way"). Thus, the complaint is not based on the normal utilitarian concern. The requirement is only not to harm another in certain objectionable ways – ways that treat others' lives as a means only. The moral complaint remains even if the purposeful harm produces net pleasure (or other good) but not if morally permissible means produce even great harm, or net loss, is produced. The complaint applies when it does because a person does not respect the value of autonomous life, and hence of her life, when she treats the other as a means only.

The interpretative implications of a person's special responsibility become prominent for interpreting political concepts of equality, liberty, and democracy. Should society ever provide a person resources (and opportunities) if the dominant societal view (maybe expressed politically) is that these resources are important for a successful life even if the person herself does not agree? Does liberty ever prevail even over good reasons for limitation? Given a person's special responsibility for herself, what role should those aspects of her own conception of the good that she recommends others share play in the collective project that law and society inevitably is? On this last question, one possibility is, given that some people (who have their own special responsibility) will reject her conception of the good, her conception should fall out as a relevant consideration, leaving only *impartial concerns* for all or of all (not all people, but all members of the societal partnership) as the aim for the "partnership" to pursue. Alternatively, as a valuable and autonomous person, maybe she should be able to pursue her conceptions of the good, not only in privately authoring her own life, but also

REV. 949 (2010), and STEVE SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).

in *partisan* efforts to craft the legal order in ways necessary to ideally serve these conceptions, although she should recognize a like political role for others, with their potentially conflicting visions of the good. This approach, of course, must recognize that her favored conception may lose out politically.

I find it unclear what our bare convictions show about these alternatives. Dworkin appears to favor an interpretation that leads to specific conclusions, for example, to the first conclusion about democracy, but I believe he also provides tools with which to support the alternatives. For example, in respect to democracy, rather than require "neutrality," some purposeful detriments to the loser as she understands herself (that is, to her successful pursuit of her conception of the good) could be accepted politically as they are in private life. In his account of morality, harming others is accepted if the harms are competitive rather than purposeful. Maybe creating political losers should be acceptable as long as the losers' efforts (both privately and politically) in pursuit of their own visions are "tolerated." In contrast, lack of toleration, like other cases of intentional harm, should be understood to reject the loser's right of special responsibility for herself. The main support that I find Dworkin to give for the first interpretation of democracy is how it fit his interpretation of the other political concepts – but that leaves open the question of whether these too should be replaced with a contrasting package of interpretations. In the end, coherence endorsed by convictions does not seem enough to adjudicate between interpretations.

With the above problem as background, consider an alternative possible connection between value in oneself and in others. The alternative attempts to add a material or factual grounding to diverse convictions. It seeks this grounding in inescapable *commitment(s)* implicit in, or presupposed by, unavoidable social practices. "Social" involves the quality of the practice centering on relations between individuals, which is the central concern of morality. "Practice" relates the argument not merely to a subjective mental realm but to the material jointly-constituted social world. If a practice is actually "unavoidable," the commitments implicit in it would in some sense escape historical, locational, or individual variation. The social practice that I will examine more below is "communicative action" – speech acts aimed at agreement, which aim to have nothing but the better reasons prevail and in which each equally has the authority to propose and to say "yes" or "no" to proposed alternatives.

Nevertheless, at least under some interpretations, Dworkin's theory of interpretation, truth, and moral concepts combined with Hume's principle blocks this alternative way to bridge the "value" an individual attributes to her own life and proposed moral and political conceptions. Thus, before exploring this alternative, further remarks on these aspects of Dworkin's program are needed.

C. *Interpretation: A Clarification*

After describing moral reasoning as conceptual (not causal or collaborative) interpretation, Dworkin distinguishes interpretative, criterial, and natural kind concepts,[109] with moral concepts being emphatically interpretative.[110] On, I believe, the most obvious reading, the proposal is that these are three *different types* or *kinds* of concepts, each having its place in the social world. Dworkin offers descriptions, seemingly criteria needed for classification, for determining whether a concept is one or the other type. Following Wittgenstein's advice, we are told that the concepts should be seen as tools of "different kinds."[111] Mistakes in categorizing concepts are possible and can have bad consequences. The modern tendency of viewing law as a criterial (or natural kind) concept has, Dworkin argues, "spoiled . . . much recent philosophy of law."[112] In the last portion of the book, Dworkin argues that a major but ubiquitous error in political and legal theory is to view important political concepts as criterial rather than interpretative.[113] This reading of concepts being of different kinds may also be necessary to sustain the divide between two major domains of understanding, science, and interpretation. Since the truth of interpretative concepts relates to value, interpretative concepts must be absent in science. This divide, in turn, may be crucial for Hume's principle, that an "ought" cannot be derived merely from an "is." The divide asserts that in science (though not apparently in interpretation) there are *mere* facts, facts which can constitute an "is" that cannot ground an "ought." The implication follows that interpretative concepts, which are normative all the way down or value-based, are absent in relation to the "is" investigated by science. Conveniently, all examples of natural kind concepts seem to be from the realm of science, as are some but not all criterial concepts. Thus, the existence of different types of concepts leaves Hume's thesis safe, at least from this potential threat.

Care shows, however, that this reading, which sees three different *types* of concepts, is unpersuasive. In fact, Dworkin's examples and discussion suggest a different, better way to understand his distinctions. For *any* concept, different types of agreement can exist or disagreement can arise about its use. Dworkin's categorizations are best seen as highlighting these alternative types of possible agreement or disagreement. Disagreement can be about (i) *the value(s)* the concept instantiates or the specific pragmatic gains achieved by correct usage of the concept, (ii) about *the criteria* that best identify or elaborate that value, or (iii) about *the application* of the criteria to particular situations. Each later disagreement requires either rough agreement at (or

[109] DWORKIN, *supra* note 1 (manuscript at 101-06).

[110] *Id.* (manuscript at 103).

[111] *Id.* (manuscript at 102).

[112] *Id.*

[113] *Id.* (manuscript at Part V).

stipulation relating to) the earlier stage – though sometimes the inquiries can become intertwined.

