
**WHAT ETHICAL RESPONSIBILITY CANNOT JUSTIFY:
A DISCUSSION OF RONALD DWORKIN’S *JUSTICE FOR
HEDGEHOGS***

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I. ETHICS AND MORALITY

Ronald Dworkin argues in *Justice for Hedgehogs* that ethics (to be distinguished from morality) is based on dignity, which involves, first, the requirement that one think of oneself and one’s life as objectively and intrinsically important (self-respect); and, second, the special responsibility that one has to oneself (in part because one is important) to live well.¹ I will refer to these elements as “importance” and “responsibility.” This responsibility to live well involves seeking to live a good life within moral constraints that have to do with relations with others.² According to Dworkin, a good life is understood as pursuing success according to one’s independently chosen goals and values (authenticity) – for otherwise one will not have really lived one’s own life. The ethical responsibility to make a success of one’s life

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¹ See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010) (Apr. 17, 2009 manuscript at 128, on file with the Boston University Law Review). Presumably one should think of oneself as objectively and intrinsically important only if one really is. I do not think Dworkin proves we have this importance. Rather he indicates that we believe we have this importance by showing, for example, that we blame ourselves if we waste our lives and we think it is important that we find correct values according to which to live. *Id.* (manuscript at 128-30).

² See *id.*

is different from a mere personal preference for oneself.³ A person must choose goals and values in response to what he views as having objective ethical value.⁴ This concept implies that one could choose the wrong goals and values, and then one would not have lived successfully. (But one might ask, perhaps one still lived with dignity because one took one's life seriously and lived according to one's own views of objective value?)⁵

Dworkin emphasizes that one can live well even if one's life is not good (a success) because one abides by moral constraints when they conflict with success, and he (reluctantly) concedes that one's life could still be good (successful) if one violated moral constraints.⁶ So, if the only route to success involves corruption, one lives well by not being corrupt, though one does not have success.⁷

³ *See id.*

⁴ *See id.* (manuscript at 134) ("Living well means not just designing a life, as if any design would do, but designing it in response to what one takes to be objective ethical value . . .").

⁵ Presumably, one should view things as having objective ethical value only if they have it. Is Dworkin's view that if there were no objective ethical values (no objectively successful ways to live) and one knew this, one could not have dignity? That is, if one thought that one was objectively important, but also thought that none of life's options had objective ethical value, would one not have dignity?

⁶ DWORKIN, *supra* note 1 (manuscript at 124-27) (discussing the distinctions between living well and living a good life, and using the example of a Medici prince who has led a good life but, through his immorality, has not have lived well). Dworkin thinks the problem of moral luck affects how good one's life is, not whether one has lived well. *See id.* (manuscript at 126) ("Someone may have a bad life in spite of living well because the goodness of his life does not depend entirely on his own decisions and efforts: it depends critically on his circumstances and luck as well."). He says that the person who faultlessly kills a child has had a less good life, but has not lived less well. *Id.* (manuscript at 127) (describing a bus driver who feels sorrow after faultlessly crashing and killing a dozen children, which thus decreases the goodness of his life). The person may regret what happened in his life but not blame himself for it. *Id.* ("I can . . . regret that my life was spoiled by the fact that but for my blameless acts a tragedy would not have happened."). Cases such as this one may, however, raise problems for Dworkin's view that living well is more important than having a good life. For what if the person's doing something *morally wrong* would have prevented him from accidentally killing the child? For example, suppose his stopping at a bar, and thus driving intoxicated, would have caused him to arrive too late to get in an accident. Is this a case in which it would be reasonable to prefer to have lived less well and had a better life? If how one interacts with others can affect how good one's life is, there may be many cases in which, for the sake of others, one should prefer to have lived less well and had a better life. And if one did not live less well and have a better life, one will regret that fact, even if one will not blame oneself for it.

⁷ *See id.* (manuscript at 124-27) (explaining the possibility of living a good life, but not living well, by making immoral decisions). Dworkin wishes to affiliate his views about ethics with those of Aristotle on the good life. *See id.* (manuscript at 13). However, Aristotle claimed that the good life had to include success as one part; if one lived morally

Dworkin argues that these two ethical principles, importance and responsibility, can help us to derive the content, and explain the attraction, of morality (understood as obligations to others).⁸ First, one cannot correctly believe that one has objective importance unless other people do too; as it is

and wound up on the rack or had bad luck, one would not have achieved the good life. See ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. XIII, at 14 (N. Kretzmann et al. eds., Hippocrates G. Apostle trans., D. Reidel Publ'g Co. 1975) (c. 384-322 B.C.E.) (explaining that suffering terrible luck precludes happiness). Since Dworkin argues that one can have lived well in the absence of success and in the presence of much bad luck, it seems to me that Dworkin's ideal of living well differs from Aristotle's ideal of the good life. Dworkin's idea of a good life (which may not be a life well-lived) may correspond in some ways more closely to Aristotle's ideal. For example, Dworkin says that "[w]hether people have lived well is not affected by what happens after they have ceased to live at all But whether someone has had a good life can be influenced after his death by anything that adds or takes away from its achievements or hopes." DWORKIN, *supra* note 1 (manuscript at 127). Aristotle famously includes postmortem events in deciding how good a life one has had. See ARISTOTLE, *supra*, at 14-15 (discussing the contribution of postmortem events to one's happiness).

⁸ DWORKIN, *supra* note 1 (manuscript at 128) (explaining how the two components of dignity, self-respect and authenticity, "are ethical principles about how to live [and not just] moral principles about how to treat other people"). In his view, it is important that morality not be merely a component of an ethical life where the content of the component is derived independently of ethics. *Id.* ("If moral values are best understood as integrated with rather than simply incorporated in ethical responsibility, then we might hope to capitalize on the connection in a more powerful interpretive exploration of moral conviction."). Dworkin wants ethics, when described *independently of morality*, to play a role in deriving the content of morality (which may then play a role in characterizing the ethical life). See *id.* This is connected with his interpretive view of normative components, according to which our understanding of each component should be formed in the light of the others. See *id.* This is Dworkin's way to eliminate conflicts between the different normative components. It is also connected with his views about metaphysics. For example, Dworkin claims that moral truth is not about discovering what views *correspond* to independent moral entities (which he refers to as "morons"). *Id.* (manuscript at 8-9) (explaining that while some believe the existence of "morally charged particles or morons . . . can make a moral judgment true," the only way to "'earn' the right to think that some moral judgment is true" has nothing to do with these morons). Apparently, he thinks that if there were conflicts between moral virtues such as kindness and honesty that could not be eliminated by proper interpretation of each virtue, this could only be because there were such morons corresponding to each virtue. This was part of his response to Richard Fallon's presentation at the Boston University School of Law Symposium. See Ronald Dworkin, Response to Panel II: Interpretation at *Justice for Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book* (Sept. 25-26, 2009) (transcript on file with the Boston University Law Review) (responding to Richard Fallon's remarks and pointing out that we may not be successful in being both kind and honest, but that if we were to say conflict is inevitable, "that seems to me dangerously close to believing in morons"). I think Dworkin is wrong to believe that ineliminable normative conflicts have this metaphysical implication.

only in virtue of the properties one shares with others that one has importance.⁹ Call this Importance-Moral. Dworkin thinks that morality requires us to respect others for their own sake, not merely instrumentally for our sake;¹⁰ and of course we could not correctly believe that others ought to respect us for *our own sake* if we did not think the same of them. In this way, Dworkin thinks that our attraction to morality can be explained by the threat to our own dignity if we do not treat others as important in their own right.¹¹

On this account of the relation between morality and ethics, a problem would occur, however, if there were moral obligations to entities whose importance is not grounded in the properties which ground a person's own importance. For example, the moral importance of animals, or God, might be grounded differently from that of human persons. If one's own importance were not implicated in denying the real obligations to these entities, one would have to find some account other than the coherence of morality and an ethical ideal to explain our attraction to morality.¹² I think Dworkin's account of the relation of morality and ethics may underestimate our capacity simply to act for reasons (such as the importance of others) independent of the connection between their importance and our own importance. Indeed, some might say it is this capacity that is a source of our own dignity, though it need not be the source of the value of other entities.

