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James E. Fleming

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## TAKING RESPONSIBILITIES AS WELL AS RIGHTS SERIOUSLY

JAMES E. FLEMING\*

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### INTRODUCTION

In his first book, Ronald Dworkin famously called for “taking rights seriously” by treating them as “trumps” over considerations of utility or the general welfare.<sup>1</sup> *Taking Rights Seriously* (along with other works) provoked calls for taking responsibilities as well as (or instead of) rights seriously, or for engaging in “responsibility talk,” not just “rights talk.”<sup>2</sup> In *Life’s Dominion*, Dworkin himself got on the responsibility bandwagon in justifying the right to procreative autonomy and the right to die.<sup>3</sup> He countenanced that government may encourage women to take the decision whether to have an abortion

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<sup>1</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xv, 269 (1977).

<sup>2</sup> See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 76-108 (1991); Robin West, *The Supreme Court, 1989 Term – Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 46 (1990).

<sup>3</sup> RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 18-19, 213 (1993) [hereinafter *DWORKIN, LIFE’S DOMINION*].

responsibly, so long as it does not compel conformity with its view of the responsible decision.<sup>4</sup>

In *Justice for Hedgehogs*, Dworkin reiterates the call for taking rights seriously and for conceiving rights as “trumps.”<sup>5</sup> And he continues to engage in responsibility talk, for he argues that government must respect individuals’ personal responsibility for their own lives.<sup>6</sup> Yet he is largely silent concerning the form of responsibility talk evident in *Life’s Dominion*, namely, allowing government latitude for moralizing: encouraging people to exercise their rights responsibly, short of compelling them to do what the government thinks is the responsible thing to do. In this Essay, I will explore the extent to which, and the ways in which, we should take responsibilities as well as rights seriously.<sup>7</sup>

I do not suggest that Dworkin has abandoned such responsibility talk in *Justice for Hedgehogs*. I will, however, make the friendly suggestion that he make it clearer and more prominent in the pages of *Justice for Hedgehogs* that he still stands by the arguments he set forth in *Life’s Dominion*. Put another way, I would observe that in *Justice for Hedgehogs*, Dworkin writes, “I ask readers to treat [his two books, *Sovereign Virtue*<sup>8</sup> and *Is Democracy Possible Here?*<sup>9</sup>] as incorporated into this one by reference.”<sup>10</sup> I urge him likewise to incorporate the arguments of *Life’s Dominion* into *Justice for Hedgehogs*.

## I. A CRITIQUE OF DWORKIN’S MORALIZED LIBERALISM

### A. Dworkin’s Place in the Project of “Moralizing” Liberalism

In *Life’s Dominion*, Dworkin propounds a notably “moralized” liberalism, making moral arguments for the right to procreative autonomy and the right to die while defending the authority of government to moralize concerning persons’ exercise of these rights. In a passage that encapsulates this moralized liberalism, he writes that America’s political heritage is characterized by “two

<sup>4</sup> See *id.* at 151.

<sup>5</sup> RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2010) (Apr. 17, 2009 manuscript at 209, on file with the Boston University Law Review).

<sup>6</sup> *Id.* In his article for this symposium, John Goldberg analyzes Dworkin’s arguments concerning personal responsibility. See John C.P. Goldberg, *Liberal Responsibility: A Comment on Justice for Hedgehogs*, 90 B.U. L. REV. 677, 677 (2010) (“I . . . assess one of [Dworkin’s] central claims: namely, that a case for liberalism can be built around the idea that each person bears a responsibility to live her life well.”).

<sup>7</sup> This Essay is part of a larger book project I am working on with Linda C. McClain. JAMES E. FLEMING & LINDA C. MCCLAIN, *RIGHTS, RESPONSIBILITIES, AND VIRTUE* (forthcoming 2011).

<sup>8</sup> RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000) [hereinafter DWORKIN, *SOVEREIGN VIRTUE*].

<sup>9</sup> RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006).

<sup>10</sup> DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5 (manuscript at 208).

sometimes competing traditions”: “The first is the tradition of personal freedom. The second assigns government responsibility for guarding the public moral space in which all citizens live.”<sup>11</sup> Dworkin continues: “A good part of constitutional law consists in reconciling these two ideas.”<sup>12</sup> And he asks: “What is the appropriate balance in the case of abortion?”<sup>13</sup>

This passage may have surprised many readers, both critics and allies, for two basic reasons. First, critics who associate liberals like Dworkin with exaltation of the tradition of personal freedom may be heartened that he acknowledges the legitimacy of the tradition that assigns government responsibility for guarding the public moral space. And allies who celebrate personal freedom may be alarmed that Dworkin sanctions governmental protection of the moral environment. For example, T.M. Scanlon, a friendly liberal ally, conceded that liberals including Dworkin have not talked very much about the latter tradition or about government promoting respect for intrinsic values like the sanctity of life.<sup>14</sup>

Second, critics and allies commonly associate Dworkin with the notion of “rights as trumps” and thus with the idea that “taking rights seriously” practically precludes reconciling rights with, or balancing rights against, governmental concern for the moral environment.<sup>15</sup> Indeed, some readers might have expected a book by Dworkin on the right of procreative autonomy and the right to die to defend these rights solely on the basis of an argument about personal freedom. And they might have expected Dworkin to argue that these rights trump the very concerns regarding the moral environment that he here acknowledges as part of our political heritage and constitutional law. Such critics and allies certainly would not have expected to hear Dworkin talking about “reconciling” personal freedom with governmental protection of the moral environment, nor would they have expected to see him asking where the appropriate “balance” lies between these two concerns.

