A MAJORITY IN THE LIFEBOAT

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I.

Toward the end of *Justice for Hedgehogs*, Ronald Dworkin makes it clear that he is not a fan of the principle of majority-decision[1] – the principle that holds that when people in a society disagree about some decision (among two or more options) that has to be made in the name of them all, the fairest way to proceed is for them all to vote, for the votes to be counted, and for the option to be chosen which attracts the greatest number of supporters. He can't see the point of it, and he doesn't think it confers any legitimacy upon the option that the majority supports.[2] After all, the fact that some option attracts more supporters than another is no guarantee that it is right. Like many philosophers, Dworkin thinks we should look for a political procedure which carries with it some assurance that unjust options or options that violate individual rights will not be chosen.[3]

An unkind observer would say that this is an instance of something more general: the philosophers' characteristic disdain for democracy. Philosophers have been in revolt against – or have been revolted by – democracy since the trial and death of Socrates, and in thirty years of teaching political philosophy in New Zealand, the United Kingdom, and the United States, I have never seen much evidence that they have gotten over this. But Dworkin repudiates this characterization. He says he believes in democracy, but he is not enthusiastic about any version of democracy that is defined by the use of majority-

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[1] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 242, on file with the Boston University Law Review). I will not follow Dworkin in characterizing the relevant principle as "majority rule," for reasons stated by Hannah Arendt: "Only where the majority, after the decision has been taken, proceeds to liquidate politically . . . the opposing minority, does the technical device of majority decision degenerate into majority rule." HANNAH ARENDT, ON REVOLUTION 163 (1963); *see also* JEREMY WALDRON, LAW AND DISAGREEMENT 108 (1999) ("[Majority-decision] may be a technical procedure which we have invented, but *also* a method that is morally respectable in a way that other technicalities and conventions might not be.").

[2] DWORKIN, *supra* note 1 (manuscript at 240-46).

[3] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15-19 (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

decision.[4] Any such definition involves a "crude statistical view" of democracy and Dworkin wants nothing to do with it.[5]

Of course, majority-decision is not necessarily democratic. The principle is used in all sorts of contexts, including contexts in which decisions affecting the lives of millions of people are made by a few. Judges use it, for example, when they disagree among themselves whether to strike down legislation. Many exercises of strong judicial review, especially in the United States, are made by Justices on the Supreme Court voting by 5-4 or 6-3 margins. Dworkin believes that strong judicial review is compatible with democracy,[6] but of course, this is not because judges use majority-decision. Like most defenders of judicial review, he has little interest in discussing or explaining the use of this decision-procedure in courts. In fact, like most defenders of judicial review, he would rather it were never mentioned in this context (at least as a theoretical point),[7] for it highlights a number of complications for adherents to this view. First, even where judicial review is practiced, there is disagreement about what rights people have. Second, it does not seem possible to get past those disagreements (among judges) to a decision (by a court) except by using the very decision-principle, the use of which is disparaged by the people, as the basis for judicial review in the first place. It has been more than twenty years since I began challenging defenders of judicial review to explain the use of the majority-principle by courts exercising "counter-majoritarian" judicial review;[8] I have long since given up any expectation of an honorable answer.

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[4] *See* DWORKIN, FREEDOM'S LAW, *supra* note 3, at 23-25; RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 127-64 (2006) [hereinafter DWORKIN, IS DEMOCRACY POSSIBLE HERE?].

[5] RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 36 (1990).

[6] Dworkin says that he has "defended judicial review for many years against the charge that . . . it is necessarily and always inconsistent with the right view of democracy." DWORKIN, *supra* note 1 (manuscript at 251); *see also* DWORKIN, FREEDOM'S LAW, *supra* note 3, at 7 ("Democracy does not insist on judges having the last word, but it does not insist that they must not have it."); *id.* at 32-33 (arguing that as long as a court's judicial review of a statute decides the issue correctly, "the decision is not anti-democratic, but, on the contrary, improves democracy").

[7] Of course, like other Supreme Court watchers, Dworkin counts votes all the time, and is very sensitive to the issue of the difference that a given judicial appointment will make to the majoritarian politics of this nine-member institution. *See, e.g.*, Ronald Dworkin, *The Supreme Court Phalanx*, 54 N.Y. REV. BOOKS, Sept. 27, 2007, *reprinted in* RONALD DWORKIN, THE SUPREME COURT PHALANX: THE COURT'S NEW RIGHT-WING BLOC 47, 47-70 (2008).