The second component of dignity – responsibility – also is said to help isolate the content of morality.¹³ For if one has a special responsibility for one's own life going well, this will be true of every other person, and will affect what is morally expected of each person. Call this Responsibility-Moral.

⁹ See DWORKIN, *supra* note 1 (manuscript at 165) (explaining the “Kant principle”: the perspective of “a person who recognizes the objective importance of his life going well and therefore the equal objective importance of any life going well”).

¹⁰ *Id.* (manuscript at 15).

¹¹ Dworkin says that he is not concerned with whether the ethical ideal of living well is or should be a *motive* for moral action, *id.* (manuscript at 122), but with whether “we can sensibly assume that our ideas about what *morality* requires and what best serves the right human ambition should reinforce one another.” *Id.* (manuscript at 123) (emphasis added). And he thinks that the question “why be moral” is “more profitably understood . . . as asking how we can account for the appeal of morality that we already feel.” *Id.* (manuscript at 12).

¹² Note that Dworkin says that it is not out of bounds to say that one's dignity is threatened if one could not live with oneself if one did something immoral. *Id.* (manuscript at 122). But in such a situation, one's dignity does not help one derive the content of morality; the content of dignity is just conceived as requiring that one be moral. It thus involves incorporation of morality into dignity, not the integration of the two that Dworkin says he seeks. See *id.* (manuscript at 128); *supra* note 8.

¹³ See DWORKIN, *supra* note 1 (manuscript at 167) (arguing that if, as Kant says, moral duty is isolated from other moral values, then ethics cannot explain moral duty, and implying this is not the case because “Kant's argument begins . . . with ethical demands that match the two principles of dignity”).

II. RESPONSIBILITIES TO SELF AND HELPING OTHERS

One of Dworkin's aims is to show that our importance implies moral duties to aid other persons, but despite everyone having equal importance, we are not required to show as much concern for others as for ourselves.¹⁴ Indeed, he says, "I cannot treat someone else's life with the same attention and concern as I treat my own without trespassing on and so denying his personal responsibility as well as neglecting my own."¹⁵ This statement suggests that showing equal concern for ourselves and others is not only not required, but also generally wrong. Here, it is important to distinguish (1) the ethical responsibility I have to independently decide how much I owe others and how much I owe myself from (2) my ethical responsibility, understood as what I owe myself. Dworkin says that in deciding how much one owes others (a matter of morality): "The test is interpretive. Which acts, in which circumstances, show a failure to respect the objective and equal importance of human life? . . . It is a matter of the right distribution of self-concern and concern for others. . . ."¹⁶ It is the responsibility of each person to decide what is the right answer, but one could independently decide and get the *wrong* answer. That is, there was something one should have done for one's self or others that one did not do. Dworkin argues that we owe aid only when not giving it shows disrespect for human life because it shows indifference,¹⁷ and

¹⁴ *Id.* (manuscript at 165).

¹⁵ *Id.*

¹⁶ *Id.* (manuscript at 176). This weighing of self versus others to determine one's moral obligations to others occurs *after* one has decided what constitutes a successful life for oneself. Dworkin's view allows that one could consider the interests of others in deciding what constitutes success in one's own life, but not because one morally owes them this. *Id.* (manuscript at 175-76). For example, one might consider whether helping others would make one happier and so more successful. Suppose one is choosing a career as a model or a brain surgeon and is undecided on the grounds of personal satisfaction in these fields. The fact that one could help others as a brain surgeon could be taken to be an additional source of satisfaction. However, this is different from the moral thought that, because it would make no difference to my satisfaction overall, helping others gives me a moral reason to be a brain surgeon rather than a model. Stating that one should reasonably decide among life projects in the first instance by taking account of moral considerations would be an objection to Dworkin's view. Professor Appiah raised such an objection in his conference presentation. See Kwame Anthony Appiah, *Dignity and Global Duty*, 90 B.U. L. REV. 661, 669 (2010) ("[Dworkin's] formulation continues to imply that the perspective of ethics permits me to utterly ignore the needs of others in *conceiving* of my success; that is, it ignores the possibility . . . that I ought to take account of the deep need of others in defining what it is for my life to go well.").

¹⁷ DWORKIN, *supra* note 1 (manuscript at 178) ("I show indifference to the importance of human life when I refuse aid that I could provide with no dent to the success of my own life, but not when I refuse aid that would seriously threaten my own success as I have identified it."). One might, of course, argue that being willing to give up a penny to save someone's life is sufficient to show that one is not indifferent to his life. This could be true even if one

this does not occur if we refuse to aid when it would involve either neglecting responsibilities to ourselves¹⁸ or interfering with responsibilities others have for themselves.¹⁹

One concern I have with Dworkin's views is that showing equal concern for oneself and others need not involve neglecting one's special responsibility for one's own life. This is so if one chooses projects and values (independently of thinking of them as morally required) that involve equal concern for oneself and others, consistent with respect for others' responsibility to care for themselves. If one chooses such projects and values, one will have taken one's life seriously and fulfilled the responsibility to choose projects and values autonomously, but success will involve showing equal concern. Furthermore, consider a different case in which equal concern for oneself and others *would* interfere with success in one's chosen goals. Dworkin himself says that it could be noble, saintly, or generous to give up one's success to save others from disaster, though it does not show disrespect for them not to do so.²⁰ And while he says that a person must not "aim to make [others'] lives more successful overall because it is their responsibility to choose goals that they can manage,"²¹ this seems inconsistent with his claim that it would be generous – not wrong – to give up a trip on behalf of someone who could not otherwise manage to fulfill a lifelong goal of taking such a trip.²²

It seems to me that those who act nobly in helping another person in an unforeseen disaster may do no wrong because they will still have fulfilled their *responsibility to live well*. This could be so even if they give up success, not because it conflicts with moral constraints, but because it conflicts with doing a *supererogatory* act (whose nonperformance would not be disrespectful of others). Suppose this is so. Then other people who do not act similarly, but choose instead to make a success (as they have identified it) of their life cannot claim – contrary to what Dworkin argues – that it would have been wrong of them to aid because they would have neglected their responsibility to themselves (or to their chosen goals). It may indeed be permissible for them to pursue their success, but it would be self-deceptive and self-serving for them to

would give no more to save his life even though giving more would not dent one's success. I shall assume that Dworkin is concerned with more than minimally ruling out indifference.