Dworkin’s recognition of the place of this second tradition in the American political heritage is significant. Both as a matter of fit with our constitutional precedents and practice and as a matter of a plausible conception of government’s proper authority, Dworkin is right to recognize that there are legitimate channels through which government may seek to promote the moral environment, such as through civics education, the inculcation of moral and political values, and the like. At the same time, however, there is no denying

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<sup>11</sup> DWORKIN, *LIFE’S DOMINION*, *supra* note 3, at 150.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See T.M. Scanlon, *Partisan for Life*, N.Y. REV. BOOKS, July 15, 1993, at 45, 46 (reviewing DWORKIN, *LIFE’S DOMINION*, *supra* note 3).

<sup>15</sup> See, e.g., West, *supra* note 2, at 46-47 (criticizing Dworkin’s “liberal legalist” strategy of “taking rights seriously” and proposing instead a “responsibility-based liberalism” that would “take seriously not only the individual’s demand for rights but also the burdens of his responsibility”).

that this tradition has been invoked to justify appalling deprivations of freedom and equality, for example censorship of great works of literature and prohibition of interracial marriage.<sup>16</sup> For this reason, it is understandable that many liberals have sought to deny, avoid, or eradicate this tradition. Yet Dworkin is right to see that the risks of this tradition do not justify rejecting it entirely. Instead, he attempts to work with, and to work within, this tradition and to make it safe for liberals and for fundamental principles of freedom and equality.

That is not to say that liberals should now go all the way to become perfectionists who propose to wield state power to sculpt perfect liberal citizens with morally excellent liberal virtues. It is to say, short of that, that liberals need to thicken up their moral arguments and provide a space within which there can be discussion of inculcating liberal virtues and undertaking a formative project of cultivating in citizens capacities and attitudes appropriate for a liberal political and constitutional order.<sup>17</sup> Dworkin's *Life's Dominion*, and in particular its analysis of governmental protection of the moral environment, fits within this larger liberal project of "moralizing" liberalism. In this paper, I do not take a position concerning whether Dworkin goes far enough (or too far) in this larger project.

Yet Dworkin's *Justice for Hedgehogs* seems to leave this project to one side and therefore does not carry it forward (which is not to say that the new book rejects this project or takes back anything said in *Life's Dominion*). In one passage concerning restricting liberty, Dworkin asks: "Why should [the majority] not be permitted to protect the religious and sexual culture it favors . . . ?"<sup>18</sup> He answers:

The argument of this book is necessary to provide a decent answer. It requires us to explain the distinctions and interconnections among responsibility, authenticity, influence and subordination. The second principle of dignity, whose right to ethical independence we assume, means that just as we should live our lives in circumstances that flow

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<sup>16</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (describing one of the appellate court's rationales for upholding Virginia's miscegenation statute as "preserving the racial integrity of its citizens" (citation omitted)).

<sup>17</sup> See, e.g., STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 5-6 (2000); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 5 (1990); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 4 (2006); Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1627 (2001); Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond 'Empty' Toleration to Toleration as Respect*, 59 *OHIO ST. L.J.* 19, 19 (1998) [hereinafter McClain, *Toleration as Respect*]; Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 *CORNELL L. REV.* 1221, 1225 (2000); see also Abner S. Greene, *Government of the Good*, 53 *VAND. L. REV.* 1, 2 (2000).

<sup>18</sup> DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5 (manuscript at 233).

from a fair distribution of economic resource[s], so we must face those lives in the cultural environment with the cultural resources that flow from the individual decisions of unsubordinated people.<sup>19</sup>

There clearly will be limits on government's protection of the moral and cultural environment.

Dworkin's arguments for rights in both *Life's Dominion* and *Justice for Hedgehogs* are grounded, not in neutrality or in autonomy, but in a deontology of state conduct (if Dworkin will forgive the expression). In other words, Dworkin advances a theory that derives from a conception of the permissible bases for governmental decisions.<sup>20</sup> His concern is with respecting limits on the grounds for governmental decision and with avoiding governmental coercion concerning questions such as how best to respect the sanctity of life.<sup>21</sup> More generally, Dworkin's theory is one that limits the grounds upon which a state may restrict or regulate our basic liberties. Dworkin has specifically denied that he is articulating a theory of rights that asks what our fundamental or especially important interests are and what freedoms are necessary to secure or further those interests.<sup>22</sup> For example, despite Dworkin's justification for a right of procreative autonomy, his theory differs in important respects from a theory of autonomy rooted in a conception of the person and what is necessary for the development and exercise of moral powers, or the like. In this respect, his theory differs from the Rawlsian theory of deliberative autonomy that I have propounded in *Securing Constitutional Democracy: The Case of Autonomy*.<sup>23</sup>

This feature of Dworkin's theory in part accounts for why he contemplates a relatively large space (compared to most liberals) for governmental moralizing. In his view, there is a large space between complete, hands-off noninterference with liberty, individuality, autonomy, or choice (of the sort strong autonomy or individuality theorists advocate) and coercion. Furthermore, government need not, and should not, be neutral in that large space. It may moralize, encourage responsibility, and the like, so long as it does not coerce the ultimate decision.<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> DWORKIN, *LIFE'S DOMINION*, *supra* note 3, at 151.