This is roughly what Dworkin had already explained in describing three stages of interpretation: individuate practice, attribute purpose, and judge best realization.[114] At this point, he was explicating his social practice theory of interpretation,[115] but the scenario is more general. Out of a mass of phenomenon, a "concept" individuates some; doing so serves some purpose(s) or value(s). Identifying purposes or values helps determine or justify criteria for application of the concept – though these need not be "necessary or sufficient" criteria. Depending on the purpose(s) or value(s) at stake, criteria can take the form of family resemblances. Then the concept can be applied, often employing factual observations, sometimes combined with further elaboration of the value or criteria. How much agreement/convergence is needed at each stage is not fixed *a priori* but is greatest at the first stage,[116] which I think reflects the later stages' dependence on the first. Thus, my suggestion is that in any interpretation, the first stage is roughly what Dworkin treats under the label of being an "interpretative concept," while the later relate to "criteria" matters. "Natural kind" concepts refer to the purported existence of reasons for employing a particular sort of criteria, ones unrelated to human practices.[117]

This suggestion about stages or levels of agreement/disagreement provides a perspective from which to examine Dworkin's characterization of interpretative, criterial, and nature kind concepts. We recognize "a family of concepts" that he calls "interpretative" when we share "an understanding that the correct application is fixed by the best interpretation of the practices in which the concepts figure."[118] For this family, though we must be able to individuate – know that the concept applies – we may disagree about the specifics of the value it serves and, consequently, disagree about examples. Is the progressive income tax an example of justice or injustice? A concept is criterial when we agree at least roughly about "the right criteria to use in identifying instances."[119] A concept refers to a natural kind when people "believe, correctly, that the concept *has historically been used* to pick out examples of some kind of entity that has a distinct existence in the natural

[114] *Id.* (manuscript at 84).

[115] This description applied to Dworkin's "interpretation" of his "practice theory of interpretation" and showed that we individuate an interpretative tradition, attribute to the tradition a package of purposes, and judge its realization on a particular occasion. This example suggests that different interpretative traditions, despite all being on Dworkin's account "truth seeking," can have different purposes – I would say, seek answers to different questions.

[116] DWORKIN, *supra* note 1 (manuscript at 84).

[117] *Contra id.* (manuscript at 101).

[118] *Id.* (manuscript at 102).

[119] *Id.*

world with a distinct physical or biological nature."[120] I suggest the reason that the degree of agreement needed is normally greatest for the interpretative stage is that for what he describes as a criterial concept, identification of criteria identified depends on reaching (rough) agreement on value issues (rough in that in an equilibrium epistemology, the stages often interact). The possibility of "natural kind" depends on an established agreement on the usefulness of a particular categorization – e.g., of grouping together stones on basis of chemical composition rather than beauty of stones or animals on the basis of DNA rather than criteria such adverbial abilities as ferociousness or cuddliness. Without agreement on the utility (value) of determinative criteria – if people had not found particular natural qualities useful for their purposes – the natural kind, which categorizes a vast number of distinct "instances" under a single label, would not exist either.

This understanding of interpretative, criterial, and natural kind suggests that disagreement can potentially break out at any stage, in respect to any concept. Dworkin so suggests and provides examples. The concept of a "planet," he says, is normally criterial – criteria I assume, although it is not essential that lay users like me to know the criteria precisely, about size or origin or type of orbit or geological activity – in identifying these entities in nature became interpretative when the discovery of many more objects in our solar system lead astronomers to reconsider the status of Pluto.[121] Presumably, the dispute related to the insights, including ease of fit into current conceptions of astrological geometry that alternative interpretations supported – these insights being the "value" served by the concept. Once (rough) agreement excluded Pluto, prior criteria of being a "planet" were accordingly revised or refined. Dworkin also describes the same multiplicity of treatments of the concept of truth. Depending on the particular type of disagreement that its application gives rise in a particular context, truth is sometimes a criterial, sometimes an interpretative concept.[122]

One point that he is insistent on is that the basic political concepts such as justice, equality, liberty, and democracy are interpretative, not criterial. When people disagree about whether a progressive income tax exhibits justice or injustice, Dworkin suggests they both deploy an interpretative concept, justice, but disagree in their interpretative theory of justice. That, however, is not the only possibility. Two Rawlsians may agree that the best theory of justice is one that organizes social and economic equalities to maximize the position of the worst off – a theory that provides potentially stringent criteria for justice. The first Rawlsian, however, may have been sufficiently brainwashed (my characterization) by trickle-down economic theories and overblown efficiency claims about the power of incentives to conclude that the progressive tax is a paradigm case of misguided intentions leading to injustice (under the Rawlsian

[120] *Id.* (emphasis added).

[121] *Id.* (manuscript at 108-09).

[122] *Id.* (manuscript at 110-13).

criteria). Or two people may agree that the best theory of justice is one to which even the worst off would (or should?) agree ex ante – i.e., a specific criterion. But after this criterion is accepted, they may then disagree about whether it leads, as an even more specific criterion, to the difference principle or to some more complex set of rights that includes a "just minimum" plus otherwise politically-chosen (or utilitarian) results. Here, criterial disagreements and value disagreements overtly intertwine. The issue is not the type of concept that justice is but the nature of the disagreement – which could be about the value, the best indicia of its realization, or application of these indicia.

Likewise, disagreements about equality and liberty can be about either the content of the concept, about the criteria a particular theory supports, or about their application. On one interpretation, the main criterion of equality is a state showing equal concern in its structural creation of wealth distributions rather than in its distribution of welfare. Disagreements may be interpretative about whether equality of concern is the best theory of equality, or be criterial and ask whether equal wealth distribution is the way to show equal concern, or be about whether particular policies meet that criterion. Depending on the dispute, the concept is interpretative or criterial (though the Platonist may, wrongly, argue that equality has a natural meaning). The proper criterion of liberty, someone may argue, is to find that part of total freedom for which there is no proper reason to restrict. Disputes can be criterial, about application of this criterion. Alternatively, the concept *in dispute* can lie earlier, at the level of the value that liberty is best understood to embody, which might lead to a different criterion – and then the dispute would be interpretive. But even if, as often is the case, there is virtually no dispute about the value involved, that does not mean the concept is instead a natural kind or criterial but only that, given this context, interpretative value questions are not in dispute.

The arenas of possible dispute are ubiquitous. Normally, I suspect most people use "bachelor" as a criterial concept with absence of an adult male's legal marriage being the most typical criterion. Still, interpretative disagreements may break out. In disgust, she says: "He's no bachelor, he is married to his work." Another says: "Though he is not legally married, he has not been a bachelor since he and Pat began living together forty years ago." Or, according to the homophobe: "No, he is a bachelor since Pat is another man." The dispute in each case seems to be over criteria and resolution here might be settled by stipulation, but at a more meaningful level, with possible consequences for other aspects of our understanding (i.e., truth is not bare), resolution depends on agreement about the value the concept properly serves (in that context). Still, there is also no reason to think the concept must serve the same purpose (value) in all contexts – maybe these usages are held together in the way of family resemblances, a package of values and meanings.

