FOXY FREEDOM?

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I. FREEDOM AND VALUE

A. *Introduction*

In Chapter 18 of *Justice for Hedgehogs*, Ronald Dworkin takes his stand against a conception – drawn by Dworkin from Isaiah Berlin's famed *Four Essays on Liberty*[1] – of valued liberty as "total freedom."[2] "Total freedom" is Dworkin's term for the entire range of possible actions of which a person is capable, left to himself without political intervention.[3] Equivalently, "total freedom" might name the possible state of political affairs in which a person's choices about how to act are left unrestricted by the community. These are

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[1] ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).

[2] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 228-37, on file with the Boston University Law Review).

[3] *See id.* (manuscript at 229).

purely descriptive denotations, conveying no value judgments. Dworkin proposes that we use "liberty," by contrast, as a strictly normative notion, referring to "the area of [a person's descriptive] freedom that a political community does wrong to impede."[4] This vocabulary allows us to construct a good question about whether the two terms have equivalent extensions. Does or does not the range of choices shielded by valued "liberty" take in all of what is covered by descriptive "total freedom"?

Isaiah Berlin (on Dworkin's assumption) answers "yes," the normative principle of liberty suffers violation by every politically imposed curtailment.[5] Dworkin answers "no." According to the conception of valued liberty that Dworkin defends, not every governmental abridgement of total freedom infringes on that liberty, but only those imposed "without a proper justification" – meaning, mainly, those for which the "putative justification relies on some collective decision about what makes a life good or well-lived."[6] A part of this view's attraction, for Dworkin, is that it lets liberty's content shape itself to certain conceptions we hold – or, in Dworkin's view, would do well to hold – of other leading, liberal political values such as equality, democracy, legality, justice, and legitimacy. And indeed, one reason (certainly not the only one!) why, in Dworkin's view, we would do well to hold those conceptions of the other values is the way in which they dovetail with each other and with the proposed conception of liberty. For reasons that form the philosophical core of Dworkin's book, we are called upon to seek and favor conceptions of each of these chief, liberal values by which each "is naturally integrated with [the others in an] overall system of mutually

[4] *Id.*

[5] In fact, as Dworkin recognizes, Berlin may possibly be read to support a more complex understanding, by which many curtailments are too marginal or petty, or too obviously inevitable in any decently ordered form of social life, to generate a demand for express justification. *See id.* (manuscript at 231). Berlin wrote repeatedly of a "frontier" dividing an inner core of negative-liberty rights from a more extensive space of descriptive freedom. "[T]he issue of individual freedom," Berlin said, is that of "the frontiers beyond which public authority . . . should not normally be allowed to step." ISAIAH BERLIN, *Introduction* to FOUR ESSAYS ON LIBERTY, *supra* note 1, at ix, xli [hereinafter BERLIN, *Introduction*]. Behind the frontier lies that "area for free choice, the diminution of which is incompatible with the existence of anything that can properly be called political . . . liberty." *Id.* at xxxvii; *see also id.* at lii (writing of a "minimum level of opportunity for choice . . . below which human activity ceases to be free in any meaningful sense"); *id.* at lxi (writing of a "minimum area that men require if . . . dehumanization is to be averted"); ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY, *supra* note 1, at 118, 124 [hereinafter BERLIN, *Two Concepts*] (writing of "a certain minimum area of personal freedom" that cannot be violated without preventing a "minimum development of . . . natural faculties" on which human agency depends).

[6] DWORKIN, *supra* note 2 (manuscript at 232).

reinforcing ideas"[7] – and, hence, liberal values will not "conflict," as Berlin maintained that they must and do.[8]

What follows contains no global challenge to Dworkin's "hedgehog" aspiration for dovetailing constructions of liberal principles, nor to his underlying philosophical defense of such an aspiration. We are not out to prove that the foxes have it right over the hedgehogs. Rather, we focus on Dworkin's particular, proposed account of the liberal, political concept of *liberty*, and ask whether *that* contributes positively to an overall effect of shaking up whatever foxy leanings you may bring to the table. Part I takes up two preliminary questions. *First*: In Dworkin's view, what is the relevance, if any, of descriptive freedom in general to judgments of political right and wrong? Is unmodified, descriptive freedom, on Dworkin's account, a matter of complete political-moral indifference, so that occasions of infringement – when they are not also occasions of infringement of liberty more specially conceived – give rise to no political-moral concern whatsoever? So that there is, in fact, no true political-moral principle, or (as I shall say) value, of just plain freedom? *Second*: Does Dworkin, then, belong in the camp of the nay-sayers in our current controversies over the defensibility of "balancing," or assessments of "proportionality," as a mode of deciding claims of violations of constitutional rights of liberty?

B. *"Total Freedom": A Closer Look*

Liberty, says Dworkin, on the clearest and best conception of that political value-concept, is not coextensive with total freedom. Rather, liberty is at stake only when a state "limits total freedom . . . in violation of some right its citizens have to be free from constraint of that particular kind."[9] "Liberty" names "a distinct protected arena of choice and activity that only certain laws, adopted for certain reasons, threaten."[10]

Ambiguity lurks in these formulations,[11] and we must clear them up before we can proceed. At first look, it may seem as though Dworkin wishes us to differentiate between more and less important or significant components of descriptive total freedom – "areas" or "arenas" of "choice and activity."[12] We are to reserve the name (and the presumptive protection) of "liberty" for the important arenas of choice, leaving the rest, with a clear conscience, to the hazards of legitimate, democratic decision. Writing that he seeks a conception

[7] *Id.*

[8] *See* Ronald Dworkin, *Do Liberal Values Conflict?*, *in* THE LEGACY OF ISAIAH BERLIN 73, 77-80, 90 (Mark Lilla et al. eds., 2001) (answering that they do not).

[9] DWORKIN, *supra* note 2 (manuscript at 231).

[10] *Id.*

[11] *See* C. Edwin Baker, *In Hedgehog Solidarity*, 90 B.U. L. REV. 759, 774-80 (2010).

[12] DWORKIN, *supra* note 2 (manuscript at 231).

that will defend "a right not to liberty as such but to certain liberties,"[13] Dworkin may seem, in this respect, to line up with John Rawls.[14] His thought, then, would apparently track and support the so-called "modern" doctrine of substantive due process in American constitutional law,[15] which leaves it to courts to pick out "fundamental" components (compare "arenas") of descriptive freedom, for restrictions of which governments are required to provide substantial justification – so that protected liberty would cover, say, choice of a sexual partner but not the choice whether to spit right now on the public sidewalk.

Despite these appearances, neither an alliance with Rawls nor a reprise of the "fundamental rights" branch of American constitutional law is what Dworkin has in mind. To the contrary,[16] any such list-based or arena-based approach to the differentiation of specially valued liberty from the rest of total freedom must be rejected, Dworkin says, because it makes the permissibility of coercive restraint depend on an inevitably controversial, collective view of which choices do, and which do not, go to the core of each person's responsibility to make the best of his life that he can. As Dworkin neatly puts his point: "[W]e contradict ourselves" when "we use a controversial collective view about which lives are successful – that a life enmeshed in politics is better than a life of courting physical danger, for instance – in order to defend people's right to make decisions of that kind for themselves."[17]

Dworkin, accordingly, rejects the idea of a "threshold approach," which would say that "while there is *some* affront to dignity in any collective decision understood to be binding on all, the affront is so insignificant in most cases, like the traffic rules, and is so easily outweighed by the evident gains in collective decision, that we ignore it."[18] Evidently – and, it would seem, inevitably – Dworkin's objection to collective usurpation of personal-ethical responsibility arises not only where political collectives take it upon themselves to decide for us all which lives are better and worse (that a politician's life is worthier than a professional daredevil's), but also where the collectives presume to decide for us all which choice-sets matter more and less (that choices regarding how fast to drive are of lesser consequence for the value of a life than choices about whom to marry).