<sup>21</sup> *Id.*

<sup>22</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* 65-66 (1985); DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at 272-73.

<sup>23</sup> JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 61-85 (2006); *see also* JOHN RAWLS, *POLITICAL LIBERALISM* 15-20, 29-35, 299-304 (1993).

<sup>24</sup> *See* McClain, *Toleration as Respect*, *supra* note 17, at 91-100.

B. *The Responsibility Critique: Taking Responsibilities as Well as Rights Seriously*

1. The Critique and Dworkin's Response

Next, I shall take up the responsibility critique of liberal political and constitutional theories like that of Dworkin. As I stated at the outset, Dworkin is famous for propounding the notion of "taking rights seriously" and of "rights as trumps,"<sup>25</sup> beginning in *Taking Rights Seriously* and continuing through *Justice for Hedgehogs*. On this view, constitutional rights, though not absolute, generally prevail over the majority's conception of the common good or the general welfare. In response, a number of calls for taking responsibilities as well as (or instead of) rights seriously have emerged in recent years. Indeed, both conservative legal scholars like Mary Ann Glendon and progressive legal scholars like Robin West who have called for "taking responsibilities seriously" have used Dworkin as a liberal whipping boy in arguing that taking rights seriously has denigrated or even excluded concern for responsibilities. Dworkin's call for taking rights seriously is Exhibit A in Glendon's indictment of the American legal culture for becoming a regime in which "rights talk" has driven out "responsibility talk" and has impoverished our political and legal discourse.<sup>26</sup> It also plays a large role in West's argument that liberals and progressives must learn to "take freedom seriously" by taking responsibilities as well as rights seriously.<sup>27</sup>

Here I shall focus on two charges that Glendon and West make against Dworkin. First, they charge that his notion of taking rights seriously excludes taking responsibilities seriously and, in particular, precludes governmental promotion of the moral environment. Second, they charge that on his conception of rights as trumps, rights to privacy or autonomy require that the right-holder be insulated from moral scrutiny, persuasion, or exhortation by the government.

Against this backdrop, it is striking that in *Life's Dominion* Dworkin answers the calls to take responsibilities as well as rights seriously, that is, to some extent he engages in responsibility talk in justifying the right to procreative autonomy and the right to die. Reading Glendon and West, one would imagine that Dworkin would develop a liberal autonomy argument that simply, abstractly, and absolutely entails that there is a right to abortion and euthanasia with which government may not interfere. On their accounts of Dworkin, one would expect him to argue that the rights to abortion and euthanasia are rights to be "insulated" from governmental attempts to persuade people to exercise their rights responsibly and to encourage them to reflect conscientiously about respect for the intrinsic value of the sanctity of life.<sup>28</sup>

<sup>25</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 1, at xv, 269.

<sup>26</sup> GLENDON, *supra* note 2, at 40.

<sup>27</sup> West, *supra* note 2, at 46.

<sup>28</sup> *Id.* at 81-82.

One would expect Dworkin to advance a strong autonomy argument, even a right of the “lone rights bearer” to be let alone.<sup>29</sup>

Dworkin’s argument defies such expectations in a way that might worry full-throated liberal autonomy theorists, not to mention liberal neutrality theorists. I have already shown that the first charge – that Dworkin’s theory precludes governmental protection of the moral environment – is mistaken. Next, I will show that the second charge – that Dworkin’s arguments for the rights of procreative autonomy and the right to die entail a right to be insulated from governmental persuasion or exhortation – is also erroneous. Dworkin argues that the rights to abortion and euthanasia do not preclude government from pursuing the goal of responsibility: encouraging people to exercise these rights responsibly by “treat[ing] decisions about abortion [and euthanasia] as matters of moral importance.”<sup>30</sup> That is, while state governments “have no power to impose on their citizens a particular view of how and why life is sacred,” they “do have the power to encourage their citizens to treat the question of abortion [and euthanasia] seriously.”<sup>31</sup>

But Dworkin is at pains to insist upon the distinction between, on the one hand, government *encouraging responsibility* and on the other, government *coercing conformity* with the majority’s conception of the responsible decision: in short, the distinction between responsibility and coercion.<sup>32</sup> And he is equally at pains to maintain that, even if the rights to abortion and euthanasia are not rights of persons “to be insulated from all others” in making their decisions, it is their right to make the “ultimate decision.”<sup>33</sup> Here, it is notable that Dworkin hews closely to the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which I will discuss later in this paper.<sup>34</sup>

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<sup>29</sup> GLENDON, *supra* note 2, at 47-66.

<sup>30</sup> DWORKIN, *LIFE’S DOMINION*, *supra* note 3, at 150.

<sup>31</sup> *Id.* at 153.

<sup>32</sup> *Id.* at 150-59.

<sup>33</sup> *Id.* at 153 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (joint opinion of O’Connor, Kennedy, Souter, JJ.)).

<sup>34</sup> In *Justice for Hedgehogs*, Dworkin still contemplates that even if a person has a right to do something, for example, have an abortion, that does not necessarily mean that the person is to be insulated from what I am calling governmental moralizing short of government’s compelling the ultimate decision. He writes:

But even if we accept that negative answer to the moral question, and hold that a mother has no moral duty not to abort the fetus she carries, critical ethical issues remain. For it remains a vivid possibility that abortion is nevertheless inconsistent with the respect for human life on which our dignity depends. . . . That is why it is crucial, in discussing abortion and related issues, to take care to distinguish the moral from the ethical issues in play.

DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5 (manuscript at 236-37). He continues:

Liberty – the right of ethical independence – . . . is violated and liberty denied when government restricts freedom in order to enforce a collective ethical judgment: a collective ethical judgment, in this instance, that a woman who aborts an early pregnancy does not show the respect for human life that her dignity demands. I myself



Therefore, it is likely that even if Dworkin goes so far as to disconcert some liberal autonomy or neutrality theorists – the folks who would deeply resent any governmental moralizing about responsible exercise of rights – he does not go far enough to satisfy conservative proponents of taking responsibilities seriously, such as Glendon. In the areas of abortion and euthanasia, conservatives want more than encouraging deliberation and responsible decision making; they want to be sure that people make the decision they (or, they might say, the majority) think is the responsible decision. Truth be told, conservative proponents of responsibility like Glendon by and large support coercing conformity with what they believe is the responsible decision (at least with respect to abortion and euthanasia). That is, in Dworkin's terms, Glendon advocates responsibility as conformity or coercion.

Glendon might counter by charging that Dworkin, in talking about responsibility, has done little more than co-opt the language of responsibility in service of a liberal theory of autonomy. She certainly would argue that his talk in *Justice for Hedgehogs* of individual responsibility for one's own life is nothing more than the right to personal autonomy. Put another way, she might argue that encouraging responsibility as Dworkin conceives it is a sham, just another word for encouraging autonomy – which itself was misguided and deeply mistaken to begin with, and which is no more justified when dressed up in the garb of responsibility. There is indeed a nice irony here: Dworkin, in distinguishing between responsibility and coercion, is saying that government is not promoting responsibility unless it respects the right of the individual ultimately to decide for herself or himself. This is what Linda McClain has called a conception of *responsibility as autonomy*.<sup>35</sup> And it is a right and a conception that Glendon would see as licensing irresponsibility, in contrast with Glendon's view, which McClain has called a notion of *responsibility as accountability*.<sup>36</sup>

By contrast, progressive proponents of responsibility like West have been heartened by Dworkin's proposal to take responsibilities seriously in the

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believe that to be the correct ethical judgment in many cases. A woman acts inconsistently with her own dignity when she aborts for frivolous reasons: to avoid rescheduling a holiday, for instance. A different ethical judgment is in my view appropriate in other cases: when a teen-aged woman's prospects for a decent life would be ruined by becoming a single mother, for example. But whether the judgment is right or wrong in any particular case, it remains an ethical not a moral judgment. That judgment must be made, in a society that respects individual dignity, by people who take responsibility for their own ethical convictions.

*Id.* (manuscript at 237) (footnote omitted).

<sup>35</sup> Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1077-87 (1994).

<sup>36</sup> *Id.* at 1077-82.

exercise of rights cherished by liberals.<sup>37</sup> The same can be said for some proponents of a moralized liberalism.<sup>38</sup>

Now, before I ask whether Dworkin's program for taking responsibilities as well as rights seriously is sound, I should ask whether it is consistent with the rest of his work. For example, is the latitude Dworkin allows government to moralize and encourage responsibility consistent with statements in his other works that government cannot improve persons' lives against the grain of their convictions that it is not doing so? Is it consistent with Dworkin's repeated statements in *Justice for Hedgehogs* that government must respect individuals' responsibility for their own lives, even though protecting one person's ethical independence may impose costs on others?<sup>39</sup>

I believe it is, because while Dworkin leaves room for governmental moralizing, he protects persons' rights to make the ultimate decision. Again, Dworkin distinguishes between encouraging responsibility and coercing conformity. This puts in relief an important feature of Dworkin's political philosophy and constitutional theory that has been present in his work from the beginning but which perhaps has been underappreciated: namely that his theory of taking rights seriously rests upon a theory about the permissible grounds for governmental decisions, not upon a fundamental interest theory of rights (for example, what rights are necessary to enable persons to develop and exercise their autonomy). Therefore, when Dworkin castigates the government for being tyrannical or oppressive, he is objecting to the government ramming down people's throats conceptions of the good or of the intrinsic value of the sanctity of life – or to the government coercing people's beliefs or actions regarding such conceptions. He is not objecting to governmental moralizing short of coercion on these grounds.

## 2. The Difficulties with Dworkin's Responsibility Arguments

Dworkin's argument for the right to procreative autonomy and the right to die – which takes responsibilities as well as rights seriously – satisfactorily responds to Glendon's responsibility critique. Yet it leads to difficulties of line-drawing in the interpretation and enforcement of these rights, in particular, the right to abortion. First, it may be difficult to maintain the distinction between encouraging responsibility and coercing conformity, especially in the hands of predominantly conservative courts. For example, Dworkin applauds the *Casey* joint opinion for recognizing and insisting upon this distinction.<sup>40</sup>

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<sup>37</sup> See, e.g., Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 *FORDHAM L. REV.* 1313, 1313 (1997).

<sup>38</sup> See, e.g., McClain, *Toleration as Respect*, *supra* note 17, at 91-100.

<sup>39</sup> DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5 (manuscript at 232) (“Government must not abridge total freedom when its putative justification relies on some collective decision about what makes a life good or well-lived. We must each make that decision for himself: that is the core of our ethical responsibility.”).

<sup>40</sup> DWORKIN, *LIFE'S DOMINION*, *supra* note 3, at 153.