[8] Jeremy Waldron, *Rights and Majorities: Rousseau Revisited*, *in* NOMOS XXXII: MAJORITIES AND MINORITIES 44, 67 (John W. Chapman & Alan Wertheimer eds., 1990); *see also* Jeremy Waldron, *Deliberation, Disagreement, and Voting*, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 210, 214-25 (Harold Hongju Koh & Ronald C. Slye eds., 1999).

II.

In *Justice for Hedgehogs*, Professor Dworkin presents what he thinks is a knockdown argument against the view that majority-decision is fair. Like many knockdown arguments in philosophy, it involves a hypothetical example. Dworkin gives us a couple of versions. In *Justice for Hedgehogs*, Dworkin describes the hypothetical as follows: "[W]hen a lifeboat is overcrowded and one passenger must go overboard to save the rest, majority vote would seem close to the worst method of choosing the victim. Personal attachments and antagonisms would play a role they should not play, and so a lottery would be much superior."[9] Later, he provides us with another version: "[W]hen a lifeboat is overcrowded and one passenger must be thrown over else all will die, it would not be fair to hold a vote so that the least popular among them would be drowned. It would be fairer to draw lots."[10] There is a slightly more extensive version of the same story in a book published by Dworkin several years ago:

> Suppose passengers are trapped in a lifeboat on the high seas that will sink unless one person – any person – jumps or is thrown overboard. How shall the group decide who is to be sacrificed? It seems perfectly fair to draw straws or in some other way to let fate decide. That gives each person the same chance of staying alive. Letting the group vote, however, seems a very bad idea because kinship, friendships, enmities, jealousies, and other forces that should not make a difference will then be decisive.[11]

Dworkin says this is a "hoary philosophical example," though I have been unable to trace its use by anyone else.[12] I suspect it owes something to *United States v. Holmes* – a well-known case from 1842 in which fourteen passengers were thrown overboard from a lifeboat in danger of sinking.[13] Though there

[9] DWORKIN, *supra* note 1 (manuscript at 219).

[10] *Id.* (manuscript at 243).

[11] DWORKIN, FREEDOM'S LAW, *supra* note 3, at 139.

[12] DWORKIN, *supra* note 1 (manuscript at 219). Perhaps it has something (a little) in common with Fuller's example of the explorers trapped in a cave who drew lots to eat one of their number. *See* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 616-18 (1949).

It might also owe something to the CBS "reality" TV show *Survivor*, in which (so I am told by Wikipedia), "contestants are isolated in the wilderness and compete for cash and other prizes. The show uses a system of progressive elimination, allowing the contestants to vote off other tribe members until only one final contestant remains and wins the title of 'Sole Survivor'." Wikipedia, Survivor (TV series), http://en.wikipedia.org/wiki/Survivor_(TV_series) (last visited Feb. 13, 2010).

[13] United States v. Holmes, 26 F. Cas. 360, 361 (C.C.E.D. Pa. 1842) (No. 15,383). I suppose one might also cite *R. v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, 273-75 (finding crew of shipwreck guilty of murder where they killed and ate their cabin boy in order to survive). Dworkin's casual reference to a "cabin-boy," DWORKIN, *supra* note 1

had been some talk of drawing lots earlier on, in fact the crew proceeded as follows:

> The mate directed the crew "not to part man and wife, and not to throw over any women." There was no other principle of selection. There was no evidence of combination among the crew. No lots were cast, nor had the passengers, at any time, been either informed or consulted as to what was now done. Holmes was one of the persons who assisted in throwing the passengers over.[14]

Holmes was later indicted for manslaughter. In his charge to the jury, Judge Baldwin of the Pennsylvania Circuit Court made two points relevant to Dworkin's hypothetical. First, he said that the crew should not be throwing passengers overboard at all:

> The passenger, not being bound either to labour or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's. The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for, except these abide in the ship, all will perish. But if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for their safety, to sacrifice the passengers. The sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor . . . owes more benevolence to another than to himself. He is bound to set a greater value on the life of others than on his own. . . . This rule may be deemed a harsh one towards the sailor, who may have thus far done his duty, but when the danger is so extreme, that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any to sacrifice a passenger in order to save a supernumerary sailor?[15]

He then went on to make Dworkin's point that if we were to suppose that the sailors and passengers *were* one another's equals, then if at all possible the selection should have been made according to the same principles that characteristically guide sailors in circumstances where "all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others" – namely, the principle of selection by lot.