But how, then, are we to differentiate specially valued, specially protected liberty from descriptive, total freedom, as Dworkin would have us do? His

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[13] *Id.*

[14] *See* JOHN RAWLS, POLITICAL LIBERALISM 291-92 (rev. ed. 1996) (explaining that, in the political conception of justice as fairness, the basic liberties "are specified by a list," and "no priority is assigned to liberty as such").

[15] *See, e.g.*, GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 831-942 (6th ed. 2009).

[16] Dworkin makes his difference with Rawls explicit at DWORKIN, *supra* note 2 (manuscript at 217, 231).

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

[18] *Id.*

answer, in general form, is that "[g]overnment infringes your liberty whenever" – and (we must infer) only when – "it restricts your total freedom without a proper justification."[19]

Now, "proper justification," here, apparently cannot normally refer to some pragmatic balance of state goals against the gravity of the liberty lost (lest, again, we contradict ourselves). To see this, consider two laws. One law totally prohibits everyone (perhaps excepting the state and its licensees) from any and all engagement in the production, storage, shipment, sale, purchase, possession, or use of plutonium. The second law prohibits the publication or dissemination of recipes for constructing a plutonium bomb.[20] The state's goals seem alike in each of the two cases, and ethically neutral in both.[21] Some free-speech advocates will argue that state goals of sufficient weight to justify incursions on commercial and economic freedoms (the first law) may very possibly not suffice to justify incursions on more humanly "fundamental" freedoms of self-expression or self-realization (the second law). Any such suggestion, however, would apparently be blocked by Dworkin's stricture against self-contradiction.[22]

But if "proper justification," then, does not refer to an exercise in balancing or proportionality, to what does it refer? It must, and does, refer to a more abstract (in a sense, a more formal) sort of compatibility relation – a relation of compatibility, in reason and in principle, of the state's action with certain high-level political-moral ideals. Every regulatory abridgement must be, in reason and in principle, congenial to the ideal of the equal objective importance of the well-going of each person's life ("equal concern"), and no abridgement may follow from a "collective decision about what makes a life good or well-lived," which would violate the ideal of each person's special responsibility for the well-going of his or her own life ("respect for responsibility").[23] It is the acute assault on human dignity, carried by collective preemptions of personal, ethical

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

[20] *See* United States v. Progressive, Inc., 467 F. Supp. 990, 991, 997 (W.D. Wis. 1979) (granting a preliminary injunction against such publication).

[21] The state cannot plausibly be accused, in either case, of acting on the basis of ideas of what does or does not make for a worthy life, or of which social groups do and do not merit first-class consideration.

[22] Dworkin might find the no-publication law objectionable on grounds of interference with free exchange of information and ideas – exchange on which the legitimacy of democratic government depends. *See* DWORKIN, *supra* note 2 (manuscript at 234). Here, my point is that he cannot find it objectionable just on grounds of obstruction of a publisher's fundamental liberty of self-expression, self-realization, or autonomy, as some liberal theorists would. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-51 (1989); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

[23] DWORKIN, *supra* note 2 (manuscript at 232).

responsibility, that qualifies such preemptions as violations of valued liberty.[24] As Dworkin puts the point, the laws that threaten valued liberty are freedom-limiting laws "adopted for certain reasons."[25]

The upshot is that the expression "total freedom" is something of a misnomer for the conception of valued liberty that Dworkin rejects. That phrase insinuates an over-extension of protection to relatively paltry matters with which political morality need not be concerned – getting liberty, as one might say, confused with license. But it seems that, on Dworkin's view as fully laid out, people's options over even the most important matters do not, just as such, count as valued liberty. Indeed, *no* selected area of total option-freedom counts, just as such, as valued liberty. "Liberty," rather, is a name we give to the state of exclusion of restrictions imposed on descriptive option-freedom for reasons incompatible with value-commitments aside from option-freedom as such – commitments to a certain conception of human dignity, or to conceptions of equality and democracy derived therefrom (thus, as Dworkin calls it, a "buck-passing" conception of liberty[26]). On Dworkin's account, valued liberty suffers no loss when a state limits everyone's freedom in the same way, as long as the state evidently does so for reasons consonant with human dignity, according to the principles of equal concern and respect for responsibility. With a view to holding this point clearly in mind, I will henceforth use the term "descriptive freedom" to name what Dworkin calls "total freedom."

C. *No Regrets?*

If a political community values descriptive freedom (or some core part of it), then, when it restricts conduct (or conduct within the core), it presumably does so in deference to some other, supposedly colliding political value or principle – equality, perhaps, or democracy, or security, or prosperity. We can imagine any of three general stances regarding such cases.[27] According to Stance A ("no right answer"), two true values have come into practical collision, and neither answer to the question of which is to prevail can be scored better or worse than the other on a moral rating scale. According to Stance B ("right answer at a cost"), the question has a right answer – but that answer results from a deliberation in which the value of freedom is positively weighed, and any resulting curb on freedom is counted a cost or loss, a cause for principled regret on the decider's part. According to Stance C ("right answer, no regret"), regulatory withdrawals from freedom are sometimes morally justified, and

[24] *See id.* (manuscript at 230-31).

[25] *Id.* For the view that Dworkin's widely known conception of "rights as trumps" has been, from the start, an "excluded reasons" (as opposed to a "key interests" or "interests for their own sake") sort of conception, see Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 19 J. LEGAL STUD. 301, 304 (2000).

[26] DWORKIN, *supra* note 2 (manuscript at 230).

[27] Here, I am much indebted to conversation with Richard Fallon.

when they are, the grounds of justification serve also to establish that whatever is withdrawn from freedom is not and never was a part of valued liberty in the first place (thus, passing the buck); hence, its withdrawal incurs no loss in value and gives no cause for decider regret.

Dworkin, as we have seen, contends in favor of Stance C,[28] which Berlin just as plainly rejects. Berlin, the all-out value-pluralist, simply did not accept the dictum that "if nothing wrong [in the sense of a wrong political action] has taken place when I am prevented from killing my critics, then we have no reason for adopting a conception of liberty that describes the event as one in which liberty has been sacrificed."[29] Berlin, rather, thought that we could have such reason.[30] He wanted us to refuse what he saw as the whitewash of political responsibility that flows from the thought that the consummation of an overall morally commendable decision washes away whatever sacrifice we thought we saw while the decision was still pending. Berlin insisted that the sight of the pending sacrifice, when we had it provisionally in view, would not be rendered delusional by our well-considered decision to incur it.[31]

We know, then, that Berlin rejects Stance C ("right answer, no regrets"), which Dworkin supports. There is, however, something more we would need to resolve about Berlin's position before we could claim a full accounting of his disagreement with Dworkin. Berlin might have rejected C in favor of A ("no right answer"), or he might have rejected C in favor of B ("right answer at a cost").

On Dworkin's report, Berlin took the view that, in cases where freedom collides with some other cardinal political-moral principle, we cannot help but act in violation of some principle that it is always wrong to violate, so that "whatever we do, we do something wrong."[32] Now, if "do wrong" means act in such a way as to incur a loss, cost, or sacrifice of value – and thus create an occasion for regret – then Berlin undoubtedly did take the view that these cases may leave us with no escape from doing wrong. But from there, it does not follow that no decision we make can be judged a "right" as opposed to a

[28] This is certainly true with respect to the question of political curbs on descriptive freedom. DWORKIN, *supra* note 2 (manuscript at 232). Whether Dworkin would insist on the "no regrets" claim with regard to all seeming collisions of normative concepts – such as kindness colliding with honesty in many social situations – is less certain. *See* Richard Fallon, *Is Moral Reasoning Conceptual Interpretation?*, 90 B.U. L. REV. 535, 539 (2010).

