

# The Sanctity of Human Life

*Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom.* By Ronald Dworkin.\* New York: Alfred A. Knopf, 1993. Pp. 273. \$23.00.

Eric Rakowski†

## I. AN OVERVIEW

*Life's Dominion* defends a novel claim: that disputes over the morality of abortion, assisted suicide, and euthanasia are fundamentally *religious* disagreements. They are religious, Ronald Dworkin contends, because most people believe that the morality of these actions depends on whether they adequately respect life's "sacred" or inherent value, and "[c]onvictions that endorse the objective importance of human life speak to the same issues—about the place of an individual human life in an impersonal and infinite universe—as orthodox religious beliefs do for those who hold them."<sup>1</sup>

Two conclusions follow, in Dworkin's view. First, because we tolerate religious beliefs we consider wrong, the recognition that someone's decision to abort a pregnancy or to hasten her death typically rests on spiritual values should lead us to permit abortion and euthanasia even if we deplore them. Second, the First Amendment guarantees individual choice in both cases. Either these existential decisions turn on commitments that are religious for purposes of the Free Exercise Clause, or government action to restrain abortion or euthanasia entails public endorsement of a religious proposition in violation of the Establishment Clause.

Dworkin also defends a related thesis about the limitations that morality places on the use of state power. The state, he maintains, may not gravely burden people to protect values other than individual rights, particularly values, like the importance of prolonging human life in any form, that are controversial and inherently religious. Abortion and assistance to people who

---

\* Professor of Jurisprudence, Oxford University, and Professor of Law, New York University School of Law.

† Acting Professor of Law, University of California at Berkeley (Boalt Hall). For generous comments, I am indebted to Meir Dan-Cohen, Gillian Hadfield, Lisa Heinzerling, Sanford Kadish, Robert Post, Samuel Scheffler, Cass Sunstein, and Jeremy Waldron.

1. RONALD DWORGIN, *LIFE'S DOMINION* 163 (1993) [hereinafter *LIFE'S DOMINION*].

reasonably wish to speed their deaths should therefore be permitted subject to safeguards against error or coercion, because neither abortion nor the voluntary shortening of a life violates a personal right even if one or both affront some people's understanding of life's intrinsic or sacred value.

These striking assertions form the book's core, but originality is not its sole virtue. *Life's Dominion* displays in abundance the deft argumentation, elegant prose, and moral passion that characterize much of Ronald Dworkin's writing. Although its themes are not unheralded—the book reworks a number of articles that Dworkin has devoted to abortion and euthanasia over the last eight years—their contours have been sharpened through restatement. The result is a remarkably coherent argument concerning the moral and constitutional boundaries of the state's authority to regulate killing near the edges of life: during the preconscious existence of the womb and the final oblivion of the fatally ill and the irreversibly demented.

The book's central thesis is that beneath the scalding rhetoric of partisans on both flanks of the debates over abortion and euthanasia lies a hitherto unnoticed consensus on what those debates are about. Advocates for abortion rights or living wills, like those who would curtail abortions or ban assisted suicide, are almost all seeking to answer the same question: what policies would best respect the sanctity or inherent value of human life? Few people genuinely believe, Dworkin contends, that destroying a newly fertilized ovum or aborting an embryo early in pregnancy is morally equivalent to murdering a child of ten. But few regard these as morally indifferent acts, even when they deny that a young fetus has morally protected interests of its own. What divides abortion's opponents and defenders is conflicting notions of how individuals and communities can most faithfully express their shared respect for the sanctity of human life, whatever its form.

Those who decry abortion emphasize the divine or natural contribution to a new life. They believe "that it is intrinsically a bad thing, a kind of cosmic shame, when human life at any stage is deliberately extinguished."<sup>2</sup> Abortion's defenders, in Dworkin's characterization, do not dispute this claim. They too acknowledge that abortion "wastes" the natural "investment" in fetal life.<sup>3</sup> But unlike abortion's foes, its defenders assert that *not* permitting abortion would often result in a morally more important "frustration" of the likewise intrinsically valuable life of the woman seeking an abortion. Both sides' views are therefore "rooted in a fundamental unity of humane conviction," which is "more fundamental" than their quarrel over how the value of life ought to be understood.<sup>4</sup>

---

2. *Id.* at 13, 91-92.