When Dworkin first invocated the recently popular notion of "natural kinds," I bristled with anti-Platonism premonitions, comforted only by the thought that he was cabining the concept within the realm of science. The

pragmatist sees that gold – and lion – are interpretive (related to the value or use of the category) and also criterial, except that in dominant scientific usage rough practical agreement has long existed on the nature of the criteria. This interpretative agreement can always be challenged on the basis of different values that may to some people (or in some contexts) seem more important. The agreement simply represents that in these cases many people no longer view the coverage, as opposed sometimes to the application, of the concept controversial. Dworkin effectively recognized this point when he described a natural kind as referring to a concept that "has historically *been used* to pick out examples."[123] Only agreement on uses – or, in the background, the values that these "uses" serve – creates the category. For some purposes, "gold" could refer to any material exhibiting a relatively precise bright yellow color, materials which can vary in chemical compositions. "Lion" could exclude those animals with the "lion" DNA that speak British English but include animals with various salient similarities but very different DNA. The view that gold and lion are natural kinds reflects merely the relatively uncontroversial usefulness we find in grouping together under one category a large number of inherently different objects that are similar in a particular criterial way. In this light, though "natural kind" and some "criterial" concepts may have features that are "necessary and sufficient" for the usage, other concepts may have features associating different specimens due to family resemblances. What I want to add is that which is the best way to see any concept will always relate to the usage that people conclude or that practices suggest best serves relevant values.

That is, my analysis largely accepts arguments of pragmatists – recently exemplified by Rorty in his challenge to correspondence theory,[124] but also by earlier American pragmatists – that "truth" is constructed to serve human purposes and, hence, never independent of value in the way Dworkin suggests for science. In the spirit of Dworkin's "just so stories,"[125] these pragmatists might observe that the industrial revolution and the modern age have settled on particular purposes for science that lead to an emphasis on falsification and reproducibility, both of which are closely related to the constructed truth's instrumental contributions to a capacity for control and its offering otherwise intriguing causal explanations. These purposes allow for the existence of natural kinds. In earlier periods, though, *these* purposes were less dominant, possibly due to cultural and economic structures that made these "control" ambitions less pressing but also due to lesser ability to produce them. In that earlier context, other criteria better served alternative status, narrative, and religious values that determined "truth" in nature.

[123] *Id.* (manuscript at 102) (emphasis added).

[124] RICHARD RORTY, PHILOSOPHY AND MIRROR OF NATURE 333-42 (1979).

[125] DWORKIN, *supra* note 1 (manuscript at 13-15).

Some theorists – consider Polanyi[126] and Kuhn[127] – while not necessarily disagreeing with this alternative "just so" story, note the significance in science, even today, of additional values such as simplicity, or ideals of beauty or elegance. Another value relevant for what truth is accepted in science is its capacity to lead to fruitful research agendas responsive to currently pressing theoretical or practical questions, an advantage that can trump even a truth's inability to answer some (but sometimes now abandoned or marginalized) questions that an old truth purportedly answered. The general point is that without some agreement on purposes and possibly other values, science has no standards for truth. Truth in science remains just as much a matter of "the case that can be made" for a particular conception as it is for interpretative truths related to human artifacts, including morality. Of course, this proposed radicalization involves major philosophical debates (in which each side unfortunately often merely caricatures the other) about which I cannot provide an adequate treatment. Still, if, as I think, these pragmatists are right, my proposed radicalization does not, as do some so-called Platonists, seek to turn interpretation into what Dworkin identifies as science, but rather the reverse – it denies a separate realm, science and nature, where truth is not interpretative.

Thus, I only claim that carving off a domain of inquiry, science, where truth is value-free and not interpretative, cannot be justified. Though in "normal" science, the value-basis and interpretative content of concepts are today seldom in question, that degree of agreement is also often, even if less often, true in the domain that Dworkin treats as interpretative.[128] Routine applications of concepts that Dworkin treats as interpretative, including moral concepts such as lying or consent, often do not raise – do not thematize or bring to the forefront – value issues. The background value issues related to truth only arise here, as in science, when accepted interpretations – say of "lying," like "lion" or "gold" or "planet" – are challenged in particular ways, challenged not in their criterial application but by disputing the values that animate the concepts' meaning and suggest criteria. In all cases, an absence of a need to address value matters only reflects the extent the point or value of the (interpretative) term is not problematized or, for the given context, is sufficiently uncontroversial. Often the value debate has been sufficiently settled at an earlier interpretative stage of understanding that it has become background knowledge that inquirers do not now consider problematic. Still, if challenged, people should be able to consider and defend their interpretations.

---

[126] *E.g.*, MICHAEL POLANYI, PERSONAL KNOWLEDGE 16, 145-50 (1958).

[127] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

[128] Analogous is how law at the trial or dispute resolution level most often involves criterial application of legal terms, while at the appellate level issues often involve conceptual interpretations that can challenge otherwise accepted criteria.

D. *Interpretation: Three Quarrels and a Radicalization*

Dworkin's approach to interpretation, I believe, needs to be radicalized – its considerable insights applied more broadly. For current purposes, my incomplete description involves three crucial points of his theory, each of which makes moves with which I will quarrel.

First, Dworkin begins with an assertion of a major divide of understanding into two domains, science and interpretation.[129] In science, claims can be "barely true," that is, true without effect on the truth of other assertions. Also in science, the intrinsic aim of inquiry, truth, is unrelated to value. (Of course, as Dworkin notes, in science as well as in interpretation, the inquiry needs a justification, for example, to find *useful* knowledge, for which the number of pebbles in Africa is unlikely to count.)[130] Neither quality – bare truth or independence of truth from value – holds in interpretative domains.[131] Instead, the truth of an interpretation affects the truth of other interpretations and this truth relates intrinsically to its value, presumably because the interpretation aims to get at that value of the interpreted object (e.g., word or practice). That is, truth exists in both domains but differs in these crucial ways. Techniques of investigation vary accordingly.

Second, in explicating interpretation, Dworkin offers two possible alternatives: either an interpretation (maybe only one interpretation) can be *objectively true*, or interpretations merely differ. The second follows if interpretations are merely personal subjective projections. Dworkin, looking at interpreters' characteristic views of their activity, is surely correct that the second is not how interpreters normally conceive interpretation.[132] Even when seemingly subjective, for example, when Pat says: "That is how *I* understand it," she opens herself to discursive challenge by those who think her interpretation wrong.