Yet the joint opinion upheld the twenty-four hour waiting period as not constituting an undue burden on the right to abortion.<sup>41</sup> Dworkin criticizes the joint opinion for doing so.<sup>42</sup> He argues that such a waiting period does pose a significant obstacle to a pregnant woman's exercise of her right, and further, that it is not likely to enhance responsible, reflective decision making.<sup>43</sup> In *Casey*, Justice Stevens uses stronger language (language that sounds like it comes straight out of Dworkin): the waiting period insults a pregnant woman's equal respect and dignity by implying that she has not already reflected upon the decision.<sup>44</sup>

Furthermore, Dworkin at one point evidently conceded that the state not only may encourage responsibility about the decision, but also may express a collective view about the responsible decision, namely, that a pregnant woman should not have an abortion.<sup>45</sup> Yet in *Life's Dominion*, Dworkin evidently stops short of making that concession (as he does also in *Justice for Hedgehogs*<sup>46</sup>). In *Casey*, Justice Stevens, who advocates a conception of autonomy that otherwise seems quite similar to Dworkin's, concludes that the state may not go that far: he argues that a state may not "inject into a woman's most personal deliberations its own views of what is best."<sup>47</sup> So there may be difficulties, even among like-minded autonomy theorists, in drawing this line in the interpretation and enforcement of rights.

The abortion funding cases illustrate further difficulties of line-drawing. If Dworkin sides with the authors of the *Casey* joint opinion in concluding that the state may moralize by encouraging responsibility, he emphatically does not side with them with respect to *Harris v. McRae*, the grandfather (or grandmother) of all of the cases holding that the government may encourage women not to exercise their right to an abortion, but instead to carry their fetuses to term because it deems doing so to be in the public interest.<sup>48</sup> *Harris* held that the government, by funding childbirth but not abortion for indigent women, could encourage women to undergo childbirth rather than exercising

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<sup>41</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885-87 (1992) (joint opinion of O'Connor, Kennedy, Souter, JJ.).

<sup>42</sup> DWORKIN, *LIFE'S DOMINION*, *supra* note 3, at 153, 174.

<sup>43</sup> *Id.* at 174.

<sup>44</sup> *Casey*, 505 U.S. at 918-19 (Stevens, J., concurring in part and dissenting in part) ("The mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women.").

<sup>45</sup> Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 409-10 (1992) [hereinafter Dworkin, *Unenumerated Rights*], reprinted in RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 72, 96-97 (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*].

<sup>46</sup> DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 5 (manuscript at 237).

<sup>47</sup> *Casey*, 505 U.S. at 916. Justice Stevens quotes Dworkin's work. *Id.* at 913 (citing Dworkin, *Unenumerated Rights*, *supra* note 45, at 400-01).

<sup>48</sup> *Harris v. McRae*, 448 U.S. 297, 325 (1980).

their right to have an abortion.<sup>49</sup> The four dissenters in *Harris* argued that such encouragement was tantamount to coercion.<sup>50</sup> Dworkin agrees with the dissenters and argues that it is time, after *Casey*, to reexamine *Harris*.<sup>51</sup> But it is absolutely clear that Dworkin would draw the line in *Harris* differently than the *Casey* joint opinion. That is, just as the authors of the joint opinion did not conclude that the twenty-four hour waiting period constituted an undue burden, they would not conclude that funding childbirth but not abortion crosses the line from encouragement to coercion.

More generally, we should not be surprised to find conservative Justices concluding that governmental moralizing does not go too far, either because they are dubious about arguments, like those by the dissenters in *Harris*, that governmental encouragement amounts to coercion or because they ultimately believe that government may encourage “responsibility” by coercing conformity to the majority’s view of the responsible decision. Furthermore, we should not be surprised if conservative Justices are dubious about the very idea of responsibility as autonomy (as distinguished from responsibility as accountability), just as they are dubious about rights of autonomy to begin with.

Dworkin of all people should be wary of an “undue burden” standard for determining whether the government has infringed basic liberties by posing significant obstacles that amount to coercion. If anything should provoke him to get up on his high horse about taking rights seriously, it should be an “undue burden” test. Because it is analogous to a “balancing” test, an “undue burden” test would seem to be anathema to Dworkin where constitutional rights are in play. We might expect him to worry that an “undue burden” test will not sufficiently protect rights, particularly autonomy rights. For majorities are especially likely to undervalue politically controversial autonomy rights or to view them as licentious, unruly, or indeed irresponsible.

Again, even if Dworkin understandably were carried along by the powerful and attractive language of the *Casey* joint opinion, he should have been made wary by the fact that the joint opinion, applying the “undue burden” standard, did uphold the twenty-four hour waiting period and therefore did implicitly reaffirm *Harris*. And so, when all is said and done, Dworkin does a masterful job of attempting to “take responsibilities as well as rights seriously,” but once he gets into the potential quagmire of the “undue burden” standard, he may want to get out and call for “taking rights seriously.” I say this partly because of his general jurisprudential wariness of balancing tests (the one thing

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<sup>49</sup> *Id.* at 314.

<sup>50</sup> *Id.* at 330 (Brennan, J., dissenting); *id.* at 347 (Marshall, J., dissenting); *id.* at 348-49 (Blackmun, J., dissenting); *id.* at 354 (Stevens, J., dissenting).

<sup>51</sup> DWORKIN, *LIFE’S DOMINION*, *supra* note 3, at 175-76.

