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AN UNSATISFACTORY NONCONSEQUENTIALIST ACCOUNT OF INTERPERSONAL MORAL DUTIES

90 Boston University Law Review 101 (2010)
Boston University School of Law Working Paper No. 10-10
(May 6, 2010)

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INTRODUCTION

Over the course of his career, Professor Ronald Dworkin has earned a well-deserved reputation as one of the most penetrating and eloquent critics of consequentialist theories of law, political morality, moral duties, and personal ethics. In the ambitious and wide-ranging *Justice for Hedgehogs*, he offers an alternative approach. Respect for human dignity, he says, entails two requirements: (1) self-respect, i.e., taking the objective importance of your own life seriously; and (2) authenticity, i.e., accepting a "special, personal responsibility for identifying what counts as success" in your own life and for creating that life "through a coherent narrative" that you have chosen.[1]

According to Dworkin, these two principles of dignity do triple duty. First, as a matter of personal ethics, they provide guidance about what we should do in order to live well.[2] Second, they elucidate the rights that individuals have against their political community.[3] And third, they account for the moral duties we owe to others.[4]

The principles of dignity that Dworkin identifies might play a valuable role

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[1] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 128, on file with the Boston University Law Review).

[2] *Id.* (manuscript at 132).

[3] *Id.* (manuscript at 210).

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

in these first two domains. But in this Comment, I will raise some doubts about the value of this "dignity framework" in the third domain, in explaining and grounding interpersonal moral duties. Specifically, the principles of self-respect and authenticity sometimes fail to justify the nonconsequentialist positions that Dworkin wishes to endorse. Moreover, even when these principles do plausibly entail moral duties of a particular scope, that scope is often significantly weaker, or in some cases significantly stronger, than many nonconsequentialists would endorse.

In this Comment, I will focus on three illustrations of these difficulties: Dworkin's discussions of (1) the duty to rescue a stranger, (2) the duty not to create an unreasonable risk of harm to others, and (3) the doctrine of double effect.

Let me begin by putting these issues into the broader context of Dworkin's analysis of interpersonal moral duties. Dworkin makes highly ambitious claims for his dignity framework, which, in his view, helps explain an enormous range of nonconsequentialist views about our moral rights and duties, including:

- Why I am permitted to care more about my children than about yours;[5]
- Why I am not required to undergo a significant sacrifice, such as volunteering as a guinea pig for a medical experiment, simply because this sacrifice is very likely to save many others from a similar risk of harm;[6]
- Why I do not have a general duty to confer a benefit on others when they could benefit more from an opportunity than I would;[7]
- Why I have only a limited duty to rescue a stranger from harm;[8]
- Why, in a rescue situation where I could save either one person or two people in danger, (a) I am permitted to rescue only one, and (b) I am permitted to do so even if my reason for selecting that person is idiosyncratic;[9]
- Why deliberately harming another is almost always impermissible while causing harm to another through competition is not;[10]
- Why, in determining how much risk of unintended harm I may permissibly impose on others, we should *not* simply balance costs and benefits in an economic calculus, but should instead balance: (a) the extent to which taking a precaution against the risk will set back *my* plans and prospects, against (b) the extent to which *not* taking that precaution will set back the plans and prospects of potential victims;[11]

[5] *Id.* (manuscript at 176).

[6] *Id.*

[7] *Id.*

[8] *Id.* (manuscript at 176-79).

[9] *Id.* (manuscript at 180-82).

[10] *Id.* (manuscript at 183-86).

[11] *Id.* (manuscript at 185-87).

- Why, generally speaking, killing someone is worse than letting him die;[12]
- Why it is permissible to employ any of a wide variety of criteria for selecting one potential recipient of an organ transplant over another, but it is not permissible to kill a patient, even one who is already dying, in order to harvest his organ, even if this would save a potential recipient's life;[13]
- Why we would also not permit people to agree in advance to a "spare parts lottery" whereby they would allow others to kill them for their organs in order to save multiple lives;[14]
- Why intentionally causing harm to another, either as a means or as an end, is generally more wrongful than knowingly causing the same harm as a side effect;[15]
- Why corporal criminal punishment, which takes away the criminal's control over his own body, is especially difficult to justify;[16]
- Why any form of criminal punishment demands an especially compelling justification, for it permits the state to use the offender in an effort to deter others, and this is only permissible when the offender has genuinely forfeited the rights that his dignity would normally demand.[17]

Dworkin also claims that his principles explain a number of plausible positions that *appear* to be justifiable only by consequentialist reasoning. Of course, Dworkin would very much like to defend these positions on nonconsequentialist grounds. Here are some illustrations:

- Why it is permissible for one swimmer in danger of drowning to try to outrace another and secure a life vest that can save only one;[18]
- Why it is preferable to save two drowning swimmers in one location rather than one in another, when you cannot save them all;[19]
- Why, in such a case, it is not permissible to save one rather than two for no reason other than whim;[20]
- Why it is permissible to turn a trolley so that it kills one person on the

[12] *Id.* (manuscript at 183-86).

[13] *Id.* (manuscript at 187-91).

[14] *Id.* (manuscript at 188-91).

[15] *Id.* (manuscript at 187-91).

[16] *Id.* (manuscript at 192).

[17] *Id.*

[18] *Id.*

[19] *Id.* (manuscript at 180-82).

[20] *Id.* (manuscript at 181). Dworkin thinks it obvious that saving two rather than one is the proper default choice, but he does not adequately explain why a weighted lottery (giving the single swimmer a one-third chance of being saved) is not an equally plausible default. *See id.*

spur rather than five on the track ahead.[21]

There is much to admire in Dworkin's analysis of these topics, including intriguing juxtapositions, and fresh and illuminating examples. In this Comment, however, I only have space to discuss the three topics identified above: the duty to rescue a stranger; the duty not to create an unreasonable risk of harm to others; and the doctrine of double effect. In each instance, Dworkin's discussion contains valuable insights, but his analysis and conclusions do not flow easily from the dignity framework. The core problem, we will see, is an unpersuasive extension of that framework from the domains of personal ethics and political morality to the domain of interpersonal moral duties.