¹⁸ *Id.* (manuscript at 177).

¹⁹ *Id.* (manuscript at 174-75) (explaining that interfering with others' lives to attempt to make them successful would not show respect for their dignity).

²⁰ *See id.* (manuscript at 165, 174-75); *id.* (manuscript at 176) ("I do not show contempt for human life even when I refuse to make more admirable sacrifices. . . . I would not imply that I regarded the lives of others as intrinsically less important than my own if I refused to [make such sacrifices].").

²¹ *Id.* (manuscript at 177). Dworkin says this is true at least if there is a just distribution of resources. *Id.* Although this is not currently true, he does not say whether or how our duties are different when the distribution is unjust.

²² *Id.* (manuscript at 176).

think that they can cloak this permissible choice as a requirement not to do something ethically wrong.

It is important, therefore, to argue, as Dworkin *does not*, that even when there would be *no* improper neglect of individuals' ethical responsibility for themselves if they sacrifice success in order to aid others, the equally objective importance and respectful treatment of each person does *not* imply that one must provide such aid or be equally concerned for each person. It need not be the presence of overriding ethical *responsibilities* that makes *unequal* concern permissible. Dworkin seems to lack confidence that a *moral right* to attend to one's own concerns, on its own, could stand up to the objective importance of other people and their needs, if not accompanied by an overriding *ethical responsibility*. I think his lack of confidence in the power of such a right on its own, as well as his confidence that an ethical responsibility can fill the gap, is unwarranted.²³

Suppose that responsibilities to self need not constrain one from making big sacrifices for others. This need not imply that there is no responsibility to make something good of one's life, but only a personal preference for one's own success. For, as I have argued in earlier work, it is not true that one must always fulfill a responsibility (e.g., to give a presentation) rather than do a supererogatory act (e.g., risk one's own life to save a drowning person).²⁴ We can agree with Dworkin that we have a responsibility, not a mere preference, to make something good of our lives so long as we think (1) that we really should be doing this when we have not chosen to do something else important (such as saving others); and (2) we may not choose to abandon our responsibility just because we prefer to do something unimportant for someone else.²⁵

Still, suppose we choose to fulfill our responsibility to ourselves, because it is a responsibility, when it would not be ethically wrong to do a noble act instead. Arguably, it is merely a personal preference for doing our duty that accounts for our fulfilling the responsibility to ourselves. Further, sticking with one's responsibility to oneself may also reveal self-preference, not merely a preference for fulfilling responsibilities in general. This would be so if

²³ Suppose your responsibility is to someone else, not to yourself. The fact that the other would suffer a significant loss and has not waived his right against you to fulfill the responsibility may constrain you from doing a supererogatory act for a third party. But if the person to whom you have the responsibility is willing to suffer a large loss, as you are in doing the supererogatory act, neither of you may be failing to perform an ethical duty to yourself that should stand in the way of the supererogatory act.

²⁴ See, e.g., 2 F.M. KAMM, MORALITY, MORTALITY 311-48 (1996) [hereinafter KAMM, MORALITY]; F.M. Kamm, *Supererogation and Obligation*, 82 J. PHIL. 118 (1985) [hereinafter Kamm, *Supererogation*]. These earlier works dealt with *moral* duties in conflict with supererogation; here we are talking about what Dworkin calls an *ethical* duty and its relation to supererogation. DWORKIN, *supra* note 1 (manuscript at 176-77).

²⁵ Notice I have not here argued that there is no responsibility to oneself because I, to whom a duty would be owed, could always release myself from it.

someone would abandon a responsibility he has for the success of other people, but not his responsibility to himself, in order to save strangers from disaster.

One particular factor that Dworkin thinks may bear on whether we have a duty to aid others is what he calls “confrontation.”²⁶ In part, for Dworkin, this is a question of physical distance – whether we are physically near to, rather than far from, someone who needs help.²⁷ However, he also seems to include under confrontation psychological interaction with a victim who, in the cases he discusses, likely knows that we could help.²⁸ Dworkin says that it is hard to explain why confrontation should matter morally, but he thinks it does to a limited extent.²⁹ However, when a terrible disaster would occur if we do not provide easy aid (his example is African famine), the absence of confrontation does not matter morally.³⁰

I am inclined to agree with this part of Dworkin’s discussion and am interested in it, in part because of my own discussion of the possible moral relevance of physical distance to a duty to aid.³¹ In that discussion, I argued that being physically near rather than far could be shown to be of some moral significance if the size of the effort one would be morally required to make varied with distance to the person in need.³² For example, if one were near the person needing aid, one might be required to make a larger effort than if one were far.

Nevertheless, I have reservations about Dworkin’s discussion. First, he does not distinguish the role of distance per se from psychological interaction carefully enough. In my view, it could be that the person who needs aid does not identify us and we do not identify him – a bush is between us – and he does not know we are able to aid, and yet our being near him could be morally relevant to our having a duty to aid him.

Second, I have argued that we could have as strong a duty to help people who are distant as those who are near, even at large cost, on account of nearness being morally relevant.³³ This is because we may be *near* to (rather than far from) a *threat* that is now far from but will soon be near a person, or

²⁶ DWORKIN, *supra* note 1 (manuscript at 178).

²⁷ *Id.* In his presentation at the Symposium, Professor Appiah dismissed the idea that Dworkin thinks that physical distance in itself matters morally (and also the idea that it could matter). See Appiah, *supra* note 16, at 669 (explaining that, “[l]ike Dworkin I think that . . . almost all of us are directly confronted with people who need help to have a chance at a life of dignity,” and that “[p]roximity of the relevant kind is epistemic, not geographical” (footnote omitted)). I think Appiah is wrong on both counts.

²⁸ See DWORKIN, *supra* note 1 (manuscript at 179).

²⁹ See *id.* (manuscript at 178) (“[The confrontation scale] is more difficult to state and justify, but it is real and distinct, and we cannot make sense of much common moral understanding unless we find place for it.”).

³⁰ *Id.* (manuscript at 179).

³¹ See, e.g., F.M. KAMM, *INTRICATE ETHICS* 345-97 (2007).

³² *Id.* at 347-49.

³³ See *id.* at 368-97.

because our *means* with which to help someone are near to that person, even though we are far both from our means (e.g., our boat) and the person who could be helped. Other discussions of the moral relevance of physical distance (including Dworkin's) have not considered all these factors that could be near or far from each other, but have only focused on the aider being near or far from the aidee.³⁴ This is why I described consideration of the nearness relation between other factors (such as aider and threat, or means and aidee) as the "New Problem of Distance in Morality."³⁵ Hence, Dworkin's focus on the nearness relation between aider and aidee is too narrow.