Dworkin has in common with Justice Scalia<sup>52</sup>) and partly because of the way the cases will come out where conservative Justices apply the standard and draw the lines. In short, for someone like Dworkin, there is nothing like an “undue burden” standard to bring out a longing for rights as trumps.

Furthermore, Dworkin’s argument may open the door to governmental moralizing and across-the-board encouragement of responsibility with respect to rights; responsibility may prove to be an idea that is not easily cabined.<sup>53</sup> We should step back and assess the breadth of Dworkin’s endorsement of governmental efforts to encourage responsibility in the exercise of rights. And we should ask what types of governmental efforts to encourage such responsibility are consistent with *Justice for Hedgehogs*. To begin, I observe that while Dworkin has undertaken responsibility talk with respect to abortion and euthanasia, he emphatically has not done so with respect to freedom of speech. Why not? Are there differences in principle between abortion and euthanasia, on the one hand, and freedom of speech, on the other? Dworkin may claim that he has made clear that he is limiting his analysis of responsibility to abortion and euthanasia. But can he successfully limit the domain of responsibility? Or does he open the door, for example, to a conservative moralism or a liberal perfectionism that is deeply offensive to liberalism and deeply at odds with protecting the basic liberties secured through our constitutional law?

Let us consider a few illustrations. Recall *Whitney v. California*, where Justice Sanford’s opinion for the Supreme Court states that freedom of speech does not confer a right to speak “without responsibility,” for that would be an “unbridled license” or an “abuse” of freedom.<sup>54</sup> Recall also that after the Oklahoma City bombing, President Clinton urged right-wing mongers of hatred toward the federal government to exercise their rights to free expression responsibly.<sup>55</sup> There are affinities between these examples and calls by progressives and some liberals to regulate pornography and hate speech or more generally harmful expression or offensive expression. We can generalize and see these calls as versions of calls to exercise rights to freedom of expression responsibly, with concern for the common good and for the welfare of others or with concern for securing the status of free and equal citizenship for all.

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<sup>52</sup> For Justice Scalia’s critique of the “undue burden” standard and balancing, see, for example, *Casey*, 505 U.S. at 987-93 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>53</sup> Cf. ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 6 (1968) (“Once loosed, the idea of Equality is not easily cabined.”).

<sup>54</sup> *Whitney v. California*, 274 U.S. 357, 371 (1927).

<sup>55</sup> Todd S. Purdum, *Terror in Oklahoma: The President; Shifting Debate to the Political Climate, Clinton Condemns ‘Promoters of Paranoia,’* N.Y. TIMES, Apr. 25, 1995, at A19.

Tellingly, many of the conservative proponents of taking responsibility seriously in the areas of abortion and euthanasia do not call for responsibility with respect to freedom of speech. Instead, they decry these calls for responsibility as calls for “politically correct speech,” as thought control, group rights, and the like. Similarly, liberals like Dworkin have rejected progressive calls to protect certain groups from harmful or offensive expression.<sup>56</sup> But again, are there significant differences between abortion and euthanasia, on the one hand, and freedom of expression, on the other? Or, once we get on the responsibility bandwagon, are we obligated in principle to stay on board through the First Amendment’s protection of freedom of expression?

Dworkin might argue that abortion and euthanasia are special because they implicate the intrinsic value of the sanctity of life. He might contend that although government generally may not moralize or encourage people to exercise their rights responsibly, government may do so when the sanctity of life is at stake. But what about political values, which, as Rawls once stated, are very great values and hence not easily overridden?<sup>57</sup> For example, may government encourage people to vote, and to vote responsibly? Or may government encourage people to engage in political expression, and to do so responsibly? Or may government encourage people to respect one another as free and equal citizens, and, pursuant to that very great political value, not engage in hateful racist expression?<sup>58</sup>

Some liberals might well conclude that, instead of accepting Dworkin’s arguments regarding taking responsibilities as well as rights seriously, they would do better to advance a stronger notion of autonomy to rein in governmental promotion of responsibility that is too intrusive. From this standpoint, Justice Stevens in *Casey* articulates the stronger and therefore superior autonomy justification for the right to abortion (not to mention his argument for the right to die in his *Cruzan* dissent<sup>59</sup>).<sup>60</sup> With such a view on hand, we might be in a better position to resist the conservative tendency to abandon responsibility as autonomy and to collapse responsibility into coercion and conformity (perhaps rooted in the basic view that responsibility is

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<sup>56</sup> See DWORKIN, FREEDOM’S LAW, *supra* note 45, at 204-07 (criticizing statutes drafted to outlaw certain types of offensive speech); *id.* at 214-26 (criticizing attempts to censor certain types of pornographic and hate speech); *id.* at 227-43 (criticizing attempts to censor pornography).

<sup>57</sup> RAWLS, *supra* note 23, at 139.

<sup>58</sup> See FLEMING, *supra* note 23, at 175-94 (discussing clashes between protecting freedom of expression and securing equal citizenship); Jeremy Waldron, Dignity and Defamation: The Visibility of Hate, Holmes Lectures at Harvard Law School (Oct. 5-7, 2009).

<sup>59</sup> *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 330-57 (1990) (Stevens, J., dissenting); see also *Washington v. Glucksburg*, 521 U.S. 702, 738-52 (1997) (Stevens, J., concurring in the judgments).