3. *See id.* at 34, 60, 84, 90.

4. *Id.* at 71.

Once people's underlying agreement on the main value in peril is brought to light, Dworkin avers, "we will see that a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect, is indeed available."<sup>5</sup> The bulk of *Life's Dominion* is an elaborate attempt to show that this commonly acceptable position is, perhaps surprisingly, virtually indistinguishable from the policy urged by many of abortion's defenders: freely available abortion through at least the first six months, apparently with no consent requirements or waiting periods, combined with public funding for women too poor to pay for their own abortions. This conclusion, Dworkin maintains, is morally required by the values that even those who condemn abortion hold dear, above all by our commitment to tolerating religious disagreement and to protecting individual liberty except where its exercise interferes with the rights of others. Furthermore, in the United States it is legally required by the Religion Clauses, and perhaps by the Due Process and Equal Protection Clauses as well.

Dworkin's legislative prescriptions and constitutional analysis are less clear with respect to euthanasia. He argues, as before, that regard for the intrinsic value of human life explains much of the opposition to killing permanently comatose patients, permitting dying patients to obtain lethal drugs from physicians, and allowing people to make legally effective requests to withhold life-sustaining medical care. After dissecting the warring claims and values, however, Dworkin refrains from offering detailed recommendations. His sympathies plainly lie with legislation empowering competent, dying patients to solicit help in hastening their death. He also appears to favor giving effect to advance medical directives or the choices of proxy decisionmakers not to treat permanently unconscious or badly demented patients. He declines, however, to endorse specific rules for determining precisely when these decisions should be respected and what care patients should receive if they did not voice any preference before they lost consciousness or mental acuity.

I shall not attempt to assess the cogency of all of *Life's Dominion's* complex philosophical and legal claims. Some are too large to compass in a review; others have already attracted able commentary. Thus, I shall say nothing about Dworkin's much-discussed theory of constitutional interpretation,<sup>6</sup> on which he relies here in determining the legitimacy of

---

5. *Id.* at 10-11.

6. See RONALD DWORKIN, *LAW'S EMPIRE* (1986). In *Life's Dominion*, Dworkin contrasts two radically opposed approaches to interpreting the Constitution. First, one may think of the Constitution as a constitution of principle, which "lays down general, comprehensive moral standards that government must respect but . . . leaves it to statesmen and judges to decide what these standards mean in concrete circumstances." *LIFE'S DOMINION*, *supra* note 1, at 119. Conceiving of the Constitution in the second manner, as a constitution of detail, means reading its provisions "as expressing only the very specific, concrete expectations of the particular statesmen who wrote and voted for them." *Id.* For criticism of this disjunction and Dworkin's failure to consider intermediate views, see Jeffrey Rosen, *A Womb with a View*, *NEW REPUBLIC*, June 14, 1993, at 35 (book review). See also "*Life's Dominion*": *an Exchange*, *NEW REPUBLIC*, Sept. 6, 1993, at 43 (containing Dworkin's reply and Rosen's rebuttal).

abortion regulation. Nor shall I examine carefully Dworkin's assertions that the Free Exercise and Establishment Clauses compel states to permit abortion during the first two trimesters and that the Establishment Clause precludes states from refusing to pay for poor women's abortions if states simultaneously provide the poor with general health care.<sup>7</sup> Finally, I shall not take up his assertion that lawmakers betray their office if they enact rules that cannot be traced to some principle that an *individual* might endorse as a principle of substantive justice.<sup>8</sup>