[29] RONALD DWORKIN, JUSTICE IN ROBES 115 (2006); Dworkin, *supra* note 8, at 88-89.

[30] *See* DWORKIN, *supra* note 29, at 115 ("[T]hose who defend Berlin's definition [of liberty] say that although my liberty has been invaded, the invasion is justified in this case, because the wrong done to me is necessary to prevent a greater wrong to others.").

[31] *Cf.* WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM 17-18 (2005); Johan van der Walt & Henk Botha, *Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification*, 7 CONSTELLATIONS 341, 351-52 (2000) (maintaining that such an outlook best reflects a commitment to political community).

[32] DWORKIN, *supra* note 29, at 109-10; Dworkin, *supra* note 8, at 81.

"wrong" decision, in the sense of being the choice we are able to defend as the morally preferred or morally commendable choice in the array, the choice for which the best justification can be summoned for the more or less grave commission or exaction of sacrifice that it involves.[33]

D. *Rights, Wrongs, Principles, Values, Regrets, and Balancing*

We must take care, here, not to stray into confusion. If in no circumstances is it wrong to prohibit murder, then no one ever has a right to murder. If, in some circumstances, it is right (or not wrong) to limit expression in some way, then no one has, in those circumstances, a right to freedom of expression in that way, and no one, in those circumstances, is wronged by the limitation. These are axiomatic demands, required for the coherence and freedom from contradiction of our practices of moral (and legal) judgment. They come under no contestation here.[34]

Standing by themselves, these demands fail to settle whether any regrettable loss (or "sacrifice") occurs when descriptive freedom is rightly limited. They fail to settle whether descriptive freedom might be one of a plurality of genuine values that may, under what we find to be the best – or, for us, the most fitting and resonant – accounts of them, come practically into conflict in ways that make inevitable some regrettable sacrifice of one or more of them by a right moral judgment in the case. Our contradiction-avoiding axioms fail to settle, in other words, whether a commitment to "balancing" or "proportionality" assessments, among apparently colliding, normative principles (treating them, then, as "optimization requirements"[35]), is a component of our moral- and legal-judgmental practices, on the best interpretation of those practices. For if

[33] *See* WILLIAM A. GALSTON, LIBERAL PLURALISM 6-7 (2002) (defending the compatibility of value pluralism with the existence of "right answers in specific cases"). Berlin did deny the possibility of crisply demonstrable best choices. He said there could be no "clear-cut" or "certain" decisions, no "conclusive," "discoverable," or objectively true solutions according to "hard-and-fast" rules or "universal maxims" or "patterns." BERLIN, *Introduction*, *supra* note 5, at xlix-li; BERLIN, *Two Concepts*, *supra* note 5, at 126, 170. But that is not yet to say that you and I can have no defensible, publicly respectable grounds for judging some resolutions right and others wrong, some "justifiable" or "rational" and others not. BERLIN, *Introduction*, *supra* note 5, at *l*; BERLIN, *Two Concepts*, *supra* note 5, at 132. Nor is it yet to excuse us from the obligation to make the right choices: Berlin scruples not to call "unjust and immoral" a system that founds the freedom of some on the misery of others. *See id.* at 125. He writes of curtailments of freedom that any "sane or decent society" must impose, and historical "failures" to provide the minimum social conditions for effective enjoyment of liberty. BERLIN, *Introduction*, *supra* note 5, at lvi-lvii. He calls "overwhelmingly strong" the case for coercive "intervention . . . to secure conditions for . . . at least a minimum degree of . . . liberty for individuals." *Id.* at xlv-xlvi.

[34] *But see* DWORKIN, *supra* note 29, at 115 ("Given that some people . . . want to kill on some occasions, is any wrong done to them by preventing them from doing so?").

[35] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47-48 (Julian Rivers trans., 2002).

balancing is an intra-practice defensible modality of moral and legal judgment – as stoutly maintained by many, of whom Robert Alexy, among legal philosophers, may currently stand first[36] – then a practice that relies on balancing to decide the rights and wrongs when values come into practical collision is (*pro tanto*) contradiction-free.

Granted, that is a big "if," and one that is hotly contested among theorists.[37] Where does Dworkin fit into the controversy? From Dworkin's rejection of the idea that restrictions on descriptive freedom are ipso facto regrettable, may we, or must we, pass directly to a placement of Dworkin among the anti-balancers?

E. *No Regret, No Value?*

We deal, first, with a closely related question. From Dworkin's rejection of the idea that restrictions on descriptive freedom are ipso facto regrettable, may we pass directly to a conclusion that Dworkin denies value to descriptive freedom?

Dworkin himself suggests as much: If, he writes, we do not find it "regrettable . . . to make rape and arson criminal," then, if liberty, for us, means total freedom, it must follow that "we do not really value liberty as such."[38] Now, this reasoning seems too hasty. Refusal of regret for the diminutions of descriptive freedom wrought by common criminal laws might possibly reflect a blanket view on what we may call a "meta" level, that *justified* infringements of values, being not wrong to commit, can never give cause for regret.

But we cannot close the case on that basis. When Dworkin asserts that regulatory withdrawals from descriptive freedom are not, as such and regardless of the reasons behind them, occasions for regret, he apparently does so not (or not solely) on the ground that overall justified actions can never give cause for regret, but rather (also) on the ground that descriptive freedom is not, just as such, and independently of the reasons for restricting it, a value (so why should withdrawals from it, just as such, give cause for regret?). It seems that promptings toward this stance lie deep within Dworkin's philosophy of values. If descriptive freedom were considered to be a value independent of the reasons for restricting it, that value plainly would come into daily collision with values of equality and democracy, on any remotely plausible conceptions of those latter values – requiring, then, a fallback to defensible balancing, as a condition of the preservation of coherence in our practice of political-moral judgment as a whole. But that looks like the sort of conflict-among-major-values result – exactly the sort of failure to achieve dovetailing conceptions of

[36] *See id. passim.*

[37] For recent, spirited arguments in the negative, see Kai Möller, *Balancing and the Structure of Constitutional Rights*, 5 INT'L J. CONST. L. 453, 461 (2007); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 489-90 (2009).

[38] DWORKIN, *supra* note 2 (manuscript at 217).

our leading political value-concepts – that Dworkin holds we must strive to avoid, once we see that these values are to be understood as interpretive, not criterial, concepts (and we understand what it means for a concept to be an interpretive one).[39]

It may, therefore, seem perverse even to suggest a doubt about whether Dworkin really does reject the status of descriptive freedom (including "core" freedom or freedoms) as a true, political value (*le renard malgré lui?*). Yet his text, itself, provides grounds for doubt.

F. *How Dworkin Values Descriptive Freedom*

According to Dworkin's favored conception, "[g]overnment infringes your liberty whenever it restricts your total freedom without a proper justification."[40] Above, we considered what counts, for Dworkin, as a proper justification, and we found that what (and all?) that is required is a genuine, public reason comporting with equal concern and respect for responsibility.[41] Plainly, the demand for this sort of justification must apply to *all* restrictions on descriptive freedom, exactly as Dworkin says it does. Take, for example, a law against spitting on the sidewalk. In deciding the political-moral propriety of that law, we may not (if we follow Dworkin) proceed by asking whether that particular restriction on the conduct of one's life is so paltry or marginal that it simply does not call into play any serious demand for justification.[42] On Dworkin's account, the only permissible way we have to answer *that* question (of marginality) is to apply the tests of compatibility-in-principle with equal concern and special responsibility (lest, again, we contradict ourselves). Thus, there can be no restriction on freedom that does not require justification in

[39] *See* Waldron, *supra* note 25, at 303, 307 (affirming tension or incompatibility between Dworkin's conception of general liberty rights and justification by balancing). The same tension does not, however, necessarily attach to rights of expressive and communicative freedoms, on Dworkin's account. Respect for those freedoms, Dworkin says, is required by their service to "a variety of principles and purposes," among which is assurance of the free exchange of information and ideas on which depend, in part, the attractions of certain dovetailing conceptions of democracy and self-government that Dworkin also commends. DWORKIN, *supra* note 2 (manuscript at 234). Given this complex and partly instrumentalist valuation of the expressive and communicative liberties within Dworkin's entire scheme of dovetailing conceptions of political values, it seems that balancing judgments – perhaps lightly disguised as categorizations (e.g., differentiating restrictions on time and place from total suppression, or commercial speech from political speech) – may often be in order in regard to them, without attributing any independent value to descriptive freedom as such, and hence without signaling the sort of conflict among major, liberal-political values that Dworkin aims to avoid. For this reason, I have mainly refrained, in what follows, from citing instances of free-speech balancing as tests of intuitions regarding the valuation of descriptive freedom as such.