> This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim. . . . For ourselves, we can conceive of no mode so consonant both to humanity and to justice; and the occasion, we think, must be peculiar which will dispense with its exercise. . . . In no other than this or some like way are those having

(manuscript at 243), hints in this direction, but in *Dudley & Stephens* there was none of the discussion of methods of choice that we find in *Holmes*. *Dudley & Stephens*, 14 Q.B.D. at 273-75. *See generally* A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW (1984) (discussing *Dudley & Stephens* at length).

[14] *Holmes*, 26 F. Cas. at 361.

[15] *Id.* at 367.

> equal rights put upon an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict.[16]

But not everyone agreed intuitively that sortition (decision by lot) was obviously the fair way to proceed. Defense counsel in *Holmes* drew attention to the combination of circumstances and the principle that was actually used:

> Lots, in cases of famine, where means of subsistence are wanting for all the crew, is what the history of maritime disaster records; but who has ever told of casting lots at midnight, in a sinking boat, in the midst of darkness, of rain, of terrour, and of confusion? To cast lots when all are going down, but to decide who shall be spared, to cast lots when the question is, whether any can be saved, is a plan easy to suggest, rather difficult to put in practice. The danger was instantaneous . . . . The sailors adopted the only principle of selection which was possible in an emergency like theirs, – a principle more humane than lots. Man and wife were not torn asunder, and the women were all preserved. Lots would have rendered impossible this clear dictate of humanity.[17]

The judge acknowledged the point about practicability,[18] and we must remember too that the judge actually preferred the class-principle ("sailors overboard first") to the principle of sortition.

No one in *Holmes* so much as mentioned majority-decision as a principle of selection, though one of the prosecutors came close:

> If the mate and seamen believed that the ultimate safety of a portion was to be advanced by the sacrifice of another portion, it was the clear duty of that officer, and of the seamen, to give full notice to all on board. Common settlement would, then, have fixed the principle of sacrifice, and, the mode of selection involving all, a sacrifice of any would have been resorted to only in dire extremity.[19]

But if this hints at majority-decision among all the occupants of the boat, it hints not at its use to decide who to sacrifice, but at its use to decide the appropriate principle for deciding who to sacrifice. I shall take up this idea – that everyone aboard the lifeboat is entitled to participate in "common settlement" of "the principle of sacrifice" – in Section V below.

I don't mention any of this to cast doubt on Dworkin's immediate objection to the idea of using majority-decision to decide who should be thrown overboard. I believe he is right to oppose its use for that purpose. I use it only to introduce some complications that we might want to think about later or whose political analogues we might want to think about later.

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[16] *Id.*

[17] *Id.* at 365.

[18] *Id.* at 367 ("If, indeed, the peril be instant and overwhelming, leaving no chance of means, and no moment for deliberation, then, of course, there is no power to consult, to cast lots, or in any such way to decide . . . .").

[19] *Id.* at 363.

IV.

What is Dworkin's example supposed to show? It is not about lifeboats; it is supposed to illustrate something about politics. I don't think it is supposed to show anything about the desirability of drawing lots as a general principle of political decision. Dworkin acknowledges that sortition – which seems obvious in the lifeboat – is obviously silly in modern politics: "When collective decisions have vast consequences for the lives people lead, leaving the decision to chance or some other form of oracle is a bad idea; it may have worked, for a time, for the Athenians, but it would not work for us."[20] He even adds to this: "A majority's opinion about whether to go to war may be no better than some minority's opinion but it is likely to be better than a decision made by dice."[21]

Dworkin says several things about what the lifeboat example is supposed to show. The strongest claim he puts forward is that it "makes the idea that majority vote is intrinsically fair . . . seem silly."[22] A slightly weaker claim is that it shows that the proposition that there is something intrinsically fair or valuable about majoritarian procedures is false, even if it is not silly. A much weaker claim is that it shows that majority-decision is not intrinsically fair in all circumstances – "not *invariably* the fairest procedure"[23] – though it may be intrinsically fair in some.[24] An even weaker claim than that is that the example shows that majority-decision is not intrinsically fair in situations *just like the situation in the lifeboat*. Because situations like the one in the lifeboat are evidently exceptional, this last claim is compatible with majority-decision being an intrinsically fair method to use in most situations.