My third concern is with Dworkin's view that not providing easy aid to someone in desperate need at one's feet must reflect indifference to, and lack of respect for, the objective value of a person.³⁶ For suppose that one is on one's way to save one thousand people who are far away and if one stops to save the person at one's feet, those others will die. It does not seem to me that one shows indifference to human life if one continues on one's way. Furthermore, suppose that the aid required by the near person is small (and so aiding her is even a *pro tanto* duty), but the aid required by those who are far is great enough so that aiding them is supererogatory. As discussed above, I believe that doing a supererogatory act can sometimes take precedence over performing one's duty, without this showing disrespect for the person to whom one has a duty.³⁷ Hence, it could be permissible even in this case to abandon the person "at our feet."³⁸

III. ETHICAL RESPONSIBILITY AND HARMING OTHERS

Dworkin's second aim is to show that ethical responsibility explains why we may not harm people in certain ways.³⁹ First, he thinks that such responsibility grounds rights to one's body and security over one's property, as without these one could not make a success of one's life.⁴⁰ It is important to emphasize that when Dworkin says "any general transfer of control over the integrity of my body . . . would leave my dignity in shreds,"⁴¹ it is the inability to fulfill the responsibility for one's own life that he thinks explains the attack on dignity, not any inconsistency with the objective value of the person.⁴²

³⁴ DWORKIN, *supra* note 1 (manuscript at 178).

³⁵ KAMM, INTRICATE ETHICS, *supra* note 31, at 368-97.

³⁶ DWORKIN, *supra* note 1 (manuscript at 179).

³⁷ For arguments that reach this conclusion, see Kamm, *Supererogation*, *supra* note 24. See also 1 F.M. KAMM, MORALITY, *supra* note 24, at 304-30.

³⁸ DWORKIN, *supra* note 1 (manuscript at 179).

³⁹ *Id.* (manuscript at 184).

⁴⁰ *Id.* (manuscript at 185).

⁴¹ *Id.*

⁴² *Id.* (manuscript at 184) ("[I]t cannot be the objective importance of human life that you offend when . . . you shoot the stranger [to save your own life]. The same preference for your own life is still at work and is still compatible with Kant's principle [of the objective

My sense, contrary to Dworkin's claim, is that ethical responsibility is not necessary for deriving such rights to one's body and property. Even if one had no such responsibility, other grounds would be sufficient for one's having a right to one's body or to property acquired in certain ways. Indeed, it seems dangerous to make such rights contingent on responsibilities, for if it is clear that someone lacks the capacity to fulfill his ethical responsibilities or has no intention to do so (or has already fulfilled them) and therefore has no need for his body or property for this purpose, he may lose those rights. I also think that having responsibilities generally is not sufficient for showing that one has a claim right to what one needs to fulfill those responsibilities, even when others do not need the same thing to fulfill *their* responsibilities. For example, if one needs a car to fulfill a promise one has made, one may have no claim right to the car. I see no reason why having a responsibility should be sufficient to generate rights in the particular case of rights to one's body or security over property.

Hence, while I do think one's dignity would be threatened if one did not have rights over one's body, I do not think these rights are related to any responsibility one has to make something of one's life. If neither the objective importance of human life nor the responsibility to make a success of one's life accounted for a right to noninterference with one's body, and yet the latter is connected with the dignity of the person, this would suggest that Dworkin's conception of dignity is seriously incomplete.⁴³

value of persons].”). Dworkin also seems to believe that maximizing the number of lives saved by shooting some people to save others is compatible with valuing life and showing respect for that value. *See id.* (manuscript at 188). He does *not* argue that this is *required* by valuing or respecting life, because he does not argue that the value of respecting life requires us to count the numbers of lives we save. (For example, he argues that if we cannot save both one person on one island and five on another island, it is not necessarily disrespectful of human life to give each person an equal chance to be saved rather than saving the greater number.) The fact that Dworkin thinks that shooting someone to save other lives is consistent with valuing and respecting the objective value of life suggests that he takes a view about life resembling a view held by some about rights. That is, it has been argued that it is (at least) consistent with valuing rights that one deliberately transgress some rights in order to prevent the transgression of additional comparable rights, as in a case where one shoots a bystander to prevent someone else from shooting more bystanders. *See* KAMM, *INTRICATE ETHICS*, *supra* note 31, at 288. Some have even argued that if such minimizing transgression is impermissible, the reason cannot be concern for rights but concern for a duty that an agent has that *he* not transgress someone's right. *Id.* at 268 (citing Jeremy Waldron, *Introduction to THEORIES OF RIGHTS* (Jeremy Waldron ed., 1984)). Similarly, Dworkin argues that concern for the value of life cannot be the reason why we should not take life to save lives; rather, an ethical duty must be appealed to. *See* DWORKIN, *supra* note 1 (manuscript at 187-90). For discussion of views about minimizing rights violations, see 2 KAMM, *MORALITY*, *supra* note 24, at 237-58.

⁴³ However, it is possible, contrary to what Dworkin says, that it is the objective value of human life that grounds a right to one's body. For killing someone out of a *concern* for human life (e.g., one's own) need not mean that one's acts are consistent with *respect* for

One of Dworkin's further concerns is to justify a moral distinction between harming and not aiding, which he seems to identify with the act/omission distinction.⁴⁴ Dworkin's tries to show that deliberate harm (but not harm that comes to others merely because we compete with them) is morally worse than denying aid (even given the same motive and aim), because deliberate harm usurps a person's *responsibility* to control his own life.⁴⁵ One of my concerns with this account is that I think harming per se could be morally worse than not aiding even if one has no responsibility to control one's own life, but only a *right* to control one's own life independent of such a responsibility.

My second concern is that Dworkin's claim that deliberate harm is wrong because it usurps someone else's responsibility for his own life seems to conflict with the distinction that he himself draws between ethical paternalistic interference and other sorts of interference. He says:

[C]oercion justified on economic, moral or aesthetic grounds does not invade the personal responsibility of anyone to identify and find value in his own life. Government may forbid people to discriminate [I]t may tax people for funds to protect . . . treasures However personal value is different from both impersonal and moral value. Government may not force people to live lives that conform with the views of those in power about which lives are worthy and which unworthy.⁴⁶

According to this statement, government coercion does not usurp a person's ethical responsibility for controlling his own life when it is *not* done to make him lead a life the government thinks is right for him, but for some other reason, such as protecting treasures. This is so even when the government's coercing for some other reason may affect his ability to control his life. Dworkin does not here claim that it is part of ethical responsibility for someone to decide whether to discriminate or support treasures. If this is so in the case of the government, it is not clear why an individual who deliberately harms someone in order *to help herself*, not in order to make the person harmed lead a life she thinks it right for him to lead, also does *not* usurp that person's ethical responsibility to control his own life.

Of course, this interference may be impermissible, while the government's interference (for aesthetic, economic, etc. values) may be permissible. But the

the value of human life. As noted above, *see supra* text accompanying notes 17-19, Dworkin interprets respect for any human life as not being indifferent to it, giving it enough weight. DWORKIN, *supra* note 1 (manuscript at 193). However, this may not be a complete or even appropriate idea of respect for human life. (It is certainly not Kant's.) Alternatively, it is possible that it is not the objective value of human life that is crucial to having a right to one's body, but rather the nature of the person. I shall not pursue this matter here.

⁴⁴ By contrast, I think that *acting* to terminate life-saving aid that we are providing is a case of not aiding, though our *act* causes death.

⁴⁵ DWORKIN, *supra* note 1 (manuscript at 185).

⁴⁶ *Id.* (manuscript at 135).

point is that the grounds for its impermissibility, or for the interference being morally worse per se than not aiding, will not be that it usurps someone's ethical responsibility. Rather, it will be impermissible because a person's seeking to benefit herself cannot justify the interference. Dworkin's attempt to connect the wrongness of deliberate interference with usurping another's ethical responsibility suggests that those who harm us for their benefit are trying to lead our lives for us, but this need not be true.