[40] DWORKIN, *supra* note 2 (manuscript at 232).

[41] *See supra* Part I.B.

[42] *See supra* text accompanying notes 16-22.

terms of those tests. Most restrictions easily and obviously pass the tests – the no-spit law is clearly driven by public health and amenity concerns, not by any collective ethical view – but the tests do apply to them, and they apply in full force.[43]

Descriptive freedom thus appears to figure for Dworkin, as it does for Berlin, as a notion that is normatively charged, not as one that is normatively inert or by-the-bye. For consider: If Dworkin did not count descriptive freedom as a value, what might be his ground for asserting that "government infringes your liberty" – and thus, treats you wrongly – "whenever it restricts your total freedom without a proper justification"?[44] If descriptive freedom were not a value independent of the justifications for restricting it, why would non-justified restrictions of it count as wrong? Why would the question of justification even come up?

G. *A Possible Rejoinder: Freedom from Harm, Not Freedom of Choice and Action*

Consider this possible response: When the state punishes you for violation of a regulatory law – takes your money (fines you) or imprisons you – it thereby, deliberately, *harms* you. These punitive state actions, therefore – the acts of fining and imprisoning – call for the minimal kind of justification we demand for all deliberate harmings.[45] But it is *they* – the penal acts of fining and imprisoning – that count as the harmings that call for justification; it is *not* the constriction of options that is immediately wrought by the issuance of the prohibition on conduct.[46]

Such a proposed account of Dworkin's position runs into problems. Take, first, the common view that justification of the harming wrought by punishment of a lawbreaker does not (normally) depend on justification of the law that is broken, but rather flows straight from the lawbreaker's breaking of the law. From that view, it would follow that, if the only harming resided in the act of punishing, then the broken regulatory law would not itself (normally) require justification, in order to justify *that* harming. Now that, decidedly, is

[43] Must the no-spit law grant an exemption on Yom Kippur, for observant Jews whose obligation to keep a fast on that day (as they understand it) prohibits them from swallowing their saliva? The answer appears to be "no," but you cannot know that before you have applied the test.

[44] DWORKIN, *supra* note 2 (manuscript at 232).

[45] *See id.* (manuscript at 230) ("Certainly it is regrettable when people are punished for disobeying the law: it harms those who are punished and it ought to dismay those who do the punishing.").

[46] If the constriction of options were regarded as a harming for which justification is required, would that be tantamount to conceding that non-constricted, descriptive freedom is a political-moral value?

not Dworkin's view, as declared in *Hedgehogs*. He repeatedly states that all legal restrictions on freedom require justification.[47]

The question pending is: Why do they? A conceivable answer would be that Dworkin – rejecting what we, just above, have called the common view – holds that the harming wrought by punishment of a lawbreaker does require justification *by* justification of the law that is broken. Dworkin, then, would be turning up as a very prominent philosophical anarchist (meaning a philosopher who maintains that the fact that some directive is law gives no reason to comply with it, or justification for enforcing it) or a very prominent, twenty-first century member of the "an unjust law is no law at all" school of thought. But Dworkin most certainly takes neither of those positions. Directly to the contrary of both, he upholds a general obligation to obey the laws of a legitimate political association, meaning one that approximates, well enough, to an ideal partnership democracy.[48] It would seem inconsistent with that stance to hold that the harming wrought by punishment of a lawbreaker (normally) requires justification by justification of the broken law, and so that won't do as an answer to our question about how Dworkin can subscribe, as he expressly does, to the proposition that all legal restrictions of descriptive freedom require justification. But then there seems to be only one possible answer left: It seems that constrictions on choice, wrought by legal threats of punishment for forbidden choices (or, perhaps, just by pressure flowing from the community's denunciation), must *themselves* count as harmings calling for justification, distinct from the harmings that may ensue, when punishment is inflicted on those who carry out forbidden choices.[49] It seems that, to that extent and in that sense, descriptive freedom, as such, counts as a value for Dworkin.

But still, you might say, we have not shown a very *deep* sense of Dworkin's counting freedom-as-such as a value. Of course, you say, Dworkin never exactly meant that *in no way at all* is descriptive freedom a value worth protecting. He means, you say, that it is not a value distinct from – or having any special standing apart from – a very general, residual value of safety against harmings. Restrictions of descriptive freedom (including restrictions by prohibitory legislation) are ipso facto harmings, but they are not ipso facto the special kind of harmings – insults to dignity – that we know as invasions of

[47] *See* DWORKIN, *supra* note 2 (manuscript at 232).

[48] *See id.* (manuscript at 204).

[49] *See* Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41, 46, *available at* http://www.nybooks.com/articles/1237 (contending that "a state grievously . . . harms such people when it prohibits [their] escape [by assisted suicide from] . . . what they regard as indignity"). The Brief's authors go on to argue that the state may not justify this coercive constriction of choice by taking sides in an "essentially ethical and religious controversy" over whether anyone really is harmed by it. *Id.* The point, for now, is simply that the authors apparently consider the constriction to be a harm.

liberty. These "blockage" harms, as we may call them, belong to the grand class of generic harms, but not (necessarily) to the lesser included class of insults to dignity that evoke the concept of liberty. As generic harmings, regulatory blockages do, without exception, call for the generic justification we demand for harmings by the state as a general class of political events. Only some of them, however, fall into the special class of harms – violations of liberty, insults to dignity – for which no justification can serve.[50] That account of the matter will successfully explain Dworkin's affirmation that all regulatory retractions from descriptive freedom require justification, while also preserving his position, contra Berlin, that specially valued liberty is not coextensive with freedom-as-such; and it will furthermore preserve Dworkin's position (as now explained) that freedom-as-such is not a value (distinct from the always presupposed, residual value of safety against generic harm).

II. "TIERS OF SCRUTINY"

A. *Detour with a Purpose*

We now launch what may seem a detour from our main line of inquiry regarding Dworkin's view of the relevance of descriptive freedom to judgments of political right and wrong, and the implications of that question for Dworkin's rejection of conflicts among major political values, when rightly conceived. At the Symposium eliciting this volume, a suggestion came up that the well-known, firmly entrenched "tiers of scrutiny" doctrine in American constitutional law reflects quite neatly the idea of a morally significant distinction between easily justifiable, "mere" harms and the non-justifiable insults to dignity we call violations of liberty. Does the tiers model, in fact, serve as a reflection or endorsement of Dworkin's political philosophy regarding freedom and its value? That question is independently interesting. It asks, in effect, whether Dworkin's favored "buck-passing" conception of valued liberty provides a good interpretation of actual American constitutional culture and practice. The investigation it prompts also serves to flesh out some of the abstractions that have mainly occupied us in Part I. Those instantiations will, in turn, aid us in our renewed assault (in Part III) on the question of conflicts among liberal values.