So we have these four possible conclusions (ranked from strongest to weakest):

(1) It is silly to think that majority-decision is intrinsically fair or intrinsically valuable.

(2) It is not the case that majority-decision is ever intrinsically fair or intrinsically valuable.

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[20] DWORKIN, *supra* note 1 (manuscript at 243).

[21] *Id.*

[22] *Id.* (manuscript at 219). Dworkin doesn't deny that majoritarian procedures have instrumental value. He says: "Majoritarian institutions may well have instrumental value – a regime backed by most people is usually more stable than one dominated by some powerful minority. But . . . that is an instrumental not an intrinsic value." *Id.*

[23] *Id.* (manuscript at 243) (emphasis added).

[24] *Id.* ("Even if counting heads is not a basic, universal principle of fairness in collective decision, it may still be the only fair way of deciding which laws will be adopted and enforced in a coercive political community.").

(3) Majority-decision is not intrinsically fair or intrinsically valuable in all circumstances.[25]

(4) Majority-decision is not intrinsically fair or intrinsically valuable in circumstances just like the lifeboat example.

In *Justice for Hedgehogs*, Dworkin wants to use one or more of these conclusions to reach a more general point of political philosophy: The lifeboat example is supposed to show that "a definition of democracy that ties [democracy] so firmly to majority rule defeats useful argument about what democracy is and how it might be improved."[26] This is what Dworkin wants to establish. Let's state it as follows:

(5) A definition that ties the term firmly to majority-decision is an unhelpful misconception of democracy.

The point of (5) is to suggest, for example, that when we have debates about the democratic or undemocratic character of judicial review of legislation, we should not center those debates on the point that strong judicial review disempowers popular majorities.

Now, if the lifeboat example established conclusion (1) or conclusion (2), it might conceivably lay a foundation for (5), i.e., for this broader claim about how to think and how not think about democracy.[27] But it is not clear how the lifeboat example can establish anything that strong. It is an interesting but highly unusual situation, quite different in character from many of the

[25] Someone may object, concerning the distinction between (2) and (3), that majority-decision can be intrinsically fair in some circumstances only if it adds something by way of intrinsic fairness in all circumstances. But that need not be the case: features of certain cases may not just over-balance the intrinsic fairness of majority-decision, but may actually cancel it out. (An analogy: the generosity of a payment from one person to another may be cancelled out in some cases by virtue of a corrupt context.)

[26] DWORKIN, *supra* note 1 (manuscript at 219). Dworkin later sets out a version of a conception that ties democracy to majority will:

> The majoritarian conception holds that people govern themselves when the largest number of them rather than some smaller group within them holds fundamental political power. It therefore insists that the structures of representative government should realize the following condition: institutions should enhance the likelihood that the community's laws and policies will be those that the largest number of citizens, after due discussion and reflection, prefer. Elections should be frequent enough so that officials will be encouraged to do what most people want; federal units and parliamentary districts should be drawn, and constitutional power divided among types and levels of officials, with that sovereign aim in view. Further questions – referenda? proportional representation? – should be debated and decided in the same way. Which system is more likely reliably to secure the reflective and settled will of the majority of citizens in the long run?

Id. (manuscript at 240).

[27] Even that would not be the case, however, if it were sensible to think that the main value of democracy is instrumental to other values, like stability or prosperity. On an instrumental theory of democracy, it might be entirely appropriate to tie the definition of "democracy" to some decision-procedure that was valuable only in an instrumental way.

situations in which the use of the majority-principle is envisaged in democratic theory. It may be appropriate for thinking about the ancient Athenian practice of ostracism, where the Athenian demos used to vote to exclude some individuals from the polis (throw them overboard, as it were, sending them into exile) on account of the baneful influence of their presence in the city.[28] But it is not at all clear that we can extrapolate from the inappropriateness of using majority-decision in the lifeboat to the inappropriateness of associating democracy with, say, the democratic of representatives or the democratic basis of legislation. I think it is arguable that that the lifeboat example gets us to conclusion (3) or (4). But there remains a huge gulf fixed between those conclusions and the further conclusion (5), which is what Dworkin is really interested in.

V.

Those who support the use of the majority-principle in democratic politics support its use for the making of policy and legislative decisions. Is there any analogy to this in the lifeboat situation?