---

7. Dworkin is one of the first scholars to urge that the Free Exercise Clause bars states from punishing all or most abortions during the first six months of pregnancy, although at least one federal judge appears to have inclined to that view. See, e.g., Tom Stacy, *Death, Privacy, and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 564 n.264, 583-85 (1992) (suggesting that the Free Exercise Clause provides a right to abortion "if the weight to be given potential life versus actual life is a quintessentially religious question"); *McRae v. Califano*, 491 F. Supp. 630, 741-42 (E.D.N.Y.) (implying support for a free exercise argument), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980). Dworkin's concomitant argument that the Establishment Clause prevents states from banning abortion, because doing so entails endorsing one essentially religious conception of the sanctity of life over another, closely resembles arguments advanced by other writers. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 566-72 (1989) (Stevens, J., concurring and dissenting) (arguing that a legislative preamble announcing that life begins at conception would constitute an establishment of religion because it only could be supported by theological premises); PETER S. WENZ, *ABORTION RIGHTS AS RELIGIOUS FREEDOM* 213-44 (1992); JOEL FEINBERG, *Abortion, in FREEDOM AND FULFILLMENT* 75 (1992); John M. Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191 (1990); Karen F.B. Gray, Comment, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399 (1990). Laurence Tribe at one time argued that when religious groups play a "pervasive role" in a subject's legislative consideration "for reasons intrinsic to the subject matter," as he believed they do in the case of abortion regulation, any resulting legislation violates the Establishment Clause. Laurence H. Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 23 (1973). Tribe now thinks that view mistaken. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1349-50 (2d ed. 1988). Dworkin does not comment on published discussions of the possibility of finding a haven for abortion in the Establishment Clause, apart from a brief footnote, in an article printed before *Life's Dominion*, rejecting Wenz's reasoning. See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 421 n.60 (1992).

The novelty of Dworkin's argument by no means disqualifies it as a constitutional claim, even in so exhaustively mined an area as abortion. But his argument seems unlikely to attract followers, partly because it diverges radically from the Supreme Court's pronouncements, especially in the area of state funding. See *infra* note 40.

8. Dworkin advances this claim most forcefully in *Law's Empire*. He there denounces what he terms "internal" compromises, which occur when a law or a collection of laws cannot plausibly be seen as derivative of or consistent with some moral principle, or as the unavoidable result of the subordination of one principle to another in accordance with some yet more fundamental principle. Internal compromises result from the rending of one or several moral principles to achieve some politically expedient outcome. For example, suppose that one-third of a community's members believe abortion to be murder, while the other two-thirds consider abortion morally permissible. A law banning abortion in every third year, Dworkin says, would lack integrity, even if it reflected the balance of ballots, because no individual could conceivably subscribe to that rule on moral grounds rather than in response to the distribution of political power. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 176-84.

Several commentators recently have questioned this assertion about legislative integrity as regards abortion. They see no disrepute in compromises that cannot be squared with a consistent set of moral principles internal to the issues they resolve, but that antagonists accept out of regard for one another's opinions or because no side has the votes to prevail. In these commentators' view, a national compromise along the lines the Supreme Court has drawn—legal protection for abortion prior to viability, hedged about with such restrictions as waiting periods or information requirements if states elect them, together with the option (but not a constitutional mandate) of state funding for abortions—is an honorable settlement. See, e.g., ROGER ROSENBLATT, *LIFE ITSELF: ABORTION IN THE AMERICAN MIND* 137-81 (1992); Nancy (Ann)

Instead, I shall focus on Dworkin's attempt to show that most people regard individual human life as sacred, even before consciousness dawns and sometimes after it has fled forever, and his account of that belief's ramifications for the government's regulation of abortion, euthanasia, and assisted suicide. Part II examines Dworkin's argument that almost everybody believes that a fetus lacks rights or interests of its own during most of its gestation, but that fetal life is nonetheless inherently valuable. Although Dworkin is right in thinking that most people's uneasiness over abortion does not derive from their belief that a fetus is conscious throughout pregnancy,<sup>9</sup> his analogies to the intrinsic value of art, cultures, and natural species do not, in my judgment, help to clarify the sense in which many people cherish a developing human life. Some people regard abortion as wrong because they think God forbids it. But most others who view abortion as morally problematic do so because they believe that a fetus, like an infant, is owed at least part of the respect due the reasoning, self-conscious human being it could become. Its moral claim against those who would end its life descends from its being an earlier stage of a creature with a right to live, and in many people's minds its moral claim is thus a close cousin of that right.