In Part II, our leading question will be whether Dworkin's proposed account of valued liberty makes a sufficiently good fit with American constitutional-legal practice to stand as a valid – hence, a potentially disciplinary or corrective – interpretation of that practice. Any such inquiry must confront a preliminary complication: "Tiers" is a doctrine of constitutional adjudication,

[50] I was unable to write "special class of harms that call for a special (or stronger) form of justification." As we have already noticed, *see supra* Part I.G, and will see further below, *see infra* Parts II.D-E, Dworkin does not and cannot recognize any form of further justification beyond generic justification. State measures failing the generic, justificatory test are wrongful, period.

developed by the Supreme Court as a set of directions for itself and other courts when engaged in judicial review of statutes.[51] No such doctrine can be automatically taken as a reliable reflection of a substantive political philosophy, at least not under the current conditions of American political culture. The default rule of "loose" scrutiny cannot reliably be tied back to a political-philosophical teaching that mine-run restrictions on freedom require no robust justification to square them with true political morality. It cannot, because the rule's formulation is obviously and deeply infested with concerns about judicial usurpation of democratic sovereignty.[52] Once those concerns are out on the table (and regardless of your or my opinion of their cogency), the loose-scrutiny branch of our tiers rule is entirely consistent with a political-philosophical view that every regulatory law demands an honest, substantial justification (so legislators who act in violation of this demand act in a politically immoral way), but only a few such laws – the ones that bear adversely on especially important freedoms – should undergo searching review by electorally non-accountable judges.

B. *The Language and Culture of "Tiers"*

But let that complication pass. Suppose that "tiers" is a direct, transparent emanation from prevailing, American political-moral conviction. Then, on an expressive level, "tiers" appears – on the surface at least – to embrace a political-moral principle of protection for freedom of choice and action, valued just as such. The due process branch of "tiers," which is relevant here,[53] has developed, after all, as an application of a constitutional guarantee against unjustified deprivations of "liberty"; and liberty, there, is widely understood to mean descriptive freedom of choice and action. That is surely how most have understood a modern American gospel on the topic, describing "this liberty" as

> a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[54]

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[51] *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 77-101 (2001).

[52] *See id.* at 95-97.

[53] That is, as distinguished from the equal protection branch.

[54] Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Might Justice Harlan's language possibly be read to envisage an excluded-reasons understanding of protected liberty, as opposed to some sort of balancing approach? Readers who try will find themselves straining to get there.

Of course, "loose scrutiny" is not *Lochner*;[55] it is not *Allgeyer*.[56] What it most straightforwardly is, though, is the dregs of those cocktails – what remains of them after Thayer's complaint takes hold.[57]

On the other hand, Americans can appeal to no constitutional guarantee against generic harming by the state, outside of constrictions on descriptive freedom. Take an example that came up at the Symposium: The incidental harms that normally result (to some in the vicinity) from the state's construction of a highway through one or another part of town. In American constitutional law and culture, these harms might, in some special circumstances, be denounced as invidiously discriminatory or as uncompensated takings of property; but they cannot, in our constitutional-cultural lexicon, be readily denounced as deprivations of "liberty" or "freedom." A government's knowing and optional choice to route a new highway through an irreplaceable site of minority religious observance – rendering impossible any future observance at that site – gives rise to no complaint of impairment of constitutionally guaranteed liberty. Why not? Because liberty consists in "protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[58] That is the vernacular of "tiers."

Thus: It is only where state regulations of abortion (unduly) burden "a woman's ability to make [the] decision" that the state invades "the heart of the liberty protected by the Due Process Clause."[59] Consider, then, the case of a law excluding abortion-related services (but not birthing-related services) from Medicaid coverage, even with regard to women who cannot otherwise obtain the services. In the view of Dworkin, that law violates liberty – if, but only if, we see it as the intended, coercive tool of a collective ethical judgment to the effect that women devalue their lives by aborting pregnancies.[60] On that construction of what it is doing, the pregnancy-exclusion carries precisely the sort of insult to dignity – hence violation of liberty – that Dworkin ascribes to all coercively imposed, collective preemptions of ethical judgments.

No doubt, the case is complicated by the apparent possibility that the pregnancy-exclusion stems from a *moral* (not ethical) aim of homicide-prevention. On Dworkin's terms, therefore, a finding of liberty-violation will

[55] Lochner v. New York, 198 U.S. 45, 56 (1905).

[56] Allgeyer v. Louisiana, 165 U.S. 578, 588-90 (1897).

[57] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (maintaining, on the basis of principles of democracy, that courts should defer to legislative judgments of constitutionality, except in instances of "clear mistake").

[58] Bowen v. Roy, 476 U.S. 693, 700 (1986).

[59] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (joint opinion of O'Connor, Kennedy, Souter, JJ.).

[60] Because, say, "a woman who aborts an early pregnancy does not show the respect for human life that her dignity demands." DWORKIN, *supra* note 2 (manuscript at 237).

depend on rejection, on some ground, of the validity of any such claimed moral basis for the exclusion.[61] In the social practice we call American constitutional law, by contrast, the possibility of a finding of liberty-violation is precluded from the start, because liberty "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion . . . ."[62] No harm, no foul. To establish a liberty-harm that instigates any scrutiny at all, you have to show coercion applied at the precise point of internal "choice" or "will" – whether to abort the pregnancy or not. If, and insofar as, American constitutional law reflects and reports American political philosophy,[63] the conclusion must be that American political philosophy ascribes distinct value to freedom of choice and action, just as such.

Of course, that would not show that American political philosophy, on this point, is not deeply confused. Suspicions that it is may invite a characteristically Dworkinian rejoinder: That how we habitually describe what we do is not decisive over what is the best account of what we do. Dworkin, you might say, offers us a construction, an interpretation, of what we do (by way of "tiers") which aims to present that practice in its best possible light. Drop your hang-up over general freedom of choice and action, that interpretation urges. Rather, think generic harm, on the one hand, and on the other, the special harm to responsibility and to dignity – liberty harm – wrought by the state's coercive preemption of ethical judgment. Rid your mind of any notion of a special harm of blockage by option foreclosure, just as such. And then you will get to the best interpretation of what "tiers" is, so to speak, *really* up to.[64] The question remains, however, whether the proposed interpretation would be a valid one.

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[61] For Dworkin's own rejection, see *id.* (manuscript at 236), as well as RONALD DWORKIN, LIFE'S DOMINION 11-20, 111-16 (1993).

[62] Maher v. Roe, 432 U.S. 464, 473-74 (1977).

[63] *See* Robert Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8-9 (2003) (defining constitutional culture as "the beliefs and values of nonjudicial actors" regarding "the substance of the Constitution," and positing "a continuous exchange between constitutional law and constitutional culture").

[64] Dworkin (if we read him that way) would not stand alone in favoring a redescription or reconstruction of "tiers" as a doctrine turning on excluded reasons. *See, e.g.*, Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 722 (1994); Richard H. Pildes, *The Structural Conception of Rights and Judicial Balancing*, 6 REV. CONST. STUD. 179, 195-96 (2001). But Pildes also (as of 2000) opined that the key-interest or "immunities" view of constitutional rights enjoys a "wide embrace" among liberal political philosophers, along with a dominance in contemporary American political culture, encouraged by "the Supreme Court's discourse of rights." Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 311 (2000).

C. *Discrepancies of Doctrinal Content and Structure*

I am going to present an illustrative regulatory law, and then run through, first, an application to that law of the vernacular "tiers" doctrine and, second, an application to that law of the justificatory inquiry that I take Dworkin to favor. Deep and seemingly decisive differences between the two schemes will become evident.

I have in mind an Anglicized version of a German case.[65] A statute makes it unlawful to engage in the activity of "falconry" without a state-issued falconry license, which may be obtained only on condition of demonstrated competence in handling a firearm. "Falconry" denotes the sport of hunting with falcons. Hunting with falcons does not mean hunting falcons. In falconry, the bird is, so to speak, the weapon, not the game. Guns are not used in falconry; in fact, their use is banned by the common rules and culture of the sport. The sport (we assume) poses no other danger to public safety, amenity, or general comfort.