There might be. Suppose there is disagreement in the lifeboat about the appropriate principle to use for determining who should go overboard. Dworkin says that (α) choice by lot is the "obvious" solution.[29] But other principles might be suggested. One possibility is (β) a principle that examines the health of each passenger and considers jettisoning those who are unlikely to survive anyway. Suppose the passengers disagree strongly as to the merits of (α) and (β). The issue needs to be decided, but how? It does not seem silly or oppressive or inappropriate to have a debate followed by a vote concerning these alternative principles. The fact that it is silly or unfair to use a majoritarian procedure to choose a victim doesn't show that it would be silly and unfair to use it to choose a method for selecting a victim. Majority-decision, which seems so obviously inappropriate for choosing who should go overboard, does not seem so obviously inappropriate for choosing which principle to use to determine who goes overboard. And this is (crudely) analogous to its use in deciding general legislation.

One might have thought Dworkin would acknowledge this point. After all, he does concede that majority-decision might be appropriate for general decisions of policy; or he certainly agrees that choice by lot is not appropriate in the modern world for these decisions. "When collective decisions have vast consequences for the lives people lead," he says, "leaving the decision to chance or some other form of oracle is a bad idea; it may have worked, for a time, for the Athenians, but it would not work for us."[30] But he sees how it

[28] *See* JOSIAH OBER, DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSICAL ATHENS 160 (2008).

[29] DWORKIN, *supra* note 1 (manuscript at 243).

[30] *Id.*

would unhinge the knockdown argument he wants to develop on the basis of the lifeboat example, and so he tries to block the point, in the following way:

> Majoritarians might say, in response, that if the passengers disagreed about whether it would be fairer to draw lots or vote, then the only fair way to settle *that* dispute would be to vote on which procedure was fairer. That suggestion is obviously fallacious: we cannot sensibly treat numbers as decisive over the question whether numbers should be decisive. It would not be any fairer for a majority of lifeboat passengers first to vote to hold an election and then to vote to throw the cabin boy out in that election than for them to vote to throw him out directly. When questions of fair procedure are controversial, they are controversial all the way down: there is no default decision procedure to decide on decision procedures.[31]

But, as it stands, this response addresses only the situation in which it is proposed to use majority-decision to decide as between (α) choice of passenger by lot and (γ) choice of passenger by majority-decision. If there were more time, I might contest Dworkin's claim that it is obviously fallacious to use majority-decision to decide about the propriety of using majority-decision to decide about particular cases.[32] I imagine he thinks it is question-begging.[33] It is certainly not *strictly* question-begging, because majority-decision-as-to-principles is being used to decide about the appropriateness of majority-decision-as-to-particulars, though at a glance it may *look* question-begging. Leaving that aside, nothing that Dworkin says here shows that there is any fallacy in the proposal to use majority-decision to choose between (α) and (β). In that circumstance, the majority-principle is not among the objects of choice, so the impression of a question-begging fallacy does not arise.

According to Dworkin, how *would* it be appropriate for the passengers in the lifeboat to decide, e.g., as between (α) and (β)? He doesn't say. In conversation, he has suggested to me that the passengers would just talk the matter through until it seemed clear. This is as striking an instance as one could find of the cheerful view – common among "deliberative" democrats – that colloquium-style deliberation (if only it goes on long enough) obviates the need for voting. Dworkin's main interest is to establish that, however the decision between the principles is made, majority-decision making should not be a candidate because majority-decision may be among the objects of choice. But even this limited conclusion is of little interest in cases like our choice between (α) and (β) where majority-decision is not among the objects of choice.

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[31] *Id.*

[32] For an outline of my argument rebutting Dworkin's claim, see WALDRON, *supra* note 1, ch. 13.

[33] Alternatively, perhaps he believes it is an instance of the majority deciding in their own cause. For an extended critique of the overuse of this idea, see generally Jeremy Waldron, *Legislatures Judging in Their Own Cause*, 3 LEGISPRUDENCE 125 (2009).

And this apparently pedantic critique of Dworkin's argument has a point. He wants to establish (5), that it is inappropriate to tie the definition of democracy to the idea of majority-decision. But at most, Dworkin has discredited majority-decision as a procedure for making particular life and death choices of for individuals and has (tendentiously) discredited majority-decision in the choice of the proper ambit of the majority-principle itself. Since these uses of the majority-principle are so marginal, it is hard to see that they get us anywhere remotely near to (5). Those who tie majority-decision to democracy do so because they are interested in the people (or their representatives) making substantive decisions of policy and principle, but Dworkin's strictures – drawn from the lifeboat discussion – about not using majority-decision to decide individual cases and not using majority-decision to decide about majority-decision cast almost no light (good or bad) on this.