<sup>60</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part and dissenting in part) (“Decisional autonomy must limit the State’s power to inject into a woman’s most personal deliberations its own views of what is best.”).

conformity, not autonomy). And we certainly could avoid or simplify some of the line-drawing difficulties just mentioned. Moreover, although Stevens's notion of autonomy may fit better with strains of earlier Supreme Court decisions, I would acknowledge that Dworkin's view better matches the *Casey* joint opinion and may be superior as a matter of public philosophy.

We might also speculate that in *Life's Dominion*, Dworkin departed from a stronger notion of autonomy, like that of Stevens, because he aims better to fit and justify the *Casey* joint opinion, or because he wants to do a better job of developing "philosophy from the inside out."<sup>61</sup> Ironically, Stevens the Justice writes with greater freedom than Dworkin the public philosopher: Stevens, unlike Dworkin, feels no obligation to fit and justify the joint opinion, or the commitments out there in the public discourse.

The difficulties mentioned above may be due in part to the form of Dworkin's argument: public philosophy. First, and most obviously, Dworkin aims at accommodation and settlement, so he makes concessions to the responsibility critique – and to the *Casey* joint opinion – that introduce the difficulties sketched in this section, including line-drawing and opening the door to responsibility talk regarding rights across the board. Second, Dworkin couples abortion and euthanasia in part because they are coupled in public discourse, and in part because both are seen in public discourse as essentially religious issues. As Benjamin Zipursky and I have argued elsewhere, this may lead Dworkin to offer a religious freedom justification for the right to procreative autonomy and the right to die that leads to difficulties for those rights, in particular, the right to die.<sup>62</sup> But his coupling of abortion and euthanasia may obscure arguments for the right to procreative autonomy that do not carry over into arguments for the right to die, most importantly, feminist equal protection arguments rooted in concerns to protect women from sexual discrimination and subordination. Feminist equal protection arguments would alert us to concerns about coercion of women's decisions short of coercion of their ultimate decisions. To be sure, Dworkin is quite ecumenical concerning the kinds of arguments he countenances and the textual homes he contemplates for them, for he sees overlap between the Equal Protection Clause, the Due Process Clause, and the First Amendment's Religion Clauses.<sup>63</sup> But when Dworkin speaks of equality arguments in this context, he apparently has in mind arguments from equal concern and respect, and in particular, arguments like his own, not feminist equal protection arguments.<sup>64</sup> Nonetheless, the point holds that feminist arguments would be more attuned to risks of subtle coercion than would Dworkin's analysis, not to mention being more attentive

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<sup>61</sup> DWORKIN, *LIFE'S DOMINION*, *supra* note 3, at 28.

<sup>62</sup> See Zipursky & Fleming, *supra* note \*, at 130-32.

<sup>63</sup> DWORKIN, *LIFE'S DOMINION*, *supra* note 3, at 160-68.

<sup>64</sup> Though, to be perfectly fair, his tack in responding to Catharine MacKinnon is to defend privacy or autonomy arguments against her critique and then to say it is fine for her to make her feminist equal protection arguments as well. *Id.* at 52-57.

to assumptions about the naturalness of motherhood and assumptions that women may not have the capacity for wise and responsible exercise of their rights.

II. AN ASSESSMENT OF THE FORM OF DWORKIN'S ARGUMENTS: PUBLIC PHILOSOPHY OR THE SIMPLE TRUTH OF THE MATTER?

The form of Dworkin's arguments in *Life's Dominion* is striking and merits comment. His arguments are not simply arguments from the political philosophy seminar room. For example, they are not arguments from first principles of liberal political philosophy, such as freedom, equality, autonomy, individuality, or toleration. Instead, Dworkin claims to be engaging in "philosophy from the inside out," or to be writing "an argumentative essay that engages theoretical issues but begins with, and remains disciplined by, a moral subject of practical political importance."<sup>65</sup> He distinguishes "philosophy from the inside out" from philosophy that connects theory and practice from the "outside in."<sup>66</sup> Put another way, he distinguishes between theories "made for the occasion," like suits made by tailors on London's Savile Row, and ready-made theories, like suits found on New York's Seventh Avenue.<sup>67</sup> Dworkin says that theories constructed from the inside out "may be more likely to succeed in the political forum."<sup>68</sup> It warrants asking to what extent *Justice for Hedgehogs* likewise represents "philosophy from the inside out" rather than from the "outside in."

These formulations are notable because Dworkin has been criticized for having grand abstract theories that he brought down from on high (or from the "outside in") readily to resolve every evidently difficult moral, philosophical, or constitutional issue. *Life's Dominion* is certainly the most grounded of any of Dworkin's works to date; grounded not only in constitutional cases but also in real world developments, public opinion polls, and the like. T.M. Scanlon has characterized the form of political philosophy Dworkin practices and commends in *Life's Dominion* as "public philosophy."<sup>69</sup> I daresay, with Scanlon, that the publication of *Life's Dominion* confirmed Dworkin's status as "our leading public philosopher."<sup>70</sup>

I shall note some of the ways in which Dworkin's arguments of philosophy from the "inside out" differ from – and are more constrained than – arguments from the political philosophy seminar room. First, and most obviously, Dworkin's arguments in *Life's Dominion* are arguments not only of political philosophy but also of constitutional theory and constitutional law. Hence, his

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<sup>65</sup> *Id.* at 28-29.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* He even goes so far as to say that such arguments "may be better suited to the academy too." *Id.* But he steps back, recognizing "that is another story." *Id.*

<sup>69</sup> Scanlon, *supra* note 14, at 45.