Wherefore, then, this law? Three at least barely conceivable explanations for its enactment come to mind. First, the lawmaker mistakenly used the term "falconry," and in fact believed that his law would lay down a licensure requirement for the activity of shooting at hawks with guns. Second, the lawmaker, understanding very well what falconry is, reasoned that, as a matter of sociocultural fact, the falconry crowd overlaps so considerably with the gun-sport crowd that the falconry license application office would make a good site for gun-safety checkups. Third, the lawmaker acted, somewhat cagily, for the purpose of putting down an activity that he regards as ethically repugnant or unworthy, just because he does so regard it.

If the first explanation were all that could be provided, the law could not pass even the weakest test of instrumental rationality. However, as the second explanation shows, the law is, in fact and objectively, at least weakly instrumentally rational.[66] Suppose, however, we become convinced that the real truth of the matter lies in the third explanation, not the first or the second. The law, then, is instrumentally rational, but with reference to a reason that might arguably count as "forbidden" or "excluded," unavailable for justificatory use by the coercive state.

With that preliminary analysis in place, we bring to bear on the law tiers of scrutiny, American-constitutional-legal style.[67] *First step*: The law is a

[65] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 5, 1980, 55 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 159 (F.R.G.). For a brief description of the case in English, see Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 389 n.23 (2007).

[66] On that score, it may have as much going for it as a law prohibiting non-medically certified opticians from duplicating broken spectacle lenses, or replacing lenses into new frames, without a doctor's prescription. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 485 (1955).

[67] The order of the steps is variable, at judicial convenience.

restriction of descriptive freedom, so it must pass (at least) loose scrutiny. *Second step*: The law is a (barely) rational means to the permitted end of gun safety, so it passes loose scrutiny. *Third step*: Engagement in falconry is not a "preferred freedom," nor is it a "fundamental" dimension of freedom of choice, one that is life-shaping, or goes to the core of identity or personhood. It is not covered by *Eisenstadt* ("matters so fundamentally affecting a person as the decision whether to bear or beget a child"),[68] or *Lawrence* ("certain fundamental decisions affecting [one's] destiny"),[69] or *Casey* ("matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").[70] This is ordinary "economic and social legislation,"[71] which does not call for heightened scrutiny.[72] But if we suppose, hypothetically, an opposite conclusion at step three,[73] then we reach the *fourth step*: Deciding whether the state has a sufficiently pressing interest in the use of this roundabout means of gun-safety checkup to override the resulting incursion on the liberty of falconing. In sum, "tiers," ostensibly, commits – at both the third and fourth steps – exactly the self-contradiction that the buck-passing conception of liberty aims to avoid.[74] As customarily understood, "tiers" calls for assigning relative weights at these steps, both to components of total freedom and to proffered justifications for limiting them.[75]

[68] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[69] Lawrence v. Texas, 539 U.S. 558, 565 (2003).

[70] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 851 (1992).

[71] Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

[72] In *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371 (1978), the Court held recreational hunting not to be a "fundamental" right or interest that brings into play the guarantee against state-citizenship-based discrimination contained in U.S. CONST. art. IV, § 2. *Baldwin*, 436 U.S. at 388. Assuming that the standard of "fundamental" for purposes of that clause differs from the due process/liberty standard, the latter is almost surely the tighter of the two. Jonathan Varat points out that, "[i]f it took a fundamental equal protection interest to activate the protection of the [interstate] privileges and immunities clause, the clause would be rendered superfluous." Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 513 (1981). The same would apparently hold if it took a fundamental due process/liberty interest.

[73] Contentions that recreational hunting is a sufficiently "fundamental" interest to beget heightened scrutiny of legislation restricting or regulating it have some purchase in American constitutional culture. *See, e.g.*, Jeffrey S. Bazinet, *Legislative Review: Game and Fish*, 18 GA. ST. U. L. REV. 134, 138-42 (2001) (describing state legislation that declares a "fundamental right" of Georgia citizens to "hunt, trap, and fish," and that arguably prescribes a heightened level of judicial scrutiny for locally imposed restrictions on these activities).

[74] *See supra* Part I.B.

[75] In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court found that the government's interest in "eradicating racial discrimination . . . substantially outweighs whatever burden [exclusion from a broadly available tax exemption for educational

But consider, again, this possible Dworkinian commentary: Granting that "tiers" appears to issue such a call, that call is deeply troubled because – or as long as – we lack an intelligible principle to explain why components are assigned the weights they ostensibly receive. To falcon or not to falcon? Sure as we may feel that any competent American judge will know *not* to class that choice as specially protected, we still do not expect to ever hear an explanation for that classificatory judgment, or any of its ilk, that does not merely state the conclusion in a raised voice. Dworkin, you might say, has given us the intelligible principle we have been lacking: Cases in which "core" components of freedom are found to have been infringed turn out (by and large, the fit won't be perfect) to be cases in which the state's reason for its restriction – perhaps its reason declared, perhaps its reason strongly suspected and not persuasively rebutted – flows straight from a collective ethical judgment, contrary to the political-moral precept of respect for responsibility.[76] So – here

institutions] places on [the private university's] exercise of . . . religious beliefs." *Id.* at 604. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court found that a state's interest in its antidiscrimination policy could justify its incursion (through its civil rights law) on the "expressive" (but not, in that case, "intimate") associational interest of the Jaycees. *Id.* at 628. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court found a like interest insufficient to justify what it found to be a graver incursion on an expressive-associational interest of the Scouts. *Id.* at 656. In *Boraas*, 416 U.S. 1 (1974), the Court held that a municipality's interest in avoiding evils of congestion, burdens on service capacities, and the like, could justify a limit on the size of groups of unrelated persons (such as students attending a nearby college) that could occupy a single dwelling. *Id.* at 5, 7. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court rejected a like justification for a prohibition (in rough effect) of habitation of a single dwelling by a sizeable extended (as distinguished from nuclear) family, the plurality observing that the "importance" of the state's interests must be "carefully" examined when the state intrudes on "choices concerning family living arrangements." *Id.* at 499 (plurality). In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court, while affirming the existence of "a private realm of family life which the state cannot enter" without special justification, upheld application of a state's child-labor law to prevent a guardian's enlistment of her ward in the distribution of religious tracts. *Id.* at 166. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court (it would seem) decided that the difference between the state's interest in an eighth-grade- and a tenth-grade-educated citizenry could possibly be make-or-break for the state's attempted justification of restriction of the religious-freedom and familial-associational interests of Wisconsin's Old-Order Amish community. *Id.* at 234. *See also* Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (declining to disapprove the "balancing" test in *Yoder*). For more on *Smith*, see *infra* note 91.

[76] Thus, the decisions in *Roberts*, 468 U.S. at 628, *Bob Jones*, 461 U.S. at 604, *Boraas*, 416 U.S. at 5, 7, and *Prince*, 321 U.S. at 166, upholding the proffered, public-interest justifications sufficient, are all consistent, in result if not in rhetoric, with Dworkin's suggestion that only laws "adopted for certain reasons" violate liberty. *See supra* text accompanying note 10. And, conversely, the Court's findings in *Dale*, 530 U.S. at 656, *Moore*, 431 U.S. at 499, and *Yoder*, 406 U.S. at 234, of the insufficiency of the state's alleged, public-moral interests to justify the incidentally related incursions into ethical self-

we go again – Dworkin need not be read as *rejecting* "tiers"; rather, we should read him as *construing* that practice in a way that shows its point in the best light possible.

D. *"Fit"*

Can it fly? Does it fit?