VI.

I have the feeling that justice has not yet been done to Professor Dworkin's lifeboat example; so let me try one more pass. What is it about the use of the majority-principles to choose which passenger to throw overboard that seems so distasteful? Can we extrapolate anything from an account of its distastefulness that would be interesting from our broader assessment of majoritarian conceptions of democracy?

Why is it wrong to vote about who to cast overboard? In Section V, I distinguished between choices about particulars and choices about general issues of policy and principle. Is it just the problem of particulars that makes the majority-decision inappropriate here?

Well, that can't be quite right. We do not think that majority-voting is always inappropriate for particular decisions. We use it to elect representatives: We vote for Smith or Jones for this particular congressional district for this particular term. And multi-member courts use majority-decision (among the limited constituency of their members) to decide which of two individuals should prevail in a particular lawsuit – whether Smith the petitioner wins or Jones the respondent wins often depends on 5-4 voting on a high appellate court. Dworkin says that drawing straws would be appropriate in the lifeboat and he adds that it might also take the place of voting in some other contexts. "The Athenians selected their leaders by lot, and it is not vividly clear that the quality of our legislators would decline if we chose them in the same way."[34] I have not, however, heard him suggest that a high appellate court such as the Supreme Court of the United States should draw lots to determine whether the petitioner or respondent should prevail in a case on which the members of the court are divided as they so often are. Despite the focused particularity of that decision, we seem happy to follow what Hannah Arendt described as the "almost automatic[]" preference for majority-

[34] DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 4, at 139.

voting when a decision needs to be made and there is disagreement about what it should be.[35]

So it can't be particularity, as such, that is crucial in explaining why majority-voting is inappropriate in the lifeboat example. Is it that the decision is one of life and death? That also can't be the reason: We allow Supreme Court voting to determine whether a particular execution will go ahead or be stayed; a man's life often depends on a 5-4 vote on the Court. And Dworkin himself says that it may be appropriate to use majority-voting to settle the question of whether to go to war, and that is certainly a matter of life and death.[36]

Dworkin's most plausible account has to do with the "personal" element of favoritism or enmity that might surround particular choices of life and death. According to Dworkin, majority-decision "seems a very bad idea because kinship, friendships, enmities, jealousies, and other forces that should not make a difference will then be decisive,"[37] and "[p]ersonal attachments and antagonisms would play a role they should not play."[38] I suspect Dworkin is right that a particular decision of this kind is likely to summon up all sorts of motives which, however compelling they are personally for each passenger, are not relevant from the perspective of the group.

The question is: What does this tell us about democracy more broadly? Professor Dworkin thinks it tells us a lot. Of the personal feelings that are likely to contaminate majority-voting in the lifeboat, he says: "Those attachments and antagonisms spoil politics as well, but on a much larger scale, and this makes the idea that majority vote is intrinsically fair in that context seem silly."[39] I think this might be a version (or application) of the "external preferences" argument that Dworkin used, many years ago in *Taking Rights Seriously* and elsewhere, in explaining why rights might sometimes be needed to qualify utilitarian reasoning. Dworkin used to argue that the function of rights is to preclude governmental actions motivated by reasons that denigrate or express contempt for certain members or sections of the community. Rights counteract the ineliminable presence of what he called "external preferences" (views that people may have about the value of others or the worthiness of others' desires) in utilitarian justifications for state action.[40] The idea was that whatever attraction the utilitarian calculus might have as a fair basis for

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[35] ARENDT, *supra* note 1, at 163.

[36] DWORKIN, *supra* note 1 (manuscript at 243).

[37] DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 4, at 139.

[38] DWORKIN, *supra* note 1 (manuscript at 219).

[39] *Id.*

[40] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 234-38 (1977); Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 154 (Jeremy Waldron ed., 1984); Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 301-07 (2000) (discussing Dworkin's theory of rights as trumps and defending it from a mischaracterization by Richard H. Pildes).

collective decisions would evaporate if people voted not for their own preferences but on the basis of their enthusiasm or antagonism towards the satisfaction of the preferences of others.