Third, Dworkin's connection of morality to his theory of interpretation warrants careful attention. He argues that moral reasoning is itself "conceptual interpretation" – as opposed to being "causal" or "collaborative" interpretation.[133] In conceptual interpretation, he says, "the distinction between author and interpreter vanishes."[134] Conceptual interpretation's aim is – and "correct" usage of a concept depends on – "the best interpretation of the value latent in the . . . practices that employ them."[135] For moral reasoning, the aim is to find the best understanding of moral values involved in people's practices. This thesis, call it the "best value realization" thesis, might be contrasted with a view of conceptual interpretation that sees interpretation

[129] DWORKIN, *supra* note 1 (manuscript at 97-98).

[130] *Id.* (manuscript at 194).

[131] *Id.* (manuscript at 96-97).

[132] *Id.* (manuscript at 78-79, 112).

[133] *Id.* (manuscript at 101).

[134] *Id.*

[135] *Id.*

more broadly as simply "insight seeking" or "question answering," which leaves the "best value" interpretation of the concept or other object of interpretation as simply the insight or answer that an interpreter seeks in the particular circumstances – for example, judicial interpretation may properly seek the best construal of the values involved.

1. The Divide

With the clarification about interpretative, criterial, and natural kinds in hand, it is easy to see that all concepts are (potentially) interpretative. This quite obviously poses a problem for the claimed divide in understanding between the domains of science and interpretation. But even if scientific concepts involve interpretation and values, weight still might be put on the other practical element, that truth in science but not in interpretation can be "bare." Here too, however, the difference may be an artifact of the examples or perspective.

Distinguish between instances of assertions of truth and the framework in which the assertion lies. Then, compare two assertions: "your statement yesterday was a lie" and "the increase in the velocity of the falling lead ball was *a*." The best interpretation (related to the values served by the concept) of a lie will determine whether negligent mistakes or white lies should count (given the role the concept of lies play in our moral web). The best resolution is influenced by and could influence the appropriate use of other concepts – it is not bare. But the specific statement may not raise such issues, being a "lie" on any competing interpretation. Moreover, either conclusion (e.g., that my statement yesterday was or was not a lie) may have no bearing on your view of me as being a lying type, on the whole a generally despicable character, and may be irrelevant for any act you will make. That is, the truth here would be "bare," having no bearing on action or on other struts of the geodesic structure of moral concepts. The finding about the acceleration of the falling lead ball can also be a bare truth – it seems that way when reported on my lab sheet. Or the reported acceleration could raise value questions about whether *a* is best understood relative to a particular environment – being in a vacuum or at particular distances from the earth – or taken as a simple report. More important, a potential "true" finding of *a* could require major revisions in a host of other purported facts and raise questions about Newtonian mechanics. Of course, the truth of Newtonian mechanics relates to the value we agree measurements should serve – it may be true for normal circumstances of an instrumental capacity to control the physical world. Newtonian mechanics, however, may be not true if the value involves either the need to explain the small differences identified by relativity theory, or to serve poetry, or reflect all-important religious needs. Like in the social realm, truth about nature can, in a given instance, be barely true or can affect a geodesic structure of understandings.

Thus, my claim is that truths about both the "natural" world and the world of human artifacts reflect values or purposes that define the inquiry. Moreover,

these values or purposes will, in both cases, sometimes limit the significance of a particular finding ("barely true") or, at other times, reflect the necessity of fitting findings together in various webs such that a particular finding could require readjustment of those webs. Moreover, for any concept – for example, lying and acceleration – disagreement may be over application of the criteria, over the criteria themselves, or over the value served by the concept, with this final potential area of disagreement creating a basis to reach alternative judgments about the other matters.

Admittedly, I do not want to deny all differences between the "natural" world and the world of human artifacts. Most importantly, understanding in the realm of nature reflects merely the values and purposes of the social role of the concept, while understanding in the realm that Dworkin calls interpretative also inevitably reflects purposes and values of social creations themselves (including both practices and concepts) and sometimes involves purposes or intentions of human creators. This difference raises the question, important for a key element in Dworkin's argument, whether social practices, as "facts" about the social world that obviously involve values and purposes, can provide a basis for conclusions about "ought" questions that are independent of "convictions" issues?[136] Facts about practices involve values, but no more than do facts of scientific understanding. So would this role violate Hume's principle?

2. Objective Truth or Subjectivity

The second highlighted issue concerns Dworkin's suggestion that a moral concept or an interpretation is offered either as a "subjective projection," a feeling, or as a purported "objective truth." By rightly rejecting the former characterization as untrue of people's convictions as exhibited in a wide variety of practices of interpretations, he purports to show that interpretations (and the interpretative realms of morals and ethics) claim objective truth. His conclusion, however, only follows if "objective" truth is the only meaningful alternative to mere subjectivity. Conceptually, the issue is the nature or status[137] of interpretative claims. Stylistically, Dworkin's argument here takes a mode used repeatedly in the book: offering a distinction between alternatives A or B as a distinction, rejecting B and then adopting A. The critic can always ask, did he fail to consider a relevant C? My claim is that Dworkin fails to listen to typical language of interpreters, many of whom often suggest a relevant C, which relies on interpreter-independent criteria (i.e., criteria that

[136] *Id.* (manuscript at 19).

[137] Continually in his critic of status skeptics, Dworkin saw them as asserting that moral claims were not objectively true because they were mere projections of attitudes or emotions. There, too, what was not adequately considered is that the claims could be correct and independent of the speaker or interpreter but that the correctness is better described as appropriate or insightful than as true.

are not subjective), but not criteria that are best or most insightfully described as asserting "truth."

Dworkin's "phenomenology of interpretation" builds on his finding that interpreters "characteristically . . . assume that an interpretation can be sound or unsound, correct or incorrect, true or false."[138] People's actual usage and our commitments show, he observes, that we do believe in interpretation's truth-seeking quality.[139] He recognizes that some theorists find his notion of "objective truth" a mouthful and might prefer to reserve by stipulation the last contrast – true/false – for scientific claims.[140] They prefer to characterize interpretations as only more or less reasonable.[141] Still, Dworkin claims that the distinction between characterizations – "sound," "correct," "true" – is empty, having no utility.[142] This conclusion, however, often seems fueled simply by his overriding (and proper) concern to reject a misguided view: that interpretation is merely subjective and leaves us with no more than a capacity to see that people's interpretations differ. Thus, I want to defend the reservation view that he rejects.