Perhaps Dworkin could try to distinguish between what the government may do and someone's interference with another's body on the ground that we need authority over our bodies to fulfill our ethical responsibility in the way we do not need the authority over what the government appropriates. So even if needing something to fulfill a responsibility does not necessarily give one a right to it, we might be more reluctant to interfere with what a person needs to try to make a success of his life and live well than what he does not need for this. However, it is not clear to me that we will be able to distinguish on these functional grounds interference with someone's body from interference with other things he could usefully have. In any case, we must keep separate two different types of arguments: (1) intrusion on someone's body attacks his ethical responsibility because it interferes with its being his choice that determines whether his body is interfered with; and (2) intrusion on someone's body attacks his ethical responsibility because he needs his body in order to fulfill his responsibility to make something good of his life. The latter is Dworkin's position.

Having discussed cases in which an individual would harm someone else out of self-interest, Dworkin moves on to discuss an individual deliberately harming someone else to help many others.⁴⁷ His objection to harming someone to help many others against the wishes of the person harmed is again based on the idea that we would thereby usurp somebody's ethical responsibility to decide how to best lead his own life, and so act inconsistently with his dignity.⁴⁸ In such cases, Dworkin says that if he is harmed to help others,

I suffer because others have decided that what I regard as harmful to me is nevertheless, all things considered, desirable. . . .

. . . [W]hat is forbidden in all these cases is not that someone's body be invaded or harmed but that this be done in service of a judgment about how his body *should* be used.⁴⁹

In inflicting deliberate harm, we act because we have decided there is something desirable about someone being harmed, either as a means or as an end. By contrast, Dworkin says, when an agent causes harm nondeliberately, the agent need not decide that harm to the victim is desirable, contrary to the

⁴⁷ *Id.* (manuscript at 188-92).

⁴⁸ *See id.* (manuscript at 189).

⁴⁹ *Id.*

victim's own decision.⁵⁰ Here, the agent, as much as the victim, can think it is bad that the victim is unlucky enough to be in harm's way.⁵¹ Dworkin's additional claim is that this distinction he draws between harms coincides with and even explains the importance of the distinction that the Doctrine of Double Effect ("DDE") draws between intending harm as a means or an end, which is not permissible, and causing merely foreseen harm.⁵² The latter can be permissible according to the DDE when the harms are proportionate side effects of bringing about a greater good by necessary means, innocent in themselves.⁵³

My first concern about these two claims is similar to the one I raised previously: in his discussion of paternalism, Dworkin draws a distinction between interference on grounds that it would be better for someone, simply for his own sake, to live a certain way (ethical paternalism) and interference that is not so grounded.⁵⁴ He says the former is an attack on one's dignity (via an attack on one's ethical responsibility); the latter need not be.⁵⁵ For example, if the government thinks it is good for one to suffer a lower salary (through taxation) for the sake of preserving art, the government sees my losing some money as desirable (as a means to preserving art), when I see the loss to be undesirable. This, according to Dworkin, does not imply that unwilling taxation for art is an attack on my dignity via an attack on my ethical responsibility for my own life.⁵⁶ This is so, even though taxing my income for art is not a side effect but itself deliberate. If this is true, then it does not seem that what makes it impermissible to harm someone in order *to save other people's lives* – not in order to make him have a more successful life – is that it usurps someone's ethical responsibility for his own life.

My second concern is that both the DDE and Dworkin ignore that it is often because we would produce a lesser harm as a side effect that it can be wrong to pursue a greater good by necessary means. For example, in his discussion of

⁵⁰ *Id.* (manuscript at 190). Such nondeliberate harm may still be the effect of a deliberate act undertaken for other reasons. *Id.* (using as an example rerouting a trolley to save five people while in the act allowing another to get killed).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Dworkin thinks his views explain and not merely coincide with the DDE:

Other philosophers say that it is always wrong to aim at someone's death But that explanation simply restates the problem. If someone's motives are good – to save as many people as possible – why should it matter whether he actually aims at the death of a smaller number or simply knowingly produces their death? Once again we find a more plausible answer The second principle, which requires that I take responsibility for decisions that define my living well, distinguishes between . . . bad luck . . . and cases of usurpation that do contradict it.

Id. (manuscript at 189).

⁵⁴ *Id.* (manuscript at 135).

⁵⁵ *Id.*

⁵⁶ *See id.*

the Trolley Problem, Dworkin does not note that it would be morally wrong to set a bomb that will redirect a trolley from killing five people when we foresee that the bomb will kill a bystander as a side effect.⁵⁷ Here, the fact that we do not judge a lesser harm to be in any way good (as a means or an end), and that we would merely act despite the harm in the course of saving more lives, does not make causing it permissible.

My third concern is that sometimes it *is permissible* to do something that has a bad effect on someone based on our judgment that it would be good if the effect occurs, and so its occurring gives us a reason to act contrary to the person's decision that it would not be good. This is true, I believe, in the Loop version of the Trolley Case that Dworkin discusses.⁵⁸ In this case, we would redirect the trolley headed toward killing five people only because one person immovably located on a side track will be hit, thus stopping the trolley from looping back toward the five.⁵⁹ We would not turn the trolley if the one person were not hit, as redirecting would not then save the five, and we take it as a reason to redirect that he will be hit.

Dworkin thinks that in the Loop Case (1) our acting on the judgment that the person's being hit is good involves (2) our intending the hit as a means to saving the five.⁶⁰ However, I have argued in earlier work that redirecting the trolley *because* we will bring about the hit is not the same as redirecting the trolley *intending* to bring about the hit.⁶¹ In general, acting only because one will produce an effect is not the same as acting with the intention to produce it. To help make this clearer, consider the Party Case.⁶² I want to have a party in order for my friends to have fun, but not if I have to clean up a mess afterwards. I read psychological studies that show that people who have had a good time will feel indebted and clean up a mess. It is only because I believe my having the party will cause such feelings of indebtedness, and this will take care of the mess, that I have the party. However, I do not have the party in order to produce feelings of indebtedness.⁶³

In the Loop Case, a willingness to turn the trolley from the five people need not imply a rational commitment to doing anything *extra* in order that the hit occur, even if the extra act is not itself hard or objectionable. The absence of this commitment suggests that the distinction between acting because one will cause the hit and acting intending to cause the hit may play a part in the Loop Case. Indeed, I have elsewhere argued that turning the trolley only because the

⁵⁷ *Id.* (manuscript at 188-92).

⁵⁸ *Id.* (manuscript at 191).

⁵⁹ *Id.*

⁶⁰ *Id.* (“[People’s] reactions depend, I suspect, whether they conceive of the proposed switch as a switch away from five people or a switch toward a buffer person.”).

⁶¹ See, e.g., KAMM, INTRICATE ETHICS, *supra* note 31, at 91-122.