It was never clear whether this was also intended to apply to majoritarian decision-making. Dworkin is well aware that majoritarianism is not the same as utilitarianism;[41] still, so far as the point about external preferences is concerned, it is not impossible that the two approaches to collective decision might be affected in the same way.[42]

Anyway, if I am right that the lifeboat argument is based on a version of the external preferences point, then there is a problem. In his earlier formulations, Dworkin did not use the external preferences point as the basis of a general attack on majoritarianism of the kind envisaged by (5). It was not supposed to show the inappropriateness of majority-decision making (or utilitarian calculation) in general. It was supposed to show its inappropriateness in a limited range of cases. And that is what the lifeboat example might illustrate: It offers us an instance of a strange sort of case in which any enthusiasm we might have for majority-decision might need to be qualified (for certain odds kinds of case). That's conclusion (4) above.[43] But that won't get us to (5); it doesn't establish the inappropriateness of majoritarianism in general, let alone the "silliness" of associating it with democracy.

VII.

It is a pity that Professor Dworkin did not take the trouble to relate the lifeboat example (and what he draws from it) to the broader considerations of political equality that are widely believed to give the majority-principle whatever plausibility it has as a principle of political decision.

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[41] Dworkin says:

> We must take care not to confuse this majoritarian conception of democracy with some aggregative theory of justice, like utilitarianism, that holds that laws are just when they produce the greatest possible sum or average of happiness (or some other conception of well-being) within a targeted community. (The phrase "majority will" is dangerously ambiguous, because it is sometimes used to describe a majoritarian process and sometimes a utilitarian or other aggregative result.) There is no reason to assume that a majoritarian electoral process will even typically produce a result that would be deemed just on that – or any other – standard. On the contrary, a majoritarian process might well produce – and often has produced – laws that injure total or average well-being on any conception of what that is.

DWORKIN, *supra* note 1 (manuscript at 240).

[42] It is interesting, though, that Dworkin has not – perhaps till now – used the external preferences point to establish the legitimacy of qualifying majoritarian decision-making with the specific institution of judicial review; his discussion of *that* issue in, say, *Freedom's Law*, makes no use of the external preferences point. *See* DWORKIN, FREEDOM'S LAW, *supra* note 3, at 1-38.

[43] *See supra* Part IV.

Most supporters of democracy start from a general conviction that matters affecting a community ought in principle to be decided by all the members of the community. In the lifeboat, as counsel said in *Holmes*:

> If the mate and seamen believed that the ultimate safety of a portion was to be advanced by the sacrifice of another portion, it was the clear duty of that officer, and of the seamen, to give full notice to all on board. Common settlement would, then, have fixed the principle of sacrifice . . . .[44]

And similarly in a broader political community: Common settlement, involving everyone, seems the appropriate principle. The decision should not be rigged in advance; it should be the upshot of a common settlement among the members of the community. It seems also appropriate to say not only that each person's voice should be heard in the process of arriving at a common settlement, but also that the voice of each person should be given weight. It should count, and count in the direction of the judgment or opinion that that person has formed. This is a matter of elementary respect for persons. On the other hand, no one's voice should count for more than anyone else's: We want each voice to count, but count equally, in a common settlement.

Now it is well-known, as a matter of decision-theory, that the principle of majority-decision and only the principle of majority-decision satisfies these requirements.[45] This is the gist of a famous argument set out by Kenneth May: If we want a decision taken among the members of a group between two options, and if we want the decision procedure to satisfy constraints of (i) decisiveness, (ii) neutrality, (iii) equality, and (iv) positive responsiveness (at the highest level compatible with equality), then the majority-principle is the only principle to use.[46] The majority-principle's strong relation to these conditions (i)-(iv) shows that it is not morally insignificant in and of itself, because the conditions themselves are not morally insignificant. This is the classic proceduralist case for majority-decision and it is morally quite important.

Does Dworkin's account of the lifeboat situation call any of this into question? I suppose his hunch about the contamination of each person's

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[44] United States v. Holmes, 26 F. Cas. 360, 363 (C.C.E.D. Pa. 1842) (No. 15,383).

[45] Admittedly, the principle of majority-decision faces other difficulties, such as those identified by Kenneth Arrow. *See, e.g.*, Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 987-88 (1989); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 6-7 (1991). But actually, as Arrow shows, that does not distinguish it from most other decision-procedures and it certainly does not detract from the moral significance of the May argument, which I am considering here. KENNETH J. ARROW, 1 COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE 5-7, 131 (1983).