I. THE DUTY TO RESCUE A STRANGER

Dworkin's analysis of the duty to rescue a stranger is problematic in two main respects. First, his framework suggests that the scope of the duty to rescue a stranger is extraordinarily weak, much weaker than many other nonconsequentialists would favor. The framework implies that an actor need not rescue if this would interfere with his idiosyncratic projects (e.g., to build a temple to his god), so long as the stranger would not suffer *serious* harm if not rescued.[22] Second, Dworkin asserts, without persuasive argument, that if the person in need of rescue is more *identifiable*, then one has a *stronger* duty to rescue him.[23]

Let us consider Dworkin's analysis in more detail. He begins by resisting the argument for a very stringent duty to rescue. A mere failure to help someone in need cannot, he says, "normally be interpreted as showing any lack of respect for the objective importance of . . . [the potential beneficiary's] life."[24] The fact that I help my own children, but do nothing to help yours, is consistent with my recognizing the objective importance of your children.[25] Still, he cautions, one cannot *completely* ignore the claims of strangers.[26] So, if someone is drowning and I can easily save them, I might have a moral duty to rescue.[27]

What is relevant to the scope of that duty? Three factors, according to Dworkin – a metric of harm to the victim, a metric of cost to the rescuer, and "confrontation."[28] But, Dworkin plausibly argues, if we are to provide a genuinely nonconsequentialist account of the duty, we cannot simply balance

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

[22] *Id.* (manuscript at 176-78).

[23] *See id.* (manuscript at 180-81).

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

[25] *Id.* (manuscript at 176).

[26] *Id.*

[27] *See id.*

[28] *Id.* (manuscript at 175-79).

harm and cost against each other in a utilitarian way.[29]

What, then, is the proper nonconsequentialist analysis of these factors?

A. *The Metric of Harm to the Victim*

Dworkin argues that a high threshold must be surmounted before a duty to rescue is properly triggered: one has a prima facie duty to help a stranger only when he is in danger of death or of losing the capacity to function as a normal human being.[30] The question, says Dworkin, is "whether denying him aid will make it impossible for him to pursue value in his life at all."[31]

This threshold requirement might well follow from Dworkin's principles of dignity, since those principles insist on the overriding moral significance of a person's ability to pursue objective value.[32] But the requirement is extremely, and implausibly, restrictive.

Suppose I know that the person in danger risks a broken leg but nothing worse. I could save him yet face *no* risk of injury and *no* interference with any of my own important life plans. It certainly seems that I should have a moral duty to aid; yet Dworkin's analysis suggests that I do not.[33]

Or suppose the harm is merely some form of temporary emotional distress. A snake, which I know is harmless, is terrifying a child. I could easily pick up the snake and toss it out of sight. Should I not do so?

It is certainly plausible to believe that I should have a duty of easy rescue that is at least this robust. And that belief can be justified on *other* than purely consequentialist grounds. To be sure, *libertarian* nonconsequentialists do reject a duty to rescue.[34] But not all nonconsequentialists are libertarians, and some indeed endorse such a duty.[35]

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[29] *See id.* (manuscript at 176).

[30] *Id.* (manuscript at 176-77).

[31] *Id.* (manuscript at 177). See also *id.* (manuscript at 176), where Dworkin asks whether "I have at least a prima facie duty to help a stranger when he is in danger of losing his life or becoming incapable of functioning as a normal human being?" He later answers affirmatively. *Id.* (manuscript at 177) ("We must ask . . . whether denying him aid will make it impossible for him to pursue value in his life at all.").

[32] *See id.* (manuscript at 162-63).

[33] To be sure, there is some ambiguity here in Dworkin's exposition: whatever the magnitude of the harm to the stranger, he says, my duty to prevent it "is greater when I can do so with less risk to or interference with my own life." *Id.* (manuscript at 177). This might imply that he would require a more extensive duty to aid than is suggested in the text. But he also seems to assume that I only need to act if the harm is "serious." *Id.*

[34] Consider Richard Epstein's early writings. *E.g.*, Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 197-99 (1973) (asserting that rejection of common law Good Samaritan doctrine and imposition of a duty to rescue would make it difficult to establish the "limits of social interference with individual liberty").

[35] For example, many Kantian theorists endorse a duty of beneficence. Corrective justice theorist Ernest Weinrib once endorsed a limited duty to rescue. Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 251 (1980). Joel Feinberg suggests that a duty of

B. *The Metric of Cost to the Rescuer*

This factor is also relevant, Dworkin argues.[36] Here, again, Dworkin's framework justifies only an extremely weak duty, because the framework will count as a serious cost whatever *the rescuer* takes to be a serious interference with his important personal projects, even if *no one else* would view the interference as a serious cost.[37] As one illustration, Dworkin considers a rescuer who is building a temple to his god.[38] Now suppose that this rescuer considers it critically important to finish building the temple by noon today rather than two minutes past noon, because his god will otherwise be intensely displeased. Then presumably he need not stop and save the child from the terrifying snake, or from a broken leg, or perhaps even from a life-threatening injury. This is not a very palatable conclusion.[39]

Dworkin might respond that I am taking his analysis and examples too literally. Perhaps we should be permitted to balance potential harm to the victim and cost to the rescuer more flexibly, according to some sort of sliding scale: if the potential harm to the victim is quite significant, then, unless the rescuer would incur comparably significant costs, he should still owe a duty of easy rescue. Yet it is not clear whether Dworkin's framework can justify this more flexible approach, an approach that seems to collapse into the type of utilitarian tradeoff that Dworkin undoubtedly means to reject. Most charitably, we might assume that the more flexible metrics of harm to victim and of cost to rescuer would still be fundamentally calibrated by the two principles of dignity: both "harm" and "cost" would be defined substantially (though not exclusively, given the problems I have just identified) by the extent to which

easy rescue is much more justifiable than a generalized duty to benefit others when one can easily do so, because the duty to rescue is one instance of a duty to prevent another from suffering harm. *See* JOEL FEINBERG, HARM TO OTHERS, 130-50 (1984). Note the criticism of Feinberg by Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO L.J. 605, 627-30 (2001), who argues that failures to rescue are better understood as failures to benefit.

[36] DWORKIN, *supra* note 1 (manuscript at 177).