Admittedly, people sometimes do say all of the above – that one interpretation is sound, correct, or true and another is unsound, incorrect, or false. But though it seems odd to say that one statement is more true than another, people commonly make comparative judgments – that one interpretation is better or worse than another on other grounds of aesthetics, playfulness, usefulness, simplicity, or insightfulness. Not just lawyers,[143] but many who try to be careful, find it more precise to stick with the claim that an interpretation is sound, persuasive, insightful, informative, or useful – or better because more playful, aesthetic, or less complicated – rather than say it is true. Dworkin's emphasis on objective truth, I suggest, provides an impoverished grammar and obscures differences in the multiple claims implicitly made by any utterance, including an interpretation.

Attention to the nature of "communicative action" may explain this tendency to use these other terms. I make a point here about "validity claims" because it supports my later claim that material "social practices," more so than mere "rational beliefs" (my claim that "commitments" implicit in practices more than individual "convictions") provide the necessarily interpreted basis of morality. Habermas describes "communicative action" – a term of art applied specifically to "speech acts aimed at agreement" – as always implicitly involving four separate validity claims: to be

[138] DWORKIN, *supra* note 1 (manuscript at 80).

[139] *Id.* (manuscript at 97).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* (manuscript at 81).

comprehensible, truthful, true, and appropriate.[144] A speech act often thematizes only one of the last three but a hearer can always challenge any of the four: (i) what are you saying; that is unintelligible; what language are you speaking (comprehensible); (ii) you must be kidding; that is a lie (truthful); (iii) you are wrong in your factual claims or in the factual claims that you must be assuming; what factual evidence can you offer for your factual claim or for the necessary factual assumption(s) of your statement, suggestion, question, or recommendation (true); (iv) your observation, question, or recommendation is inappropriate or unauthorized; your proposal is the wrong thing to do; you have no right to ask that or for that; even if true, what you say is irrelevant to the matter under discussion (appropriate). Only the third of these challenges explicitly concerns a matter of truth. Often truth in this "standard" sense will not be the most relevant (thematized) concern. Still, none of the four validity claims raised in these potential challenges is merely a matter of individual subjectivity. Validity can always be challenged on these four non-subjective but different grounds, each calling for a different investigative or argumentative discourse. Even "truthfulness," which *refers* explicitly to individual subjectivity and about which the speaker has privileged access, is in a sense an "objective" matter – it can be inter-subjectively disputed. Though initially Lynn or even Sue may think Sue's statement is a lie, now Lynn sees that it is true or Sue finds, after discussion or reflection, that at a deeper level or in a less obvious way, her statement expresses a meaningful truth. Thus, my claim is that the term "truth" is more usefully reserved for a single, and in interpretation not a normally thematized, speaker-independent validity claim.

Assertions about social practices – necessarily interpretative claims – are speech acts that at least implicitly assert each of the four validity claims. In addition to comprehensibility, truthfulness, and truth, an assertion about a social practice necessarily asserts the appropriateness not of the practice but of the assertion. This fourth validity claim encompasses a non-subjective normative dimension. The claim can be correct, right or wrong, useful or dysfunctional. As a discourse-based validity claim, the speaker assumes – as Dworkin consistently emphasizes, though without suggesting this validity claim framework – that the claim has an interpreter-independent content, although the claim need not assume a content that is independent of human activities and choices. The practical appeal (but hardly necessity) of seeing statements as raising four different "validity" claims, only one of which claims "truth," rather than raising four *different* truth claims, is to mark distinctions between types of claims that communicative action makes and that can be subject to challenge. Using Dworkin's criteria of utility for evaluating his descriptive of claims about interpretations,[145] resistance he observes toward his calling an interpretation "true" rather than merely claiming attributes such as

[144] JÜRGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press 1984) (1981).

[145] DWORKIN, *supra* note 1 (manuscript at 97).

sound, persuasive, informative, or insightful (appropriate), may reflect inclinations to be precise about the type of validity claim(s) on which the interpreter or her audience wants to make. In this perspective, interpretations and moral judgments aim not to be non-subjectively "true" but to be inter-subjectively "right."

3. Best Value Theory of Interpretation

Dworkin's excellent discussion of different genres of literary interpretation begins to show inadequacies of his account of conceptual interpretation, and his claim of the disappearance in conceptual interpretation of the distinction between author and interpreter. Interpreters in different traditions have different possible aims in interpreting a poem – or a law – and the right or valid or most insightful interpretation is the interpretation that most informatively serves this aim. This aim, however, need not be the purpose either of the creator (which in the case of concepts or social practices is best described as some larger community) or of the artifact. This possibility occurs precisely because value-based purposes or aims exist at three points as to cultural artifacts (though only one in the realm of science) – the creator or creators, the artifact, and the interpreter.

The three distinguishable loci of purpose needs emphasis, particularly because they are somewhat obscured by Dworkin's suggestion that the distinction between author and interpreter "vanishes" in conceptual interpretation.[146] All specific human artifacts, including texts and even words, are inevitably created by particular people at particular times for particular purposes – for example, to make money, to lift a weight, to provide warmth, to please a boss, to be beautiful, to communicate with another, to organize the day. The creator's point or purpose (maybe call it "intent," a term out of place when referring to the artifact itself, since "intent" is most at home in referring to the individual creator/speaker[147]) is a subjective matter about which an interpreter may or may not be interested. Artifacts, however, become social and receive inter-subjective recognition when they fit into ways of life or social practices – geodesic frameworks – and as such they have purpose(s) and meaning. Thus, artifacts are also a loci of purpose on which the intent of specific creators and creations often piggyback. To be comprehensible (maybe, according to the Wittgensteinian critique of private language, even to the creator), the artifact must fit into a social world, created by the conscious acts of many people, in which the artifact can be understood to have a purpose

[146] *Id.* (manuscript at 101).

[147] Most speakers, I suspect, do not find it strange to say a chair has a purpose but would find it strange to say that a chair has an intent. The analytic difference between the "purpose" of the artifact and the "intent" of the creator, and the greater relevance of the former for constitutional law is developed in C. Edwin Baker, Comment, *Injustice and the Normative Nature of Meaning*, 60 MD. L. REV. 578, 579-83 (2001).

that is independent of any subjective purpose of the creator.[148] The independence of a statement's purpose from speaker-subjectivity is illustrated, for example, by the possibility of a statement representing a mistake from the speaker's perspective. To say: "I really meant x even though I said y" makes sense only because of this second purposeful, non-subjective aspect of the meaning of an artifact, an aspect implicit in statements and our understanding of them. Even the subjective intent to please a boss or obtain money obviously requires social practices that, for example, recognize authority or attribute value to money.