<sup>70</sup> *Id.*



arguments are constrained by the aspiration to fit and justify constitutional text, history, and structure, to say nothing of tradition, practice, and culture. In particular, Dworkin aims to fit and justify leading cases involving the right to procreative autonomy, such as *Griswold v. Connecticut*,<sup>71</sup> *Roe v. Wade*,<sup>72</sup> and *Casey*. That is, he seeks a reflective equilibrium between his theory and the legal materials. To be plausible as a theory of our constitutional order, as distinguished from an ideal liberal order, Dworkin must fit and justify most of the significant legal materials; but he may criticize some of those materials as wrongly decided. For example, he criticizes two leading cases involving the right to die, *Cruzan* and *Glucksberg*.<sup>73</sup>

Second, Dworkin's arguments are constrained by his aspiration to be a public philosopher and to resolve a divisive issue in the political forum. He constructs his arguments in response to contemporary moral, political, and constitutional controversies. And he aims to change the character of public debate on abortion and euthanasia. Consequently, his arguments are constrained by his quest to fit and justify certain considered judgments or moral convictions extant in the polity, as revealed in public opinion polls, public statements by political figures, and the like. He claims to have his finger on the pulse of public moral conviction, or to capture the nerve of such conviction. His goal is nothing less than to grasp and re-characterize certain arguments and issues in order to make accommodation and settlement more likely. This project leads him to concede more than we might expect, and more than he might need, to the "pro-life" position. For example, Dworkin suggests that if a fetus is a person then states may prohibit abortion as murder,<sup>74</sup> notwithstanding the existence of powerful and ingenious arguments that even if a fetus is a person, women may have a right to abortion.<sup>75</sup> It also leads him to put forward justifications for the right to abortion and the right to die that may imperil those rights, or at least present difficulties for them.<sup>76</sup>

Finally, the form of political philosophy in which Dworkin is engaged has implications for his aims and the criteria for assessing his arguments. First, what are his aims? He is not seeking to advance an argument that would put the clamps of reason upon everyone everywhere and silence the disagreement

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<sup>71</sup> 381 U.S. 479, 485 (1965) (holding unconstitutional a state law forbidding the use of contraceptives by married couples).

<sup>72</sup> 410 U.S. 113, 163 (1973) (holding unconstitutional a Texas statute forbidding anyone from procuring an abortion).

<sup>73</sup> Dworkin's criticism of *Glucksberg* was published subsequent to *Life's Dominion*. See DWORKIN, SOVEREIGN VIRTUE, *supra* note 8, at 465-73.

<sup>74</sup> DWORKIN, LIFE'S DOMINION, *supra* note 3, at 9-10.

<sup>75</sup> See, e.g., F.M. KAMM, CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY 78-123 (1992); EILEEN L. McDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 10 (1996); Judith Jarvis Thomson, *A Defense of Abortion*, PHIL. & PUB. AFF., Autumn 1971, at 47, 47.

<sup>76</sup> See Zipursky & Fleming, *supra* note \*, at 130-33.

of all reasonable people. Nor on the other hand is he seeking common ground in the sense of a half-way compromise of opposing positions or simply learning to live together disagreeing about abortion.<sup>77</sup> Some readers, including sympathetic readers like Laurence Tribe, have criticized Dworkin for thinking that he could resolve the problems surrounding abortion and euthanasia simply by redescribing the arguments of supporters and opponents of these rights.<sup>78</sup> But this criticism rests upon a misunderstanding; again, Dworkin is trying to re-characterize the arguments in order to pursue a settlement and accommodation. He aims for more than pale civility, and more than “empty” toleration; indeed, he apparently aims for respect.<sup>79</sup>

Next, what should be the criteria for assessing his arguments? Not formal philosophical criteria alone, though of course these can be brought to bear in analyzing the cogency and coherence of his arguments. And to be successful, he does not have to persuade everyone. Rather, all he must do to have some impact in the political forum is to persuade some people at the margins. Furthermore, he might make an important contribution by offering an argument that better articulates or bolsters convictions many people already have in support of the right to have an abortion and the right to die, which were at risk of being put in doubt by arguments against these rights. Finally, he might achieve a measure of success – even if he did not persuade anyone to change his or her fundamental views – by defending these rights in a manner that would bring about greater understanding and respect by each side for the other side’s positions.<sup>80</sup>

*Justice for Hedgehogs*, by contrast, seems less a work of public philosophy so understood than a form of philosophy that simply and vigorously argues for the truth of the matter – and for the unity of value across ethics, morality, justice, and law – irrespective of what anyone else who vigorously disagrees might think! *Justice for Hedgehogs* nonetheless is compatible with *Life’s Dominion*. I simply urge Dworkin to bring this out more clearly.

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<sup>77</sup> DWORKIN, *LIFE’S DOMINION*, *supra* note 3, at 9.

<sup>78</sup> Laurence H. Tribe, *On the Edges of Life and Death*, N.Y. TIMES, May 16, 1993, § 7, at 1 (reviewing DWORKIN, *LIFE’S DOMINION*, *supra* note 3).

<sup>79</sup> See McClain, *Toleration as Respect*, *supra* note 17, at 21-24 (distinguishing between “empty” toleration and toleration as respect).

<sup>80</sup> In a similar vein, West makes a progressive (or reconstructed liberal) argument that “taking freedom seriously” requires showing that persons exercising their reproductive and other rights typically are acting responsibly rather than licentiously. West, *supra* note 2, at 82-83.