⁶² *Id.*

⁶³ For more detailed discussion of the because of/intending to (or in order to) distinction and the Party Case, see generally *id.*

hit will occur is consistent with helping the one person off the track if this becomes possible after one has redirected, but before he is hit, even though the five will then die.⁶⁴ By contrast, intending the hit is harder to make consistent with such help. To see this more clearly, consider the following Scarce Drugs Rescue Case.⁶⁵ With a scarce drug for fatal disease *X*, I can save either persons *A* and *B* (who need a one-half dose each) or one other person *C* (who needs it all). It makes moral sense to save two instead of one, I think. However, it turns out that only in *A* and *B* will the drug have the side effect of causing fatal disease *Y*. Given that *A* and *B* will die soon anyway, I would have a duty to give the drug to *C* instead. However, I also find out that if I give the scarce drug to *A* and *B*, and leave *C* to die, another scarce drug I would otherwise have been obligated to give *C* had he lived will be available with which to save *A* and *B* from disease *Y*. Given all this, I think, it would be permissible to give the first scarce drug to *A* and *B* only *because* *C* will die and the second drug will be available for *A* and *B*. Nevertheless, giving the first drug to *A* and *B* (whether or not it is permissible) is consistent with fulfilling an obligation to save *C* if we subsequently discovered that he could be cured of disease *X* by a third drug that does not work in *A* and *B*. We should save him, even though his being saved means that *A* and *B* will die for want of the second drug. By contrast, intending *C*'s death as a means to save *A* and *B* is harder to make rationally consistent with saving *C* from disease *X* by the third drug. Similarly, we may turn the trolley away from the five in the Loop Case only because we believe the one person's death will block the further bad effect of its looping back to the five, and yet seek to remove the one person from the track if this subsequently becomes possible, though the five will then die.

If what I have argued is correct, redirecting the trolley in the Loop Case need not violate the DDE, because it need not involve intending to hit the one person. However, redirecting the trolley still runs afoul of the distinction between harms that Dworkin wants to draw, based on whether we cause something bad to happen to someone (the hit) because we decide it is desirable, contrary to the judgment of the person who will be harmed.⁶⁶ This shows that contrary to what Dworkin claims, the distinction he wants to draw does not overlap with the DDE.⁶⁷

⁶⁴ See *id.* at 272-75.

⁶⁵ See *id.* at 274 (referring to the same scenario as the Two Diseases Case).

⁶⁶ See DWORKIN, *supra* note 1 (manuscript at 190). Dworkin also believes that causing the hit because we see it as good, in relation to saving five people, will involve usurping a person's ethical responsibility to decide what is a good use of his life. *Id.* ("The large man, in an act of near incredible heroism, might throw himself on the track [to prevent the trolley from hitting others]. He might think, as Sydney Carton did in making the same sacrifice, that that would be a far better thing than anything else he could do with his life. But no one else is permitted to make that choice for him."). Above, I argued against the view that even intentional harm for the good of others must involve ethical paternalism.

⁶⁷ In his response to this part of my presentation at the Boston University School of Law Symposium, Dworkin said that in using his general distinction between harms that do and

The primary reason Dworkin worries about the Loop Case is that if redirecting is permissible, this could be a counterexample to his claim that usurping someone's ethical responsibility to decide what is a good role for his life characterizes morally *wrong* instances of causing harm. Rather than absolutely deny that redirecting is permissible in this case, even if it involves usurping ethical responsibility, Dworkin attacks the methodology of using what he says is a "hyper-artificial" case to defeat what he thinks is his plausible general principle.⁶⁸ There are at least two problems with this response based on case methodology. First, it seems inconsistent with Dworkin's response to those who accuse him of using hypothetical cases to decide ethical and moral principles.⁶⁹ There he argues that the refusal to use the methodology of hypothetical cases is based on the incorrect belief that we must confront real cases, because for our moral judgments to be correct simply means that they correspond to some independent moral entities (that Dworkin calls "morons").⁷⁰ Independent of whether this has to be the basis of an objection to using hypothetical cases, my point is that distinguishing between ordinary unreal cases, which Dworkin says are acceptable, and "hyper-artificial" cases, does not seem defensible. In general, a case does not have to be instantiated in reality in order to have all the properties necessary to render a moral judgment about it. This is because (as Kant argued in discussing the ontological argument⁷¹), existence is not a further descriptive property necessary to judgment, but only the instantiation of other properties. And

do not require us to override a person's own conception of what is a good use of his life, he had not aimed to solve the problem of whether it is permissible to redirect in the Loop Case. See Ronald Dworkin, Response to Panel IV: Morality: Aid, Harm, and Obligation at *Justice for Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book* (Sept. 25-26, 2009) (transcript on file with the Boston University Law Review). Rather his aim was to show that it was a problematic case just because it seemed to involve doing what is ordinarily ruled out, namely, overriding a person's own conception of his good. See *id.* One of my points, however, is that the Loop Case may be problematic because it is *mistakenly* taken to involve intending something bad for someone. This is because people may think, as Dworkin does, that intending the hit is entailed by acting (or omitting) on the ground that the hit would be useful. *Id.* I have tried to show that there need be no such entailment. I have also tried to argue that redirecting the trolley because hitting the one is good for the five does not involve overriding a person's own conception of his good in a way that conflicts with Dworkin's notion of ethical responsibility.

⁶⁸ DWORKIN, *supra* note 1 (manuscript at 191).

⁶⁹ *Id.* (manuscript at 182) ("We confront imaginary cases not to speculate about what we would perceive if we were actually exposed to them but in order to see what integrity would require us to accept if we embraced the principles we test in that way.").

⁷⁰ See *id.*

⁷¹ IMMANUEL KANT, CRITIQUE OF PURE REASON 578-86 (Werner S. Pluhar trans., Hackett Publ'g Co. 1996) (1781 & 1787) (arguing that existence is not a predicate of anything and therefore not a predicate of God).

sometimes it is only by constructing artificial cases that one can hone in on a property or distinction that eludes us in messier, realistic cases.

The second problem with Dworkin's response that the Loop Case is hyper-artificial, is that the structure underlying the Loop Case is quite common in many real life cases, and many other hypothetical cases (besides the Loop Case) can also have this structure. This is because the distinction between acting because one will bring about an effect and acting in order to bring it about is appropriately drawn, in general. I have already presented the Party Case (which I do not think is unrealistic) and the Scarce Drugs Rescue Case as other cases where the distinction, I believe, should be drawn. There are many others.⁷² Hence, suppose my first objection – there is no usurping of Dworkinian ethical responsibility in the Loop Case – was incorrect. There would still be many possible counterexamples to Dworkin's claim that causing harm is impermissible when we act because we see something positive in a harm to someone that the person himself rejects.

In sum, I conclude that (1) even intending harm to someone as a means to help others need not involve usurping his ethical responsibility; (2) Dworkin's proposed explanation of the DDE's moral distinction between intended and merely foreseen harm *does not explain it*, because acting on a view of the desirability of a harm to someone that the person himself rejects need not *always* indicate an *intention* that the harm occur; and that therefore (3) Dworkin's account of what is wrong with deliberate harm (whether or not it involves usurping ethical responsibility) also *does not coincide* with the DDE's distinction.

IV. EX ANTE AGREEMENTS

Dworkin's discussion of harming someone to help other people also takes up the question of ex ante agreements (hypothetical or real) by each person.⁷³ This is because harm to someone might be justified as the outcome of agreements each person could reasonably make in order to maximize his own success. But Dworkin's interest in ex ante agreements is also independent of its relation to harm, as he first introduces them as a way of reconciling ethical responsibility with moral responsibility.⁷⁴ In this final Part, I wish to consider his thoughts on ex ante agreements.