[37] *Id.*

[38] *Id.* Dworkin takes this example from T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 659-60 (1975) ("The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat . . . ."). Here, of course, Scanlon is arguing that the idiosyncratic preference of the person in need of aid (rather than the preference of the rescuer) is not morally decisive.

[39] It is possible that Dworkin's theory has more bite, however, in situations where *A*'s reason for not aiding is neither (a) that aiding risks causing *A* significant harm (harm that could interfere with his general pursuit of his life projects), nor (b) that aiding would interfere with some *specific* project, such as completing his temple on time; but rather, where *A*'s reason for not aiding is just (c) that *A* does not want to be bothered. Perhaps in such a case, *A* must rescue, at least if the interference with the rescuee's life plans is serious enough.

they interfere with the life plans of the victim or of the actor. Still, this revised, more flexible balancing approach leaves critical questions unanswered. For example, does "substantially" mean "significantly"? "Mainly"? "Almost exclusively"? I am not confident that Dworkin can formulate a coherent intermediate criterion, one that escapes both the Charybdis of implausible deference to idiosyncratic personal projects and the Scylla of unacceptable utilitarian balancing.

C. *"Confrontation"*

According to Dworkin, the third factor that is relevant to the scope of the duty to aid is "confrontation."[40] I have a stronger duty if either (a) the person in need of help is a particular, identifiable person, or (b) the need to rescue arises here and now, rather than at some physical distance or in the future.[41] We would display a "callousness that mocks any pretended respect for humanity," says Dworkin, if we ignored the "impending death of a particular person dying in front of us."[42]

Dworkin points out that this third factor has "puzzled economists."[43] For example, if a cave-in traps a miner, he says we expect the community to "spend whatever further sums it takes" to rescue the miner.[44] These sums could amount to much more than we expect the community to spend ex ante on mine safety in order to prevent cave-ins or other dangerous accidents from happening in the first place.[45] Dworkin treats the economists' bafflement at this disparate treatment as evidence that their cost-benefit analysis is out of tune with common sense intuitions, intuitions that are better explained by his nonconsequentialist principles of dignity.[46]

But I think nonconsequentialists should also be more than a little puzzled by this phenomenon. Why should we treat the identifiability of the victim as a moral feature of such dramatic significance? Dworkin's only argument for this position is that it is wrong to ignore the natural responses that a respect for life provokes when we are directly confronted with a person facing imminent death.[47] But why give such enormous weight to that natural response, if, for example, we could save five miners from being trapped and killed in the first place, for every one trapped miner we spend enormous sums to rescue?

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[40] DWORKIN, *supra* note 1 (manuscript at 178).

[41] *Id.* (referring to "particularization" and "proximity" as the elements of confrontation).

[42] *Id.* (manuscript at 179).

[43] *Id.*

[44] *Id.* Dworkin's assertion that we would pay "whatever further sums it takes" to save the trapped miner is an exaggeration. *Id.* We would not spend five-hundred million dollars to save a trapped miner; and we do call off rescues of missing persons when the chance of saving them is extremely low but greater than zero.

[45] *Id.*

[46] *See id.*

[47] *See id.* (manuscript at 178-79).

Perhaps our reluctance to treat their lives with equal respect is just a failure of imagination.[48]

Elsewhere in *Justice for Hedgehogs*, Dworkin is exceedingly careful to distinguish between fact and value, following David Hume.[49] Why is he so extraordinarily deferential to our "natural" reactions here?[50] Could they not be irrational, or even morally indefensible, as so many of our instinctive and intuitive responses are? Consider the equally "natural" phenomenon of disgust, which historically has played a troubling role in efforts to justify racism and homophobia.[51]

Now, I concede that our intuitive response to the trapped miner is an understandable emotional reaction, and one that psychologists have empirically verified. Researchers have discovered, for example, that if study participants are told, not just that a person in need is a child, but also the *age* of the child, they are more likely to help; and their readiness to help increases even further if the child is given a name.[52] Perhaps evolutionary biologists can explain the adaptive value of such intuitions. But the question remains: why *should* we give weight to such reactions in justifying a stronger moral duty to rescue? A better explanation should be offered than the simple fact that the reaction is a "natural" one. We might "naturally" feel more compassion towards someone if we know their first name, but that is hardly a justifiable basis for imposing a stronger moral duty to rescue such a person.

Consider an analogous problem, the allocation of health resources to the terminally ill. We currently allocate a huge amount of health expenditures to end-of-life care, when those dollars could save many more lives if invested in earlier prevention and treatment.[53] Dworkin noted, in his Keynote Address at the Symposium, that in the type of hypothetical insurance market he favors,

[48] It almost seems that Dworkin embraces the intuition that identifiability of the victim is morally salient just because it is a telling counterexample to what economic analysis would suggest. But, it hardly follows from the fact that economists and consequentialists would oppose a position, that nonconsequentialists should embrace it. The enemy of my enemy need not be my friend.

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

[50] *Id.* (manuscript at 179).

[51] MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 1-4 (2004) (warning that the psychological reactions of disgust and shame, although unavoidable, should not be the foundation of legal rules, in part because of the risk this poses to stigmatized groups such as gays and the disabled).

[52] Tehila Kogut & Ilana Ritov, *The "Identified Victim" Effect: An Identified Group, or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157, 157-65 (2005); *see also* Deborah A. Small & George Loewenstein, *Helping* a *Victim or Helping* the *Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5, 5-14 (2003) (finding that even "weak" identifiability increased the altruism of subjects).

[53] *See* Reed Abelson, *Months to Live: Weighing Medical Cost of End-of-Life Care*, N.Y. TIMES, Dec. 22, 2009, at A1 (referring to estimates that the United States could save $700 billion a year by reducing costs of end-of-life care).

distributive justice would probably allocate these health dollars very differently.[54] Yet the same could be said about the trapped coal miner. In Dworkin's hypothetical insurance market, we might well choose to invest more in prevention of coalmine disasters and relatively less in rescues of identified victims.

Of course, one important reason that we do spend too much on end-of-life care is the factor of "confrontation" that Dworkin endorses. Your dying mother or grandmother is in the hospital. You want her to get the best possible care. You do not want a government "death panel" to tell you what to do.[55] But again, does your natural feeling that society owes a special duty to improve the health of this identifiable person really provide a convincing basis for concluding that society indeed owes such a duty? If $200,000 would either extend a terminally ill person's life for a few months, or prevent several people from contracting a debilitating lifetime disease, is the latter allocation not more sensible and more humane?