The third, here most relevant, locus of purpose is the interpreter. She inevitably has specific purposes or aims or inquiries. Her effort seeks, and her interpretation of the artifact claims, to provide insight into particular questions or solutions to particular problems. This purposefulness might be obscured to the extent that a particular purpose is relatively unquestioned in particular contexts. Both in the context of practical reason (and in the judicial context) interpreters generally assume the agreed upon purpose is the best value-based answer to the question: "What *should* I do?" In addition, the insight sought by the judge, but not for individual actors, is narrowly focused by role obligations in respect to the case before her. Still, finding an answer to the direct practical question is only one possible purpose with which an interpreter can approach an artifact – a text, law, concept, object, or practice. It describes the position of a judge but not of an English professor interpreting Chaucer or even a historian interpreting a legal order. Legal interpreters other than a judge might seek to see, for example, whether the law represents and tries to mask an ideology of oppression,[149] or represents a step in a progressive history of liberation – or has some other, maybe even biographical, significance. Dworkin, I believe, cloaks – though apparently does not reject – this variability of interpretations by emphasizing the claim of interpretations' objective truth[150] and that truth is independent of human will.

The same tendency to obscure is present when he asserts an erasure of the distinction between the questioning interpreter and the artifact, for example, the concept subjected to interpretation. Dworkin properly claims that conceptual interpretation focuses on social phenomenon, not individual subjectivity, a move that if successful disposes of subjectivity, the constant

[148] DWORKIN, *supra* note 1 (manuscript at 87).

[149] Consider Dworkin's discussion of "critical legal studies" in American law schools, an enterprise that sought to reveal that contradictions in legal doctrine were caused by the underlying influence of powerful groups seeking to further their own interests. *Id.* (manuscript at 92-93). Dworkin calls this approach "explanatory interpretation," seeking to demystify the origins of a doctrine, and suggests that such an approach could have been complementary to "conventional collaborative interpretation that aims to improve the law by imposing some greater degree of integrity and principle on doctrine whose causal roots may well have been what the Crits claim they were." *Id*.

[150] *Id.* (manuscript at 96-97).

bogeyman of his anti-relativistic stance.[151] Dispensing with subjectivity does not, however, suffice to erase the distinction between author (even if it is a social or collective tradition) and interpreter. Dispensing with the author's subjectivity and focusing on the purpose or value of the social artifact – the concept or practice – skips over a key locus of purposes or aims that always exist in interpretation: the interpreter as someone independent of the object of interpretation – the poem or law or concept. Only this independent role of the interpreter explains why interpretations can be causal, collaborative, or conceptual.[152] It also allows interpretations to be, as Dworkin explains, independent, complementary, or competitive.[153] Even in the case of concepts and conceptual interpretation, the questions the interpreter can bring can include the aim of finding how the concept produces dissonance, needs reform, or has warts. Certainly, in conceptual interpretation of, for instance, a social practice, best realization of the value(s) implicit in the practice is an inadequate, even if not wrong, statement of typical aims. Rather, the best interpretation is the one that provides the most insight into the particular questions that the interpreter brings to the interpretative exercise.

E. *Hume's Principle and Convictions – Social Practices and Commitments*

The relevance of "academic" quibbles about Dworkin's insightful theory of interpretation might at first seem marginal. His aim is only to pursue interpretation in value realms, especially ethics, morality, and politics, so the correctness of his commonsense characterization of the domain of science might be unimportant. Nevertheless, continuously, Dworkin's argument relies on "Hume's principle" – that no "ought" can be derived simply from an "is."[154] He regularly rejects any determinative role of some offered "fact" to the normative realm – though he takes note that facts often take on a subsidiary role due to relevance given by reasons developed in the independent normative realm.[155] Conventional "social practices," for example, become relevant in the arena of obligation. But they do so not, Dworkin says, by creating obligations – which would violate Hume's principle – but by providing a useful *vocabulary* for creating and clarifying obligations.[156] Often this rejection of the relevance of "facts" is persuasive – but only because the value(s) involved in their interpretative content is not relevant to the practical question(s) at issue at that point. If something like the pragmatist account of truth is accepted, this account not only expands the scope of interpretation to include science but also challenges the category of a simple "is." Mere identification of a "social practice" requires value, often normative, judgments, and the factual existence

[151] *Id.* (manuscript at 101).

[152] *Id.* (manuscript at 86).

[153] *Id.* (manuscript at 90).

[154] *Id.* (manuscript at 14-20).

[155] *Id.* (manuscript at 17-18).

[156] *Id.* (manuscript at 200).

of the practice can involve commitments that add to or replace convictions as an ultimate place to stand.

This broader interpretative realm that includes science could become relevant – though argument would be necessary to show that it is relevant – for moral truth.[157] Dworkin asserts persuasively, I believe rightly, that the moral truth in which we believe is not merely a matter of subjectivity.[158] He argues that we must stand on "conviction"[159] and, at least in interpretation where truths are not "bare," presumably on matters such as the consistency or coherence of our constructions.[160] Still, he creates obvious unease when he leaves us only with the immaterial and seemingly subjective fact of individualistic conviction, which we then approach through conceptual interpretation and an equilibrium epistemology as a basis for moral truth.[161] Once facts are not discredited in Hume's fashion as sources of normative insight, the realm of social artifacts, in particular, social practices, opens up as a material and factual realm, also appropriated only through interpretation, as a possible foundation of moral content.[162] Thus, below, this critique of Dworkin's reliance on his interpretation of Hume leads me to discuss "communicative action" as an inescapable human practice that could constitute (necessarily interpreted) facts on which to base moral demands. My claim will be that while concepts involve only convictions, social practices can involve commitments on which to stand.