Dworkin thinks that one way to derive the content of morality from ethics is to take up an ex ante perspective to one's own good, from behind a veil of ignorance.⁷⁵ He thinks that seeking to do well by oneself will lead to moral rules when one does not know what particular characteristics one will actually

⁷² For more hypothetical cases with this structure, see KAMM, *INTRICATE ETHICS*, *supra* note 31, at 91-122 (discussing examples such as the Store Case, the Munitions Grief Case, and the Secondary Transplant Case).

⁷³ DWORKIN, *supra* note 1 (manuscript at 191).

⁷⁴ *Id.* (manuscript at 169).

⁷⁵ *Id.* (manuscript at 172).

have.⁷⁶ Yet his positive account of our duties to aid and not harm⁷⁷ is not explicitly derived by him from such ex ante reasoning. Indeed, it is possible that the duties that would be derived from an ex ante perspective are very different from the ones Dworkin actually endorses. He himself raises this possibility when he discusses a “spare parts lottery,” in which someone will have a duty to let himself be sacrificed for his organs when this will save more people.⁷⁸ Dworkin asks: “If it would be in everyone’s interest to join a spare parts lottery, then why is it wrong for us to treat people as if such a lottery had always been in place?”⁷⁹

One reason stronger duties to aid might be derived is that Dworkin interprets reasoning ex ante from behind a veil of ignorance as involving a single person deciding what would be good for himself. (This is how a connection between ethics and morality is established by ex ante agreements.) Many have rejected this understanding of ex ante reasoning on the ground that it threatens to ignore the morally significant separateness of persons⁸⁰ and, hence, any special responsibility one person has for his own life going well. For example, it would be in A’s interest to sacrifice his leg in order to save his own life. Suppose A does not know, ex ante, whether he will be in the position of (1) someone who will die if another person does not give up his leg to save him, or (2) someone who will have to sacrifice his leg to save another person. If one were to derive moral rules from a person’s own prudential perspective on his own life, it might seem that one could derive a duty for one person to sacrifice his leg for the sake of another’s life. This goes beyond the duty to aid that Dworkin supports.

However, Dworkin believes that one should live in accordance with dignity.⁸¹ This means that if Dworkin uses ex ante reasoning to derive morality from ethics, he might try to derive morality from both an individual’s concern for the success of his own life and also from his accepting special responsibility for his life going well. So when a person reasons about interpersonal cases, he would be aware that his dignity is affected not only by his success (whether his life is saved) but possibly by who assumes responsibility for his life.

⁷⁶ See *id.* (pointing out that the veil of ignorance may serve participants’ “interests because it allows them to concentrate on the crucial question of what treating everyone’s life as having the same objective importance requires”).

⁷⁷ See *supra* Parts II-III.

⁷⁸ DWORKIN, *supra* note 1 (manuscript at 188).

⁷⁹ *Id.* (manuscript at 189).

⁸⁰ See T.M. Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND 127 (Amartya Sen & Bernard Williams eds., 1982); see also F.M. Kamm, *Should You Save This Child? Gibbard on Intuitions, Contractualism, and Strains of Commitment*, in RECONCILING OUR AIMS: IN SEARCH OF BASIC ETHICS 120-46 (Allan Gibbard ed., 2008) (discussing interpretations and arguments for and against ex ante reasoning).

⁸¹ See DWORKIN, *supra* note 1 (manuscript at 128).

I argued above that a disaster victim's dignity need not be sacrificed if a saintly individual sacrificed his leg to save the victim's life, and the saintly individual could meet his special responsibility to himself to live well (and possibly even meet his personal goal of living successfully) if he gave up his leg to save another person.⁸² However, in my earlier discussion, I imagined that the saintly individual would voluntarily and supererogatorily sacrifice his leg. The fact that the saintly person decides for himself whether to make the sacrifice means, on Dworkin's view, that he would not neglect his responsibility to himself, nor usurp someone else's responsibility for himself. This satisfies the ethical independence condition Dworkin places on personal responsibility.

Nevertheless, Dworkin himself argues for *some* moral *duties* to aid.⁸³ For example, one would do *wrong* if one did not aid, at minimal cost to oneself, someone nearby who would otherwise be in a disastrous situation.⁸⁴ When Dworkin derives such a duty, he does not say that anyone has a right to coerce someone to perform the duty.⁸⁵ Even if there is a prohibition on coerced performance, knowledge of these duties could constrain an individual's independent decisions about what to do. Hence, in order to have dignity, individuals need not *always* decide what to do completely independent of duty. This raises the possibility that one could satisfy the requirements of dignity to live well, even if there were a *duty* to sacrifice one's leg to save someone else's life, especially if the performance of the duty was not coerced. This suggests that ex ante reasoning that took dignity and not just success into account might still yield stronger duties to aid than Dworkin endorses.

But let us consider what Dworkin specifically says about why we should reject a spare parts lottery.

What about the ex ante argument I made for a spare parts lottery? The lottery is a vehicle for selling yourself into a kind of slavery for what you anticipate will be your own good. If you join the plan, you give others authority, when the time comes, to make the most basic decisions about what to do with your life, decisions that the second principle requires that you make for yourself. Imagine your number has come up and others advance on you with needles and scalpels. You might think then that as you might have benefited from the scheme it is right that you now be killed in its name. But you might not: you might then think the fate too horrible or that the arrangement unjust after all or simply that your wish

⁸² See *supra* Part II.

⁸³ See DWORKIN, *supra* note 1 (manuscript at 176).

⁸⁴ *Id.* (manuscript at 177).

⁸⁵ See *id.* (manuscript at 167-68, 209). Someone might not perform his duty because he got the wrong answer when he independently decided on whether he had the duty. He would then not have decided in a way that was in accordance with a component of human dignity, according to Dworkin. *Id.* (manuscript at 176). Alternatively, someone might not perform his duty because he independently decided not to act on his knowledge of his duty.

not to die trumps everything else. No matter: the decision is no longer yours. That is why we must not sell ourselves into slavery even for our own good. We might have longer lives but we live in indignity. Volunteering for danger – volunteering for the army, for instance – is different. Volunteers have made their own decision that the best use of their lives includes accepting a heightened risk of danger. They may accept that in virtue of their decision someone else – an enemy soldier – has a right deliberately to try to kill them. But they do not accept that they have a duty to let him do so.⁸⁶

He emphasizes that others would have authority to make the “most basic decisions about what to do with your life, decisions that the second principle requires that you make for yourself.”⁸⁷ Further, the agreement gives you a duty not to resist when “others advance on you” to take your organs.⁸⁸ It is important to see that this argument is intended to rule out the moral permissibility of an actual agreement (“[i]f you join the plan”), not merely treating people in accord with what they would have done in a hypothetical agreement.⁸⁹

I have several concerns about his argument against the actual ex ante agreement to a “spare parts” lottery. First, the most basic conclusion someone might seek to draw from an ex ante agreement argument is that one has a duty to make a sacrifice, independent of whether it could be coercively enforced. Dworkin is here concerned with others having the authority to enforce and one having a duty not to resist this enforcement,⁹⁰ but an argument against these might not rule out an argument against a personal duty.