To be sure, these allocation decisions are complex, and their ethical resolution depends on more than simple cost-benefit analysis. Distributive justice considerations are important, as is the moral obligation to continue the care of a patient whom one has started to serve, even in circumstances where discontinuing care and shifting resources to another patient would be more cost-effective. More broadly, if you are "confronted" with specific individuals in need here and now, very often you have much more reliable grounds for judging that their need is genuine and compelling, that you can easily rescue them, that others cannot help, and so forth; as compared to the much less certain grounds you are likely to have for determining, ex ante, whether to take a precaution that might save a diffuse, unidentified class of individuals in the future. But Dworkin's endorsement of the "confrontation" factor does not rely on these contingent epistemic differences. Rather, he claims that the identifiability and spatiotemporal proximity of a victim is an intrinsic moral difference.[56] This contention needs much more argument.

Finally, it is not even clear that Dworkin's embrace of the "confrontation" position – such as the view that we should pay whatever is required to save the trapped coal miner – actually follows from his two principles of dignity. True enough, our immediate emotional reaction when we witness the plight of particular individuals in dire need of rescue is that we should save them. But Dworkin provides no argument to show that this altruistic impulse, together

[54] Ronald Dworkin, Keynote Address at the Boston University Law Review Symposium: Justice for Hedgehogs (Sept. 25, 2009) (transcript on file with the Boston University Law Review) (arguing that we should spend less "keeping people alive" at the end of their lives because people could spend that money on useful activities throughout life instead of financing expensive end-of-life care).

[55] *See* Jim Rutenberg & Jackie Calmes, *False 'Death Panel' Rumor Has Some Familiar Roots*, N.Y. TIMES, Aug. 14, 2009, at A1.

[56] *See* DWORKIN, *supra* note 1 (manuscript at 178-79).

with his two principles, entails a stronger moral duty to rescue those whose plight is staring us in the face. He simply asserts that one displays a disregard for the objective value of human life if one fails to spend enormous sums on saving them, or if one fails to spend much more on saving them than on saving less identifiable individuals through prudent ex ante precautions.[57]

II. THE DUTY NOT TO CREATE UNREASONABLE RISKS OF HARM TO OTHERS

Let us turn to the second topic – the scope of the moral duty not to create an unreasonable risk of harm to others. This is a topic that is of crucial significance to the proper scope of tort law, and of some significance to criminal law as well. Here, too, Dworkin's principles of dignity suggest a surprisingly narrow duty.

In determining the scope of this duty not to cause unintended harm, we should not, Dworkin warns, simply engage in the sort of cost-benefit balance that economists and consequentialists would recommend.[58] Although now is not the occasion for a full discussion of the problems engendered by a purely cost-benefit analysis of risky conduct, I share Dworkin's reservations.[59]

Trouble comes, however, when we examine the formula that Dworkin recommends in lieu of cost-benefit analysis. He says we should balance:

> (a) the extent to which the plans and prospects of a potential injurer will be set back by his taking a precaution against risks

against

> (b) the extent to which the plans and prospects of potential *victims* will be set back if the actor does not take that precaution (and thus increases the risk of injury).[60]

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[57] Dworkin's arguments about the scope of our duty to alleviate global poverty are similarly problematic. *See id.* (manuscript at 179). We do have such a duty, he says, given the high need under the first metric and the low cost under the second, but he believes that the factor of confrontation is still relevant: if we are more vividly aware of African poverty today than in years past, due to extensive media coverage, this "aggravate[s] [our] failure of duty" to respond to the problem, and we should feel more shame when we do not respond adequately. *Id.*

But this view, taken literally, has bizarre consequences – for example, the greater the media coverage of a natural disaster or of a poverty problem, the more funds we are morally required to allocate towards alleviating the problem, even if we know that greater problems exist elsewhere that the media have not highlighted.

[58] *See id.* (manuscript at 187).

[59] Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1188 (2008) (rejecting as "highly implausible" the use of unqualified consequentialist cost-benefit analysis as a criterion of tort negligence).

[60] See DWORKIN, *supra* note 1 (manuscript at 186-87), stating that the Learned Hand test is the correct basic strategy for determining when risk-creation is permissible, but endorsing a restricted version of the test, under which we compare how much the actor's projects and

But now we have a problem reminiscent of the problem we encountered with Dworkin's analysis of the scope of the duty to rescue.[61] Under this type of a balance, the subjective importance of the potential injurer's own plans and projects will often *override* the rights of potential victims. Specifically, it will override whenever the injury that the victims might suffer from the risky action is modest or short-lived enough that it will not interfere in a comparable way with the victims' own long-term plans.

Consider two examples. First, recall the saga of our friend the temple-builder, who was in such a great hurry to complete his monument by noon today. Now suppose that our friend is stuck in an unforeseeably horrendous traffic jam. Once the traffic clears, he drives at a very high speed to the site of his building. Speeding is the only way he can arrive at his destination on time.

Unfortunately, speeding will also terrorize dozens of young children along the way. But, fortunately, their terror will only be momentary. His speeding does not actually pose any risk of physical harm to them, and does not cause any long-term emotional harm. So it does not set back their life plans or prospects in any way. Still, is it really morally permissible for him to speed? And should he not have a moral duty to compensate them for their emotional harm?[62]

Now consider a second example, my own variation on a famous example from T.M. Scanlon.[63] Imagine Lopez is in the transmitter room of a television station. Electrical equipment in the room poses a serious risk of falling on him and causing him extremely painful shocks, though it will cause no other harm. There is only one sure way to prevent him from suffering these shocks: turning off the transmitter for fifteen minutes while we fix the problem. But the final match of the World Cup is in progress, watched by a huge number of people, and it will not be over for an hour. Should we turn off the transmitter now, and save Lopez immediately? Or should we instead wait until the match is over?