Given his conception of truth claims, Dworkin rightly tells us that moral concepts and their truth lie in the realm of interpretation.[163] He also (at times) argues that morality is a matter of conviction all the way down and that we can only test one of our convictions against others.[164] Or, he later says: "We always stand, in the end, on our convictions. There is no place else to stand."[165] In his recommended "equilibrium epistemology . . . the beginning and [] end is the conviction."[166] His point is surely right *in one sense*. A

[157] Hart claimed to identify certain "facts" that he thought had a *rational*, not merely causal, relation to a minimum content of natural law. H.L.A. HART, THE CONCEPT OF LAW 193-200 (2d ed. 1994). Although I agree with Hart's general point, I have argued that he then became unpersuasive as well as too Hobbesian in the *type* of facts he identified as giving a *reason* for minimal content of natural law. C. Edwin Baker, Hart's Transformation of Positivism: Natural Law Without Metaphysics (2009) (unpublished manuscript, on file with Nancy Baker).

[158] DWORKIN, *supra* note 1 (manuscript at 10).

[159] *Id.* (manuscript at 10, 39).

[160] *Id.* (manuscript at 74).

[161] *Id.* (manuscript at 37-39).

[162] *Id.* (manuscript at 14).

[163] *Id.* (manuscript at 10-11).

[164] *Id.*

[165] *Id.* (manuscript at 41).

[166] *Id.* (manuscript at 40).

person finally faced with the practical question of what to do, as well as the question of what to think, implicitly or explicitly relies on her convictions, even if with wise hesitancy and self-conscious recognition of their fallibility. I believe, however, he offers convictions as loci of evidence and insight, which can be rationally and responsibly probed, harmonized, and revised, and is not merely stating the truism that (putting aside claims of determinism) we must view ourselves as acting on our judgments. Thus, Dworkin also argues for responsibility in our convictions – argues that moral integrity and ethical responsibility depend on forming convictions in a responsible manner.[167] The justification of a conviction lies in the case that can be made for it – but it seems this case can only ultimately refer to other convictions. Responsibility, that is, refers to care in assuring that the final convictions fit together and, hence leads to the recommended equilibrium methodology. The categorical imperative is a test of moral responsibility, not of moral truth.[168] An obvious fear, however, is this equilibrium epistemology will lead to a loss of critical potential. Is there nothing more to be said about where we stand than to refer to convictions appropriately adjusted to other convictions?

Dworkin constantly refers to factors, such as conviction and "sustained reflection,"[169] that intrinsically involve only individual consciousness, certainly the apparent location of convictions. This emphasis encourages the view he most wants to reject: that the content of what we consider "truth" – even if our own understanding must treat this truth as objectively existing – is subjective. Put this problem aside – as Dworkin shows we actually do in our practice no matter what philosophical commentators say. More interesting is to consider whether there are alternatives to these individualistic standpoints. Specifically, consider the possibility of probing the perspective already implicit when Dworkin characterized interpretation as a *social* phenomenon,[170] or when he argues, in respect to interpretative concepts, that they are concepts that "we *share* . . . by accepting that the correct application depends on the best justification of the various *social practices* in which the concept figures."[171] I failed to see these enticing comments adequately developed. Still, they suggest an alternative – or an addition – to standing only on (individual) conviction or any other form of "subjective" mental facts.

Wittgenstein observes that giving grounds must come to an end "but the end is not an ungrounded presupposition: it is an ungrounded way of acting."[172] An "ungrounded presupposition" sounds awfully much like a conviction, but can Dworkin make use of the alternative possibility, resting instead on a "way

[167] *Id.* (manuscript at 72-73).

[168] *Id.* (manuscript at 73).

[169] *Id.* (manuscript at 40).

[170] *Id.* (manuscript at 83-84).

[171] *Id.* (manuscript at 67-68) (emphasis added).

[172] LUDWIG WITTGENSTEIN, ON CERTAINTY 17e, No. 110 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969).

of acting"? He might argue against "coming to an end" or say that, rather than an Archimedean "ground," the proper end is a "web of convictions" – an equilibrium epistemology.[173] But the Wittgensteinian alternative of a way of acting – social practices or ways of life in contrast to convictions or individual reflection – implies, I think, elements of commitment, not just conviction, and of plurality or inter-subjectivity not just self-reflection. That is, while reflection or reason[174] at most leads only to *convictions*, voluntary and valued social practices necessarily involve *commitments* – which are surely central to the aim of morality. The possibility emerges that the best practical interpretation of *inescapable* social practices, *if there are any*, could show a commitment to a type of equality and liberty of others that provides a grounding for moral and political concepts. This could solve a problem emphasized earlier. Without rejecting the claim of equal value or worth of all human life, I complained about the lack of logical reason for, or historical accuracy of, the transition from the observation that people exhibit a conviction about the objective value of their own life to the claim that they must consequently have some conviction that the lives of others equally have this objective value. The proposal is that inescapable social practices could contain a commitment to holding and respecting this conclusion.

Of course, this alternative might be ruled out by Hume's principle. An attempt to rely on the factual existence of purportedly inescapable social practices, an "is" about the world, to provide a factual Archimedean point for "ought" conclusions makes the mistake that Hume warns against. However, the notion of a factual social practice, unlike say an observable behavioral regularity of dying or eating, involves a type of endorsement by the participants of proper relations with others. It is a collective invention but requires constant autonomous individual endorsement and participation. A social practice merges "is" and "ought." Though I earlier argued that interpretation applies to the properly pragmatic conception of truth in scientific as well as social realms, the latter involves human artifacts that I emphasized have two additional loci of purpose – that of their creators and the product of their behavior. This second additional loci in the artifact, the social practices, leads to understanding the socially (i.e., collectively) created practice as involving value endorsement to which individuals are committed. Thus, if as Dworkin rightly argues, interpretation applies at least to all social phenomena, including those that are both factual and independent of any individual subjective projection, then Hume's fundamental divide between "is" and "ought" is breached. Social practices could provide a factual basis for moral commitments to equality and liberty.

---

[173] DWORKIN, *supra* note 1 (manuscript at 37).

[174] Compare to Kant, whom Dworkin calls "the paradigm of a moral isolationist: morality is categorical, he said, because its commands are imperative independently of any desire or inclination an agent might have, including an inclination to spread happiness or reduce suffering." *Id.* (manuscript at 167).