Second, this claim that others having the authority to make the most basic decisions about what is to be done with your life conflicts with your ethical responsibility, again raises the issue brought up by Dworkin’s own discussion of the distinction between ethical paternalism and other forms of coercion.⁹¹ If others have authority over your life not in order to make sure that *you* live your life well and successfully – after all, one need not be coerced for one’s own good to join the actual spare parts lottery – but in order to use you to help others, it is not clear that their act usurps your ethical responsibility. At least not if the government would not usurp your ethical responsibility if it taxed you to save lives of others, but not because it thought this was the best way for you to live.⁹²

Third, Dworkin says that it violates one’s dignity to exercise control at Time 1 (“t1”) in a way that may lead one to lose a right of control over basic

⁸⁶ *Id.* (manuscript at 191).

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *Id.* (manuscript at 135).

⁹² *See supra* Part II.

decisions about one's life at Time 2 ("t2"), when one is still competent to exercise such control.⁹³ In an earlier work of mine, discussing *ex ante* agreements, I proposed such a "constant agent" view.⁹⁴ I said:

So, according to this proposal, we are taken to be *constant agents*, whose fates must be continuously determined by ourselves. The proposal is not saying that our chances of living must be reduced (1) for the sake of not becoming intentional killers of the innocent (the agent-focused argument), or (2) for the sake of not being mere means, or even (3) for the sake of inviolability. It says rather that our chances of living must be reduced when only this is consistent with our being the sort of people (some of) whose constraining rights are under their own control at such time as losses are to be imposed upon them (or the nearest competent conscious period to it).⁹⁵

This was one of the views that I said implied that "[w]e may all lead harder lives, but our dignity is greater."⁹⁶ However, I also considered further implications of, and objections to, this view. First, I noted that it does not rule out an agreement in the second of the following cases:

In the first, the Disease Case, a deadly disease threatens a community. The only thing that an individual can do to significantly decrease his chance of getting the disease is to take a drug which, if it doesn't help him, will kill him *if* he is one of the *few* who are not susceptible to the illness, the death occurring some time after he learns that he is not susceptible. . . .

Compare the Disease Case now with the Disease' Case, in which again, a deadly disease threatens a community and there is a drug that will kill those few who were not susceptible to the disease. In the Disease' Case, however, the drug itself never directly helps anyone who takes it. Here, if you take the drug and die because you were not susceptible to the illness after all, your body parts can be used to make a serum to save others from the disease. If no one takes the drug, those who fall ill will simply die. In the Disease' Case, but not in the Disease Case, a person's death is a source of benefit to others. However, *ex ante* in both cases the victim takes the drug from self-interest. Though, in the Disease' Case, the only thing that made it *be* in his interest to take the drug was that this was the only way to insure that others also take the drug. Then someone will die for the benefit of others when this person need not otherwise have died, but his chances of survival were increased. The Disease' Case also

⁹³ DWORKIN, *supra* note 1 (manuscript at 191).

⁹⁴ See 2 KAMM, MORALITY, *supra* note 24, at 297-98.

⁹⁵ *Id.* at 298.

⁹⁶ *Id.* at 294.

overcomes some interpersonal agent-focused objections insofar as the person himself, rather than anyone else, causes his death.⁹⁷

The “constant agent” view implies that it is permissible for everyone to agree to take the drug in Disease’ Case. This may not be troubling to Dworkin, given his concern with someone’s making his own personal decision about when to die. More problematic for the “constant agent” type view are the cases in which it seems to be *morally permissible* to make agreements *ex ante* that result in one’s having a duty to make a large sacrifice when one would not volunteer it at the time and result in one’s losing control to others over an important decision.⁹⁸ Here are two of these cases:

(1) The Arm-for-Life Case: It seems permissible to make “an actual . . . agreement to give an arm to save five lives, when one might have been among the five in danger of dying. . . .”⁹⁹ This is so, even when the arm is taken at time *t*₂, when one knows it is not in one’s interest to lose it to save one’s life. In this case, a fraction of what one stood to lose (life) is paid for having gotten insurance against death. (I did *not* claim that because such an *actual* agreement could bind individuals, we ought to treat them in the same way based on a comparable *hypothetical* agreement.)

(2) The Two Diseases Case:

[T]here are two diseases in a community. One, the Arm Disease, causes one and only one arm to fall off, and is very prevalent among a part of the population whose members we can identify beforehand. The second, the Death Disease, is very rare in a *different* part of the population that we can identify as susceptible to it. The only thing that cures the Arm Disease is a serum made from the finger of a person who was subject to the Death Disease but didn’t get it, and the only cure for the Death Disease is a serum made from the arm of a person subject to the arm Disease who did not get it.

I believe it would be in the interest, *ex ante*, of all involved to make an agreement to provide the resources necessary to make the serums needed at the time they are needed, and that enforcement of this agreement *ex post* (i.e., once one knows who will and who will not be getting the diseases) would *not* be morally wrong. There is a high incidence of the Arm Disease; so there is a high probability that the people once susceptible to the Death Disease will lose a finger in exchange for avoiding the small risk of a big loss to themselves, that is, death. There is a low incidence of the Death Disease; so there is a low probability that a person once susceptible to the Arm Disease will lose an arm, that is, a low probability of his making a larger sacrifice for others (than those

⁹⁷ *Id.* at 293-94. I would now add: at a time when it was still in his interest to do the act that kills him.

⁹⁸ *Id.* at 300-02.

⁹⁹ *Id.* at 300.

susceptible to death make) in order to diminish his chances of losing an arm (i.e., in order to lower a high probability of his suffering the loss of an arm).

Yet this is also a case in which an Arm person would have to pay with the *very item* he had attempted to increase his probability of keeping (his arm), at a time when it is known to be no longer in his interest to do so (for he no longer faces the threat of the Arm Disease), having received only the benefit of that increased probability of protection from the Arm Disease. The significant difference between this case and cases considered before, however, is that here the arm would be sacrificed to prevent an even greater loss (death) to another person. What the person who is sacrificed loses is significantly less than what the person who is saved would lose if he were not saved. Note that the agreement is permissible even though the Arm Disease person stood no risk of getting the Death Disease.¹⁰⁰

Suppose these cases are indeed examples of morally permissible *actual* agreements which generate duties and entitle others to enforce the agreement against those resisting. Then Dworkin's explanation of why an actual *ex ante* agreement to kill one person in order to maximize lives saved will not be an adequate explanation because it would also rule out these agreements that seem morally permissible. Like Dworkin, I believe that even an actual agreement could not create a duty to give up one's life or create authority in others to enforce a sacrifice in the standard "spare parts" lottery. I just think Dworkin must say more in order to explain why it is impermissible.¹⁰¹

Suppose also that only *actual* agreements engender duties in the Arm-for-Life Case and the Two Diseases Case. Then it would be morally wrong to act as if people had duties that could be enforced simply on grounds of imagining a comparable hypothetical agreement. This suggests that Dworkin's view that *hypothetical* agreements can be used to generate moral obligations from ethical responsibility may also be problematic.

¹⁰⁰ *Id.* at 301-02. I would also add that it may be of moral significance in legitimating this agreement that there is (potential) reciprocal sacrifice.

¹⁰¹ For a more complete discussion of my view about the right explanation, see *id.* at 290-310 (analyzing the permissibility of various agreements).