Scanlon asks, in his similar example, an arresting question: "Does the right thing to do depend on how many people are watching – whether it is one million or five million or a hundred million?"[64] Clearly, it does not. The question nicely captures the nonconsequentialist intuition that it is *not* always permissible to harm someone, or even to risk harm to them, simply because the aggregate expected benefits derived from the conduct that causes or risks the

plans are set back by taking a precaution, relative to how much *not* taking the precaution (and thus causing damage) would set back the projects and plans of others.

[61] *See supra* Part I.

[62] In tort law, of course, he would most likely not have a legal duty to compensate them, since liability for emotional harm alone is imposed only in narrow circumstances not present here. *See* DAN B. DOBBS, 2 THE LAW OF TORTS § 302 (2001).

[63] For the original example, see T.M. SCANLON, WHAT WE OWE TO EACH OTHER 235 (1998). In Scanlon's version, Jones is trapped under fallen equipment, and, in order to rescue him, we must turn off the transmitter for fifteen minutes. *Id.*

[64] *Id.*

harm outweigh the expected costs.[65] A huge number of tiny benefits might, on a utilitarian metric, have greater aggregate value than the disvalue of a single individual's pain, and yet, in these examples, it is impermissible to choose the course of action that produces those greater benefits.

Both Scanlon's example and my example demonstrate that any balancing test for permissible risk imposition should include a constraint against this type of utilitarian aggregation.[66] But I want to pose an additional question about my scenario. Suppose that watching the World Cup live is extremely important to the life plans of some of the viewers, indeed one of the most important experiences in their lives.[67] It would appear that under Dworkin's view, such a setback to the plans and prospects of these viewers weighs heavily, and could easily override the substantial risk that Lopez might suffer significant but temporary pain if we do not turn off the transmission.[68] For it is quite possible that the painful shocks that Lopez might suffer would set back his life plans very little, if at all.[69]

The basic problem that both Scanlon's example and my example reveal is this: Dworkin employs a criterion of permissible risk imposition that places too much value on whether the life plans of the relevant actors are substantially furthered or hindered. Although these features might deserve some weight in the rescue context, it is not at all clear that they should be so decisive in the context of an actor imposing a risk of harm on a class of potential victims. In this context, we need to weigh, not just what effect a rule permitting (or forbidding) risky activity will have on the life plans of potential injurers and victims, but also: (1) the way in which the benefits and burdens are distributed and (2) the *social* value of the activity.[70] As a matter of personal ethics, it may be perfectly defensible for sports fans to devote significant portions of their time to rooting for the home team. Indeed, such devotion might be laudable in many respects, for it might build community spirit and reinforce such values as valor, effort, discipline, self-sacrifice, and acceptance of defeat. But it hardly follows that these values are entitled to significant social weight when pursuing them requires endangering the welfare of others. By contrast, if the reason one is endangering others is to save one's own life or the life of another person

[65] *See id.*

[66] As stated, Dworkin's balancing test does not include such a constraint, though it would be easy enough for him to add one. *See* DWORKIN, *supra* note 1 (manuscript at 187).

[67] This is not an unrealistic assumption, I think, in light of the maniacal behavior of sports fans around the world.

[68] *See* DWORKIN, *supra* note 1 (manuscript at 187).

[69] Perhaps one could distinguish this second example from the first because the sports fans are not literally the injurers, but are people who benefit from the injurer (the TV station) not taking a precaution. But I am not so sure that this matters. Would it really make a moral difference if the TV station owner also was a rabid sports fan and considered this experience of watching the World Cup final the highlight of his year?

[70] Simons, *supra* note 59, at 1191-92, 1202-08.

(e.g., by transporting the needy person at high speed to the hospital), that reason has significant weight both in personal ethics and in interpersonal risk imposition.

How would Dworkin respond to these criticisms? Perhaps he would say that permitting either our friend the temple builder or the TV station owner to impose these risks on others is unjustly asking the victims to "subsidize" the injurer's choice of life project.[71] This is indeed a valid concern. However, what counts as an unjust subsidy is a notoriously difficult inquiry,[72] and it is not clear how one would apply the concept here. Can I not take a drive for pleasure, at a careful rate of speed, even though this endangers pedestrians to a slight extent? Why are they not thereby "subsidizing" me? After all, they might not consent to the risks, nor benefit in any direct way from those risks. Moreover, Dworkin's two principles of dignity are not a promising source for a plausible account of what constitutes an "unjust subsidy" in this context.

One other portion of Dworkin's analysis deserves attention. Before introducing his formula for permissible risk-imposition, Dworkin places the question of liability for unintended harm within an illuminating framework. He suggests that we must find some middle ground between the actor *always paying* for the risks he imposes on others (an option that takes away our control by burdening our ability to act), and always *leaving the cost* of the risks he imposes *on the others* (an option that takes away our control by leaving us at the risk of being victims).[73]

I agree with Dworkin that a middle ground between pervasive liability and no liability must be sought. I also agree that each extreme would result in an excessive burden on personal liberty. But I do not agree that focusing on the effect of a liability rule on the actor's or the victim's degree of control over his life is a helpful way to determine the permissible scope of risk-imposition, for two reasons. First, it is dubious that "maximizing control"[74] is the only or even

[71] DWORKIN, *supra* note 1 (manuscript at 132, 177). Elsewhere in *Justice for Hedgehogs*, Dworkin's analysis of what political justice does and does not require implicitly employs the idea of an unjust or undeserved subsidy. *See id.* (manuscript at 221-27).

[72] For discussions of this topic in the context of unconstitutional conditions, see Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1294-300 (1984); Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 292-94 (1989); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV L. REV. 1413, 1415-19 (1989).

[73] DWORKIN, *supra* note 1 (manuscript at 186). For an analysis along similar lines from a prominent tort scholar suggesting that tort law balances the interests in liberty and security, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 382-84 (1996).

[74] DWORKIN, *supra* note 1 (manuscript at 186) ("My goal is to maximize my control; that is what my ethical responsibility for my own life demands."). It is surprising that Dworkin's criterion here employs "maximization," since his purpose is to supply an alternative to the utilitarian "maximization of utility" criterion. *Id.* (manuscript at 209). To be sure, he wants to maximize "control," not "utility." Still, many nonconsequentialists

the most important criterion for determining the defensible middle ground, either in morality or law. For example, whether the risk is fairly distributed is also critical, as noted above. Indeed, even in a purely *intrapersonal* case in which all the advantages and disadvantages of taking the precaution inure to the actor (e.g., a hermit is deciding how carefully to build a house that no one else will visit), the decision about what level of care to adopt should not depend on whether that level will "maximize control."