F. *Communicative Action: An Inescapable Practice on Which to Stand*

Justice for Hedgehogs can be seen as an elaboration of Dworkin's interpretation of what he labels Kant's principle: "[A] person can achieve [] dignity and self-respect . . . only if he shows respect for humanity itself in all its forms."[175] Or as he puts it later, "self-respect . . . *entails* a parallel respect for the lives of all human beings."[176] Grant (though this is unclear) that a person has a reason to achieve dignity and self-respect. My repeated question has been: How does this entail respect for others? What can be said to the person who says her dignity and self-respect comes from being one of God's chosen and, thus, is different from others? Or from membership in her clan? Or from being better than others? Dworkin's answer may be that this view is contrary to ours and, thus, her convictions, on which we, and thus, she, stand all the way down.[177] He can add the related supporting logic of other convictions. That is fine if the person is satisfied, but what if she is not? Equally troublesome is where, within this account, do we get any insight in how to interpret this entailment of "respect" (which is not yet "concern") in relation, for example, to the political concepts of equality, liberty, and democracy?

Given these difficulties of the Kantian argument, consider, based on the discussion above, a second answer. Denial of this entailment of respect for all could contradict social practices to which people, including the imagined denier, are committed. These social practices could be inescapable for people as we are, though we could be different; thus, the entailment is not independent of the facts, the "is," of social life. Many more steps are needed, which I have tried to make elsewhere,[178] but the practice of engaging in communicative action, where agreement with another is sought, may be one (not necessarily the only) practice that fits the bill.

If communicative action provides a basis, an "ungrounded way of acting," beyond mere convictions and reasons, then the immediate follow-up question is: What does this practice suggest in terms of Dworkin's proposed two principles of dignity? In elaborating an answer elsewhere,[179] I argued that Habermas is led to a discourse-based universalism test that recommends only principles to which people could agree as in the interest of each. This answer, I argued, encounters problems that are the mirror imagine of problems encountered with Kant's categorical imperative. Kant's universalism does not rule out possible conflicting maxims, so it is too full.[180] Habermas's

[175] *Id.* (manuscript at 15).

[176] *Id.* (manuscript at 162) (emphasis added).

[177] *Id.* (manuscript at 10).

[178] I carefully set out the argument and respond to many objections to the argument in Baker, *supra* note 29. *See also* Baker, *supra* note 34; Baker, *supra* note 157.

[179] The rest of this paragraph follows Baker, *supra* note 29.

[180] I understand Dworkin to agree with the criticism of Kant's categorical imperative but to suggest that it still provides a good test of test of responsibility. *See* DWORKIN, *supra* note

universalism, in contrast, rules out too much to provide solutions to basic moral questions.[181] Agreement can always be rationally rejected from the perspective of some plausible value commitments – so the universalism is too empty.

A better initial approach (or an additional approach given no theoretical objection to a discourse universalism test, but merely a practical complaint about its potential lack of results) is to invoke *presuppositions* of basic, inescapable social practices. Within communicative action, aimed-for agreement must presuppose the possibility of non-agreement and, thus, the practical necessity of action must not require such agreement. The *aim* of agreement, however, means each participant respects, at least for purposes of seeking agreement, the authority of each to say "yes" or "no," to agree or not, a presupposition which respects the autonomy of each. The aim of agreement also presupposes the equality of each. Each *equally* has this authority to say "yes" or "no," so no proposal is plausible that does not respect this equality. That each can freely propose alternative solutions also commits participants to an open process of considering proposals.

If the status of these presupposed commitments were in being instrumental to this basic, inescapable practice, their application outside the range of the practice would not follow. They are, however, constitutive of how people act within this basic social relationship. Because of this constitutive status, though more needs to be said to support this claim,[182] these commitments towards others are better understood as involving general commitments people have in their relations with others. Though these commitments are hardly rich enough to determine proper content to social relations, behavior that contradicts them involves a person contradicting her basis commitments. Though such behavioral inconsistency is hardly unusual, the inconsistency does provide morality with a basis for critique. Without elaborating complications, note here that this interpretative understanding of practice commitments is consistent with Dworkin's interpretative aim of finding a unity of value – an aim that can also be described as an effort to achieve consistency and coherence in understanding.[183] The unity, however, derives not simply from individual convictions or reasons but from the more pluralistic and material basis of Wittgenstein's ungrounded way of acting.[184] Thus, my general claim is that elaborating these presuppositions, the commitments (not merely the convictions) implicit in communicative action lead to a proper interpretation of various normative values, and specifically to the proper interpretation of the

1 (manuscript at 71-72). Dworkin describes Kant's "less demanding kind of universalism: we must act in such a way that we can will the principle of our action to be universally embraced and followed." *Id.* (manuscript at 168).

[181] HABERMAS, *supra* note 144.

[182] *See* Baker, *supra* note 29; *see also* Baker, *supra* note 22, at 39.

[183] *See* DWORKIN, *supra* note 1 (manuscript at 74).

[184] *See supra* note 150 and accompanying text.

political values of equality, liberty, and democracy with which Dworkin concluded his book.[185] It favors each of the alternative interpretations recommended in Part I.

Clarity also suggests the importance of noting what this practice does not presuppose. People hope to engage in communicative action with the aim of achieving agreement, ideally among all whose interests are involved, before either the individual or group acts. This effort does not presuppose either that agreement will be reached or that the propriety of action is, in the end, dependent on it being reached. This effort at achieving agreement presupposes, however, openness to proposals of any sort, proposals exhibiting any conception of the good except, maybe, conceptions that contradict respecting equal agency and equal intrinsic worth of each participant since such proposals could hardly have any serious claim on the other's acceptance. Specifically, proposals *need not show equal concern* for the conception of the good of each since often a person's proposals will advocate, and she will hope others will accept, particular conceptions of the good. Though equality of respect – represented by not denying the equal worth and the equal participatory rights of each – is basic, equality of concern is not.

Finally, Dworkin's proposal of a "partnership" conception of democracy was better than his elaboration.[186] A partnership involves a commitment to jointly carrying out projects that require or are best realized collectively – but unlike a stockholder relationship, where each share should receive the same material dividend, a partnership does not need to presume each receives the *same* or an equal benefit from the partnership for her subsequent pursuit of her private goals. The amount and type of concern the collective project should show for each or for any conception of the good that a particular member holds is one of the matters on which agreement is sought but not guaranteed. When agreement is not reached, presumably action will continue – both privately and collectively. When this occurs, some people will be losers in the collective enterprise – their values will not prevail. Respect, as in any true partnership, does require that at least those values that they could have reasonably proposed to the whole not be suppressed. If not accepted as a group project, their proponents should still be able to advocate that the group change and to pursue these conceptions, these values, privately. That is, communicative action presupposes tolerance, though not neutrality.

[185] DWORKIN, *supra* note 1 (manuscript at 217).

[186] *Id.* (manuscript at 240-41).