Consider our case of the falconry law. That law is not totally devoid of instrumental rationality, relative to the plainly permissible state goal of gun safety. The law, therefore, passes loose scrutiny. Freedom to falcon does not appear to be a core liberty right, so heightened scrutiny does not apply – end of case. But Dworkin would have us proceed quite differently: In his view, not only does it not matter how degrading to the chooser's life anyone might think her choice to falcon would be, it also does not matter how minor or dispensable a part of anyone's life plan anyone might think retention of the option to falcon must be.[77] To the contrary: The question is whether we must deeply suspect the regulatory crimping of that option of flowing from exactly that sort of collective ethical decision, thus insulting human dignity, by violating respect for responsibility. If so, then, on his view, the falconry law is off-limits for a morally scrupulous government.

Or take another example. Fast-forward to the year 2201. An American Congress (or an American state, no federalism complications, please) enacts the Malthus Act, exposing each person to a deterrent, or punitive, tax on the occasion of the birth of each child, beyond the fourth, that he or she has biologically fathered or mothered. Assume that social and economic conditions are such that a set of standard, public-safety reasons for this law is apparent, but that the conditions are not yet at a point of flat-out emergency, or fully certain ever to become so. Assume also that our "tiers" doctrine has survived intact to the twenty-third century. In terms of "tiers," there can be no doubt that the Malthus Act limits a core liberty,[78] therefore requiring strict scrutiny, so we can expect a battle royal over whether the state's interest is sufficiently weighty and pressing to overcome this grievous inroad on a core freedom, and thus justify what every participant in the fight predictably will pronounce a deeply regrettable, public necessity. On Dworkin's proposal, though, this looks like a hands-down case for upholding the law. No one could honestly suspect the state of having acted on the basis of a collective judgment of the unworthiness of large-family parenting as an ethical choice; nor can the law be said in any way to insult the principle of equal concern, or in any other way to clash with liberal equality or partnership democracy. In sum, the

determination might plausibly be reconstructed as the Court's detection of an unacceptable degree of likelihood that those alleged interests were drapery for an underlying disfavor on the lawmakers' parts for certain ethical choices and views.

[77] *See supra* Part I.B.

[78] Specifically, "the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

Malthus Act does not appear to infringe on liberty according to the buck-passing conception of liberty. Rather, it enacts a creditable, if debatable, judgment about what rules are required, in the circumstances, to ensure that each life-swimmer keeps within his or her lane,[79] and does not usurp resources and opportunities that rightly fall to the shares of other people.[80] Therefore, no regrets.

Are you moved to object? Have I forgotten the possible interpretation by which Dworkin would agree that the state, regrettably, harms you – although it does not necessarily violate liberty or dignity – just by constricting choice; just by blocking a path to what you might regard as a worthy sort of life, and the best or right life for you?[81] The Malthus Act most certainly does commit a blockage harm against those whose authentic choices it blocks. Accordingly, under that interpretation, the Act requires justification. And – you might be tempted to add – since the blockage in this instance is especially grievous, so must the justification be especially weighty and clear. Strict scrutiny ensues, and the Act may fail – not as a dignity-denying preemption of ethical responsibility, but as an inadequately justified blockage harm.

We have already dealt with this in Part I.B, where we took note of Dworkin's rejection of the "threshold approach" that sorts limitations of freedom according to collective judgments of their comparative "significance." To judge the blockage from the Malthus Act especially grievous (just as blockage, and pretermitting the reasons behind it), and as therefore calling for an especially compelling justification, would apparently be to commit what Dworkin calls the self-contradiction of using a collective ethical view about what matters, and how much, to the well-going of someone's life, in order to defend people's right to make decisions of that kind for themselves.[82] If the state's putative reliance on such reasons is the factor that turns a restriction on descriptive freedom into an infringement of valued liberty, and not just of descriptive freedom, then every infringement of *liberty*, once found, is ipso facto beyond justification by allowably public reasons. Once a law can be said to infringe buck-passing liberty, and not merely to limit descriptive freedom, then, by the same token, it is beyond the possibility of political-moral redemption by further argument.

It is not simply a question of the admissibility of balancing. Dworkin would be quite free to say that the public goals addressed by the Malthus Act are so clearly and massively compelling as to override whatever loss of freedom-components its pursuit might be found to necessitate; just as he would be free

[79] *See* DWORKIN, *supra* note 2 (manuscript at 185-86, 233).

[80] If necessary in order to ensure conformity to the "principle of abstraction" proposed by Dworkin as a part of liberal equality, the Malthus Act might provide for marketability of the four-children-per-person allowance – a "tradeable cap." *See* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 147-48 (2002).

[81] *See supra* Part I.F.

[82] *See* DWORKIN, *supra* note 2 (manuscript at 236).

to say that some other, undoubtedly public goal (such as raising everyone's expected future yearly income by 0.01%) is too paltry to justify any curbs at all on descriptive freedom. Those would be strictly moral, not ethical, judgments, against which a commitment to respect for ethical independence poses no objection that I can see. What I cannot see, though, is how Dworkin could possibly maintain that such a judgment might ever serve to justify a violation of *valued liberty* (as distinct from a bare blockage harm or curtailment of descriptive freedom), on his proposed conception of what valued liberty is. The problem appears to be that, in any case where a sufficiently credible, public justification is available, that justification must forestall or rebut any suspicion or conviction of the state's having acted in pursuit of a collective ethical judgment. A showing that blocks a possible finding of infringement of (buck-passing) liberty cannot conceivably justify an infringement once found.

E. *Recapitulation of "Tiers"*

We can present the "tiers of scrutiny" scheme in an abstract, notional form. For this purpose, we differentiate among state-inflicted harms as follows:

> A blockage harm is any constriction of descriptive freedom by a legal prohibition.
>
> Blockages are divided into "mere" or "low-level" (those that a bare, rational basis justification suffices to show have not been wrongfully imposed) and "grievous" (those that may be found wrongfully imposed despite their passing the rational-basis test).

Following Dworkin, we reserve the term "liberty" to name the right against wrongfully imposed blockages, or the political-moral principle that condemns such wrongful impositions.

The scheme of tiers of scrutiny, then, is notionally constructed as a step-wise series of queries, as follows:

1. Does the state measure in question impose a blockage harm?

   If no, the state measure does not violate liberty.

   If yes, go to

2. Does the measure pass the test of (barely) instrumentally rational connection to a permitted state goal?

   If no, the measure violates liberty.

   If yes, go to

3. Does the blockage in question qualify as grievous?

   If no (and "yes" is the answer to Query 2), the measure does not violate liberty.

   If yes, go to

4. Does the measure pass some stiffer justificatory test that is proper to blockages as grievous as this one?

   If yes, the measure does not violate liberty.

If no, the measure violates liberty.

In American constitutional law, the tests used at Steps 2, 3, and 4 all differ from each other: At Step 2, rational basis; at Step 3, the more or less "fundamental" character of the zone or dimension of freedom withdrawn by the questioned measure; at Step 4, the suitability or necessity of the measure to achieve a substantial or compelling state interest. That is not so, however, under Dworkin's proposed buck-passing conception of liberty. The key difference lies at Step 3. For Dworkin, differentiation of grievous from mere blockage harm is not, and cannot be, a matter of the collectively-judged importance to a life of the path that is blocked.[83] Rather the differentiation is, and can only be, a matter of the political-moral acceptability of the state's reasons for imposing the restriction. In effect, the test at Step 3 merely reproduces the test that the measure must already have passed, at Step 2, in order for Query 3 to arise. Moreover, as we have just seen, Dworkin's prescription allows no Step 4 for a measure that fails that test at Steps 2 or 3; rather, that prescription defines a measure that fails that test as a violation of liberty, period.