Second, even if control is the proper criterion, I do not see how it entails the type of balancing test that Dworkin endorses. Under Dworkin's analysis, the balancing formula tells us when it is wrong for us not to take more care.[75] For example, he asserts: "It would destroy my life, not enhance it, if I were to take as much care as is possible not to harm others. I could not even cultivate my garden."[76] But the issue of when an actor should compensate for risk is distinct from the question of when it is morally permissible to impose that risk. It is an open question whether one who permissibly cultivates his garden with particular chemicals or a particular irrigation method should nevertheless pay for the harm that he thereby causes. Strict liability, which Dworkin does not discuss, is a liability option, one that the Anglo-American common law occasionally employs. And if the strict liability rule that is adopted will only rarely result in liability, it need not be especially burdensome, and thus need not significantly affect the "control" that the actor has over his life.[77]

III. THE DOCTRINE OF DOUBLE EFFECT

The last topic to be explored is Dworkin's attempt to make sense of the controversial doctrine of double effect ("DDE"). Under this deontological doctrine, *intentionally* causing harm (either as a means or as an end) is more difficult to justify than *knowingly* causing the same harm as a side effect of what one intends.[78] Consequentialists, of course, would not draw such a distinction, but would instead focus on whether the action taken minimized net harm, without regard to whether the actor intended the harm or merely knew

criticize any form of maximization.

Moreover, why does Dworkin focus here on "control"? Perhaps this is a result of his analysis of free will earlier in the book, *see id.* (manuscript at 137-60), or of his anti-subjugation principle, which I discuss in the next section. But it is unwise to employ an undifferentiated concept of "control" in all of these contexts. Distinct conceptions of "control" are actually at work.

[75] *Id.* (manuscript at 186-87).

[76] *Id.* (manuscript at 186).

[77] Kenneth W. Simons, *The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355, 1356 (2009). Similarly, the fact that almost all tort liability is insurable means that even a very expansive negligence or strict liability rule need not be a severe burden on actors.

[78] *See* DWORKIN, *supra* note 1 (manuscript at 187-88). In some versions of DDE, intentionally causing harm is categorically forbidden. *Id* (manuscript at 187).

that it would occur.[79]

Here are two of Dworkin's supposed illustrations of DDE:

(1) Liver transplant:

> (a)It is permissible for a doctor to save one of two patients who each need a liver, when only one liver is available, even though he knows that the other patient will thereby die; but
>
> (b)It is not permissible for a doctor to kill an elderly patient who will die of his illness in a few weeks, for the purpose of extracting his liver to save another patient, one with a much greater life expectancy, who will otherwise die.[80]

(2) Trolley:

> (a) It is permissible to turn a runaway trolley headed towards five people who lie immobilized on the track, even though the actor knows that by turning the trolley onto a spur, he will cause the death of one person who lies immobilized on the spur; but
>
> (b) It is not permissible, if no spur exists, to throw onto the track a large stranger who is fortuitously passing by and whose bulk suffices to stop the trolley from killing the five.[81]

After pointing out that deontologists have not had an easy time justifying DDE,[82] Dworkin asserts that his principles of dignity both explain these illustrations and offer a persuasive justification for DDE. Alas, neither assertion is convincing.

According to Dworkin, his second principle of dignity forbids one person from imposing a decision on another person about how that other person's life, person, or property should be put to the service of others.[83] If you divert the trolley onto the spur and cause the death of one rather than five, he says, you do not "impose a decision" in that impermissible way; but if you push the fat

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[79] *See* JORAM GRAF HABER, ABSOLUTISM AND ITS CONSEQUENTIALIST CRITICS 10 (1994) ("[C]onsequentialists hardly think kindly of the D.D.E. convinced as they are that consequences alone determine right conduct.").

[80] DWORKIN, *supra* note 1 (manuscript at 187-88).

[81] *Id.* (manuscript at 188-91). The trolley problem was introduced by Philippa Foot. *See* PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, *in* VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 23-31 (Oxford Univ. Press 2002) (1978). Judith Jarvis Thomson made the problem famous. *See* Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395-415 (1985).

[82] DWORKIN, *supra* note 1 (manuscript at 189) ("[Some] philosophers say that it is always wrong to aim at someone's death no matter what the gain. That explains our reactions to the transplant and trolley examples, they say . . . . 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?").

[83] *See id.* (manuscript at 133-34).

man into the path of the trolley so that his body serves as a brake, you improperly "impose a decision" on him.[84]

But this anti-usurpation argument fails, both descriptively and normatively. Although some private interpersonal moral duties not to interfere with another's rights do rest on the other's right to make an autonomous decision,[85] the type of cases we are considering are not within this category. In both trolley scenarios, the actor ignores the victim's likely (or even expressed) wishes. Thus, suppose the actor can reach the person on the spur by cell phone; it is doubtful that turning the trolley is permissible only if that person verbally consents. What distinguishes the two trolley cases is not any difference in whether the actor imposed his decision on an unwilling victim, but instead differences in the actor's causal responsibility for the harm, or in the nature of his commitment to harming or involving the victim.[86]

At several points, Dworkin does hint at such deeper differences. For example, he frames the question as whether the actor imposed a decision "about whether and how [the victim's] life should be put *at the service of others*."[87] In another instructive passage, Dworkin states:

> Of course you are not entitled to take even small risks with my children's lives for the thrill of it. But you are entitled to drive with normal care in my street even though this measurably increases the risk of harm to them. The difference explains much else: warring nations may be entitled to bomb enemy munitions factories knowing that innocent civilians will be blown apart. My children playing in the street and civilians living near enemy factories are in the wrong place at the wrong time; they suffer bad luck if they are harmed but *no one has judged that it is desirable that they should suffer it*.[88]

But in both of these passages, Dworkin's language merely restates, rather than solves, the problem of how to justify DDE. The first passage hints that using someone as a means is what is especially troubling. The second hints that intention to harm is the morally relevant feature. Each passage reinforces the point that the anti-usurpation principle alone is not the operative principle.[89]

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[84] *See id.* (manuscript at 188-91).