[46] Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952); *see also* AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 71-73 (1970) (elaborating on May's theorem).

preferences with personal "attachments and antagonisms"[47] might be thought to undermine constraint (iv) of positive responsiveness. Perhaps we don't want the decision to be responsive to *X*'s view if *X*'s view embodies something like personal enmity. This is an interesting spin on the external preferences argument considered in the previous Section.[48] In the present context, what is interesting is that the Dworkin critique we are imagining does not just provide a reason for not following the majority-outcome; it provides a reason that undermines the appeal of one of the premises of the majority-principle's appeal.

But the undermining of the premise of positive responsiveness is, as we have seen, quite limited. It is not at all clear that it extends to all or most cases in which individuals vote on general principles or policies. And those are the cases that matter most to theorists of democracy.

Elsewhere, Dworkin has made arguments (e.g., in favor of judicial review) that call into question a couple of the other morally significant conditions that I said justify majority-decision.[49] Like many constitutionalists, he does not accept constraint (ii) of neutrality – the constraint that says the decision procedure itself should be indifferent to the moral merits of the options under consideration. He thinks we should load the dice against certain outcomes, and that it is the function of constitutional rights to do so.[50] Also, I think he believes that the notion of political equality embodied in constraint (iii) is inadequate. He puts forward what he believes is a richer conception of political equality – of what it is to treat people as equals in the making of political decisions.[51] Maybe he would not go so far as to deny that people's inputs should be treated equally in most political decisions. But I think he believes there is much more to be said about equality than this.

For present purposes, the important point is that *none of this follows from our response to the lifeboat example*. The lifeboat example does not illustrate or explain either of the points discussed in the previous paragraph.

The lifeboat example does not illustrate the wrong-headedness or redundancy of the principle of neutrality. On the contrary, the decision-procedure that Dworkin favors – decision by lot – seems even more attentive to neutrality.

As for equality, it is true that Dworkin criticizes the inadequacy of the conception of equality that majoritarians rely on – he calls it, unkindly, the "counting heads" principle[52] – and he cites the lifeboat example as a reason for

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[47] *See supra* notes 37-40 and accompanying text.

[48] *See supra* notes 39-43 and accompanying text.

[49] *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE 208-10 (2000).

[50] *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note 3, at 15-19.

[51] *See* DWORKIN, *supra* note 49, at 184-210.

[52] DWORKIN, *supra* note 1 (manuscript at 242) ("Many people – I imagine most people who have thought about the matter – favor the majoritarian conception because they subscribe to what they take to be a more general, indeed fundamental, principle of fairness

doing so. But in fact, the lifeboat example casts no doubt on *this* aspect of the case for majority-decision either. To see why the "counting heads" principle is inadequate (if it is), we would have to look at the places elsewhere in this work where Dworkin disparages it – for example, where he argues that we should not make so much fuss about formal political equality because each person's power is so minuscule anyway.

> The measure of positive political control [provided] to you is so small that it can sensibly be rounded off only to zero. Your decision to vote one way or another would not improve the odds on your preference succeeding to any statistically significant degree. People in a large community whose political impact is actually or close to equal have no more power over their own governance by themselves than they would if priests took political decisions by reading entrails. If the political impact of an ordinary citizen with an equal vote is infinitesimal, why should it matter whether the infinitesimal impact each has is equally infinitesimal?[53]

Or we would have to look at the passages both in *Justice for Hedgehogs* and pervasively in the rest of his work where Dworkin has articulated a powerful alternative conception of political equality that is intended to eclipse the narrow, formalistic one on which he says majoritarians rely.[54] I wish there were time to talk more about that, but there isn't. The lifeboat example adds nothing to that discussion. I have concentrated on it here only because I fear that its constant introduction into the discussion of democracy by Dworkin and others is little more than a distraction.

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and equality: the 'counting heads' principle. Jeremy Waldron, among contemporary political theorists, has given that principle most prominence in his arguments against judicial review.").

[53] *Id.* (manuscript at 245). Curiously, this consideration did not weigh with members of the civil rights movement who braved dogs, fire-hoses, and beatings to get the right to vote and have their vote counted as the equal of that of any other voter. Professor Dworkin appears to acknowledge the force of this point in his comments about "dignity." *See id.* (manuscript at 245-46).

[54] *See, e.g.*, *id.* (manuscript at 244-46); DWORKIN, *supra* note 49, at 184-210.