Given these results, it might be tempting to say that, on the buck-passing conception of liberty, liberty turns out to be nothing special at all.[84] On that conception, "invasion of liberty" names nothing other than a bare, blockage harm for which a proper justification is lacking. Protection of liberty simply *is* a sort of qualified protection against a certain sort of generic harming, the option-foreclosing sort that is wrought by any and every regulatory restriction of descriptive freedom.[85] Thus, the *value* at work turns out to be avoidance of generic harm, and, remarkably, liberty turns out to be the Dworkinian system's empty idea.[86]

Such a conclusion would be perverse; it would be wrong. "Liberty," for Dworkin, does plainly represent an important value, one that is distinct both from absence of harm and from unhindered enjoyment of descriptive freedom (in the "option" sense of the term). That value – the one for which "liberty" primarily stands in Dworkin's system – is the strand of human dignity that Dworkin calls ethical responsibility, the special responsibility that accrues (equally) to every person for the well-going of his or her life, which every collective preemption of ethical choice plainly violates – hardly an empty idea.[87] Nothing I have written in Part II does, or could, raise a doubt about the reality or importance of that value. The question, rather, has been whether, in view of the apparent entailments for legal doctrine, the value of respect for

[83] *See id.* (manuscript at 231-33) (arguing that laws that deny liberty for people to "decide for themselves what kind of life is good for them" are not justified).

[84] Just as Dworkin has foreseen we might say. *See id.* (manuscript at 232).

[85] *See supra* Part I.F.

[86] *Cf.* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 594-96 (1982).

[87] *See* DWORKIN, *supra* note 2 (manuscript at 11).

ethical responsibility can plausibly be said to *exhaust* what "liberty" stands for in one particular liberal culture. A further question, now to be resumed from Part I, is whether Dworkin has successfully severed – or could successfully sever – the interpretive/interpreted value of respect for ethical responsibility from an inexorably foxy assignment of value to descriptive freedom just as such.[88]

III. TAKING STOCK

A. *Practice and Philosophy*

In his book, *Is Democracy Possible Here?*, Dworkin undertook to present "common ground" – shared premises, in the form of abstract principles – on which Americans concerned to revivify their democracy might converge, as starting points for political debates in which the opposing sides do not talk past each other.[89] To that end, Dworkin proposed the two principles of human dignity that figure so strongly in *Hedgehogs* – "intrinsic importance" and "special responsibility" – along with the Kantian principle that turns those into precepts of political morality.[90] Our discussion in Part II may perhaps raise a doubt about whether these premises – or, at any rate, the conception of valued liberty that Dworkin draws from them in *Hedgehogs* – can currently succeed in providing common ground for American political debates.[91]

If one finally answered "no" to that question – and a case for that is far from proved in these pages[92] – we would have on our hands a failure of interpretation of American political practice, but not a failure of the political-

[88] For those persuaded by Dworkin that normative liberty, along with other prime political-moral principles, is an inescapably "interpretive" concept, whose content can be ascertained only through the coherentist work of conceptual ascent and so on, a claim that every regulatory withdrawal from descriptive freedom violates liberty must appear extremely unlikely to be right. Such claims must be treating liberty differently – as something like a culturally determined, "criterial" concept – thus placing themselves in direct and profound philosophical disagreement with Dworkin.

[89] RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 6-8 (2006).

[90] *Id.* at 9-21.

[91] Perhaps somewhat suggestive along these lines is the political response to the Supreme Court's 1990 transition, when dealing with claims of constitutional rights to religious exemptions from ethically neutral regulatory legislation, from the "balancing" approach of *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), to the "excluded reasons" approach of *Employment Division v. Smith*, 494 U.S. 872, 879-82 (1989), which seems more in line with Dworkin's view. Congress has restored the balancing test for federal government actions, *see* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1, 2000bb-2 (2006), and sought to do so for state government actions as well, *see* Pub. L. No. 103-141, § 5, 107 Stat. 1488, 1489 (1993) (codified as amended at 42 U.S.C. § 2000bb-2); City of Boerne v. Flores, 521 U.S. 507, 513 (1997) (denying congressional authority to impose a balancing test on the states).

[92] *See supra* note 76 and accompanying text.

philosophical project of conceptual interpretation, to which *Hedgehogs* is, in major part, devoted. The project, I mean, that starts with arguments aimed at establishing the interpretive – as opposed to the criterial or natural-kind – status of leading political-moral concepts; proceeds through pursuit of the sort of dovetailing (including via conceptual ascent and descent) between and among our conceptions of these concepts that their status as interpretive concepts (along with certain, related conceptions of the virtues of personal and political responsibility) requires us to strain for; and ends by presenting certain conceptions of liberty, equality, democracy, and the rest as an overall appealing interpretive outcome.

On various levels, a showing of lack of fit between Dworkin's conceptual-interpretive results and seemingly entrenched American political culture and practice would fall short of impeachment of the philosophical project thus described. On one level, the case still could be that Dworkin convinces his readers all the way down, so to speak, and his readers, accordingly, conclude that American legal culture and practice are, alas, deeply misguided. On another level – represented by C. Edwin Baker's contribution to this Symposium[93] – the case could be that the basic, philosophical framework is accepted; all that (arguably) has gone wrong is the particular set of dovetailing, conceptual interpretations that Dworkin has produced by way of instantiating the framework, and a somewhat different set of dovetailing interpretations would vindicate it fully.

That said, a question still may linger about whether anything written above stands in the way of Dworkin's commendation of the "hedgehog" stance and outlook regarding political philosophy. The prime suspect would seem to be the suggestion, launched in Part I.F and never withdrawn, that Dworkin values descriptive freedom, even if not above the level of the value of safety from generic harm. From which, given the inevitability of regrettable conflicts between descriptive freedom and other prime principles such as equality and democracy (on any plausible conceptions of those principles), it would follow that, even according to Dworkin, liberal values do, indeed, conflict.

Recall the argument: To say, as Dworkin does, that the political community acts wrongfully whenever it restricts descriptive freedom without a proper justification is to treat descriptive freedom as a value.[94] Against this, we have Dworkin's entirely persuasive insistence that what we have reason to value, in the name of liberty, is not a state of political affairs in which descriptive freedom is unrestrictedly enjoyed; rather, it is a state of political affairs in which descriptive freedom is restricted for good and right reasons, but never for bad and wrong ones. But to embrace that proposition is not yet to deny recognition to descriptive freedom as a value that can come into practical collisions with other true, political values. Followers of Isaiah Berlin will

[93] *See* Baker, *supra* note 11, at 760.

[94] It may be nothing more than the value of avoidance of harms in general, but a value it is.

insist that what we should prize most highly is a state of political affairs in which conflicts of true values are, first, recognized for what they are, and second, rightly and well arbitrated. That is what we should aim for, say the Berlinians, in preference to a state in which *either* conflicts are denied, *or* they are arbitrated wrongly or badly.

Beyond doubt, Americans preponderantly value the state of affairs that Dworkin says we have reason to value: Freedom subject to justified restriction – "ordered liberty," our scriptures call it,[95] or "freedom under law," or maybe "liberty, not license."[96] The question, though, is whether that is *all* that we value, or have reason to value, under the names of liberty and freedom. Is ordered liberty – freedom subject to properly justified limitation – all that anyone could have reason to value under those headings? The foxes grow uneasy. What about that case of the Malthus Act?[97] What about the blocked options of a person to parent a large family, or to allow children to come as they may? Do we value those options? Do we regret the blockage of them – even if in service to the preservation of the valued state of liberty itself?[98] Because if those options are values, regrettably lost to an overpowering emergency of ordered liberty, then ordered liberty does not fully contain those values. Ordered liberty cannot be said to contain the value that it crushes, under necessity, driven by its own logic of existence, and not without regrets.

[95] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[96] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690).

[97] *See supra* Part II.D.

[98] *Cf.* Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 188 (1956) (offering a parallel defense for certain laws prohibiting advocacy of overthrow of the United States government by force and support of organizations engaged in such advocacy).