[85] One example is a doctor's duty not to provide medical care to a patient unless she has the patient's consent. *Id.* (manuscript at 189).

[86] The person turning the trolley merely diverts the path of a threatening object; but the person pushing the fat man is committed to using or appropriating the victim's body as a mean to the end of saving the five. For two recent, valuable discussions that try to refine and more deeply justify this distinction, see F.M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 138-76 (2007); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 18-20 (2008).

[87] DWORKIN, *supra* note 1 (manuscript at 191) (emphasis added).

[88] *Id.* (manuscript at 189-90) (emphasis added).

[89] Dworkin at one point suggests that what is impermissible is relying on a justification

Dworkin does offer one other formulation that purports to distinguish the (permissible harm) "turning of the trolley" case from (impermissible harm) cases of true usurpation: "[W]hat is forbidden in all these cases [of impermissible usurpation] 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."[90] But this criterion also fails to explain the different outcomes. If "a judgment about how his body *should* be used"[91] means "an (impermissible) judgment that his body *must be* used as a means or end rather than side-effect," then this merely restates and does not justify DDE. However, if that phrase means "an (impermissible) judgment that the victim will not endorse about how his body will be used," the criterion fails to distinguish means and ends from side-effects at all, because in all of these scenarios, the injured victim might well object to the ultimate judgment that his welfare must be sacrificed for the sake of a larger good.

To be sure, Dworkin's legitimate concern to preserve autonomy, and specifically to preclude others from unjustifiably usurping a decision, has genuine traction in the context of political morality.[92] It is indeed especially troublesome when the government overrides the choices of its citizens, not just because the government thereby seeks to avoid harm to others or to provide social benefits, but because the government rejects on the merits the morally permissible choice that the citizen exercises. As Dworkin explains:

Even those who believe that pregnant women should have themselves

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that "suppose[s] my right to decide *what it is desirable should happen to you*." *Id.* (manuscript at 190) (emphasis added). But this broad criterion, too, is unpersuasive. Even in the scenario where the actor turns the trolley, this criterion is, in one sense, satisfied: we believe that the state of affairs in which the trolley is turned is a better state of affairs, from either a deontological or consequentialist perspective, than the state of affairs in which it is not turned. Yet this is not the same as deciding that it is desirable that the person on the spur should die or be harmed. And, on a narrower understanding of the criterion, even pushing the fat man does not satisfy it. The actor choosing that unfortunately necessary means to the end might greatly regret that he must use this harmful alternative. And again, it is not the case that the actor who pushes the victim has decided that the best use of the victim's *life* is to sacrifice him to save five. Rather, the actor has decided to use the victim's body, and presumably would be delighted if the victim survived.

Notice, finally, that the likelihood that harm will ensue is not the decisive consideration in deciding which of the courses of actions is morally permissible. Even if the fat man has only a 50% chance of dying, while the person on the spur in the diverted trolley scenario would have a 90% chance, using the fat man's body as a brake arguably is impermissible while diverting the trolley is not.

[90] *Id.* (manuscript at 189).

[91] *Id.*

[92] *See id.* It also has importance in the context of personal ethics. *See id.* (manuscript at 133) ("We cannot escape influence, but authenticity [the second principle of dignity] requires us to resist domination. The distinction is of great ethical importance: it is the difference between limitation and subordination.").

> tested so that a defective fetus might be saved by medical intervention would be horrified if such tests and intervention were mandatory. People have a right . . . that nothing be done to them that supposes that they are not the final judges of how their bodies should be used.[93]

But Dworkin is on treacherous ground when he takes this plausible duty of government not to usurp the decisions of its citizens and extrapolates it to the domain of interpersonal moral duty, the duty of one private person to another. The anti-usurpation principle is much less relevant in this domain, for two reasons. First, private persons rarely have power over the decisions of others that is remotely comparable to the power of government over its citizenry. And second, private individuals ordinarily have the liberty to act for a wide variety of reasons, including disagreement with the (morally permissible) views, lifestyles, or life projects of other private individuals. It is morally permissible for me to befriend only those who share my political views, or to shun starving artists or wealthy hedge-fund traders, but it is certainly not legitimate for the government to rely on such criteria in deciding who may use or speak in a public park.

Another problem arises with Dworkin's use of the second illustration. The trolley problem is not clearly an illustration of DDE at all. It is not the case that an actor who pushes or throws someone in the path of the trolley in order to stop its motion must intend to cause death, or even harm, to the involuntary human brake. If the victim happens to be wearing indestructible garb that protects him from any physical harm, that would hardly set back the actor's plans (so long as the victim's body will still stop the train). Thus, it is not the case that the actor must have intended to harm the victim.[94] In passing, Dworkin implicitly recognizes this notorious problem with individuating intentions. For example, he describes the "thrown bystander" variation as a case in which "you throw one person onto the single track *intending that he be struck*";[95] Dworkin does not say, "intending that he die or be injured." And in another scenario, in which an actor shoots another in order to obtain a needed medicine, Dworkin acknowledges that what is really necessary to achieve the actor's end is (merely) that the victim "be in some way immobilized,"[96] not that the victim be killed or physically harmed.[97]

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[93] *Id.* (manuscript at 189).

[94] Even in the liver transplant example, arguably the death of the elderly patient need not be intended. The doctor could anesthetize the patient, remove his liver, and then hope against hope that the patient miraculously survives. But many deontologists would concede that in this type of case, what the doctor does intend to do (remove a liver from a patient who needs it to survive) is "close enough" to intending the patient's death that it should be so considered for purposes of DDE.

[95] *Id.* (manuscript at 188) (emphasis added).

[96] *Id.* (manuscript at 189).

[97] Dworkin pairs this example of an impermissible harming with an example of a permissible harming that results in the same consequence, the death of the other. Dworkin

Consider one final argument that Dworkin offers for the anti-usurpation approach. If we switch from an ex post to an ex ante perspective on the liver transplant problem, we could imagine that a group of individuals agree in advance to a utilitarian "spare parts lottery": they agree to a later involuntary reallocation of human organs whenever this would produce a net saving of lives.[98] Why, Dworkin asks, is such an agreement still troubling and not enforceable?[99] The reason, he suggests, is that under the agreement you give others authority to make basic decisions about your life when the time comes for an organ transplant.[100] Indeed, Dworkin says, in this respect, enforcing the agreement is akin to enforcing an agreement in which you sell yourself into slavery.[101]

This argument, though initially attractive, is overstated. We do sometimes permit individuals to irrevocably give up their right to decide how their bodies may be used. If you sign up for the Army and later, before your tour is up, change your mind about exposing yourself to physical harm, you will suffer a significant legal sanction. Or if you agree to play professional football but later decide that the rewards no longer justify the risks of physical injury, you will suffer a financial burden for exercising that choice. Still, Dworkin is correct that a "spare parts lottery" agreement should not be enforced. But the better explanation for this result is not a broad anti-subjugation principle, but instead a narrower principle, that consent does not override all deontological rights and duties.

In sum, Dworkin's anti-usurpation principle, while it indeed flows from his second principle of dignity, does not help justify DDE or any plausible variant of DDE. (Nor does it justify the distinction between killing and letting die, despite Dworkin's assertion that it does.)[102] Whether the victim has been fully

supposes that the actor and the other both need the medicine to survive a rattlesnake bite, and the actor merely outruns the other and thus secures the medicine for himself, realizing, however, that this will cause the other to die. *See id.* (manuscript at 183). Note that in this example, as in the trolley and liver transplant examples, what is problematic is not that the actor improperly supposes that he is the final judge of how another's body or welfare should be used. In both cases, the actor decides to save himself knowing that this will be at the cost of the life of another. If the actor needing the medicine knows that he is very likely to outrace the other, his choice to race and secure the medicine for himself does not, in any meaningful sense, preserve the other actor's right to decide for himself whether his life will be lost.

[98] *See id.* (manuscript at 188-89).

[99] *Id.* (manuscript at 189).

[100] *Id.* (manuscript at 191).

[101] *Id.*

[102] Dworkin asserts that the distinctions between killing and letting die, and between deliberate harm and the harm that occurs as a result of legitimate competition, also are explained by the anti-usurpation principle. *Id.* (manuscript at 183-86). Referring to the rattlesnake bite scenario noted earlier, *see supra* note 97, Dworkin claims that there is an important moral difference between killing someone to obtain a needed medicine and

consulted, and whether the actor has made a decision that overrides the victim's judgment, are sometimes relevant, even decisive, considerations in political morality. But only rarely are they prominent features of the topography of interpersonal moral duties.

CONCLUSION

Dworkin plausibly rejects consequentialist accounts of interpersonal moral duties. But the principles of dignity that he offers instead are an inadequate alternative account. His general analysis of the duty to rescue justifies an unduly weak duty. Although Dworkin would enlarge that duty when the victim is identifiable or proximate, his argument for that enlargement is itself insufficient. Dworkin's analysis of the duty not to create an unreasonable risk of harm encounters similar problems. By emphasizing the subjective importance of the actor's personal projects, he does not adequately constrain the actor's risky conduct, and he implausibly frames the question of permissible risk-imposition as a question of what liability rule will "maximize the control" of actors and victims. Finally, in his analysis of the deontological doctrine of double effect, Dworkin invokes an anti-usurpation principle that protects autonomous decision-making. But this principle fails to explain and justify the distinction between intending harm as a means or an end, and knowingly causing harm as a side effect of what one intends.

Dworkin's "interpretive" account[103] of interpersonal moral duties is

competing in a race for the medicine with that person:

> But any general transfer of control over the integrity of my body, particularly to those who do not have my interests at heart, would leave my dignity in shreds. Only when we recognize that connection between dignity and bodily control can we understand why killing someone is intuitively horrifying when letting him die, even out of the same motive as we might have for killing him, is not.

Id. (manuscript at 185).

This argument flounders in ways that we have already encountered. Usurpation or control is not the morally relevant difference in these cases. Note, first, that the wrongfulness of killing someone (as opposed to letting someone die) often has nothing to do with the victim's lack of conscious control. A bomb can kill instantly, and thus not affect the victim's ability to control his fate; a failure to save a victim from drowning can result in the victim helplessly flailing in the water for a considerable period of time, and thus measurably compromise his control over his fate. Moreover, a particular killing method could permit the victim some degree of control, and yet the method could thereby be more, not less, horrifying and morally blameworthy. Thus, suppose murderer Marv places you into a contraption that permits you the choice of killing yourself sooner or dying more slowly and painfully. Murderer Max simply kills you suddenly. It is not obvious that Max, by taking away your control, is more blameworthy, but that is what Dworkin's analysis suggests.

[103] Dworkin purports to address the problems with a consequentialist account of interpersonal moral duties within his comprehensive "interpretive" perspective. *Id.* (manuscript at 79-119). I have not addressed his interpretive strategy in this Comment. However, I believe that that perspective is much more suitable to understanding legal

inadequate, but I do not suggest that it is without value. His analysis provides numerous inventive examples that powerfully illuminate the difference between consequentialist and nonconsequentialist explanations. Moreover, many of his arguments are plausible components of a nonconsequentialist account – for example, his emphasis on whether a liberty (or harm) implicates the personal plans or projects of the actor (or victim), and his attention to autonomy and subordination. However, some of the most difficult issues, especially the question of how to justify attention to consequences within a largely deontological or nonconsequentialist perspective, are more convincingly analyzed by other moral and legal philosophers.[104]

practice, *see* RONALD DWORKIN, LAW'S EMPIRE 45-86 (1986), than to solving the problems of metaethics, reconciling free will and responsibility, or justifying moral duties.

[104] *See* KAMM, *supra* note 86, at 91-224; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149-294 (1974); SCANLON, *supra* note 86, at 89-121; Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 893-912 (2000); Michael S. Moore, *Patrolling the Borders of Consequentialist Justifications: The Scope of Agent-Relative Obligations*, 27 L. & PHIL. 35, 35-96 (2007); Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3, 3-39 (1982). *See generally* Larry Alexander & Michael Moore, *Deontological Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2008), http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological (discussing the relationship between deontological and consequentialist norms).