If this alternative account of popular beliefs is correct, Dworkin's assertion that the state may not proscribe early abortion loses some of its power. He would then find it more difficult to describe the primary debate over abortion as religious (although that might still be possible), and his arguments based on religious tolerance and the First Amendment would be undermined. To be sure, the fact that many disagree fervently about the moral significance of an entity that is not a sentient or self-conscious bearer of rights, together with the enormous burden that pregnancy and childrearing impose on many women, does argue strongly against forbidding early abortion. But Dworkin offers scant reason to think that the concentrated burden a law would impose and societal disagreement about its propriety are decisive considerations against its passage, just because a five-month-old fetus, unlike slaves freed by the Thirteenth Amendment in the face of national dissensus and at great cost to slaveholders, is not yet conscious. Thus, *Life's Dominion* offers only the start of a justification, not a complete defense, of the liberal abortion laws Dworkin favors.

Part III turns to Dworkin's discussion of assisted suicide and euthanasia. It summarizes his account of the values at stake in empowering dying patients to obtain help in ending their lives. It also delineates issues that must be

---

Davis, *The Abortion Debate: The Search for Common Ground, Part 2*, 103 ETHICS 731, 771-74 (1993); Stephen L. Carter, *Strife's Dominion*, NEW YORKER, Aug. 9, 1993, at 86, 92 (book review). I shall not join that debate over the type of moral coherence legislation ought to display.

9. Like Dworkin, I use the term "fetus" broadly, to refer to a developing human organism at all stages of its prenatal existence beginning with conception, even though in many technical vocabularies the term may not be applied properly until eight weeks after conception.

addressed if the policy Dworkin advocates—liberty to quicken death if one is terminally ill or permanently comatose—is to be justified. Although Dworkin leaves some of these issues unexamined, his general defense of competent patients' right to decide when they will die is compelling.

More doubtful is Dworkin's claim that a person's life is improved by denying him essential medical care when he is irreversibly incompetent if he earlier asked that he not be allowed to languish. Although the value that Dworkin ascribes to cognitive abilities and to avoiding dependence on others exceeds the importance some people assign to them, many will welcome his call for respecting individual autonomy. A more powerful challenge to Dworkin's argument for honoring the prior wishes of badly demented individuals disputes his assumptions about personal identity. If the psychological bands of memory and purpose that link the stages of a person's life over time are broken, as they are if dementia is pronounced, the moral authority of those earlier choices is imperiled. They then appear to be the choices of one competent person concerning the treatment of a *different*, disconnected, incompetent individual, and to deserve no more deference than somebody else's wishes regarding that individual's care. Dworkin needs to reinforce his claim that personal identity persists and that consequently a person's competent directives should be heeded once her faculties have left her. There are reasons for heeding advance directives—the anxiety that afflicts people who are still competent if they lack that control, for example, or the greater concern they have for the future person than friends or fellow citizens usually do. But common beliefs about the survival of personal identity that Dworkin alleges are implicit in many social practices do not offer a sufficient justification for enforcing prior wishes.

## II. THE INTRINSIC VALUE OF FETAL LIFE AND ABORTION REGULATION

### A. *Detached and Derivative Objections*

Dworkin begins his argument against outlawing abortion with an empirical claim. Most people believe, he says, that the morality of abortion does not depend on the existence or strength of a fetus' right to live, weighed against a woman's right not to bear or raise a child. Although anti-abortion crusaders scream of murdered babies, few people, in Dworkin's report, take this rhetoric seriously. What people believe instead is that even though a fetus has no interests of its own early in pregnancy, it nonetheless is alive, and life has a sacred or intrinsic value that abortion unavoidably destroys. People disagree about how important that offense is, by comparison with the harm that not aborting an unwanted fetus does to the woman carrying it or to others. But because their disagreement turns on the salience of an impersonal value rather than on the scope of a sentient being's right, Dworkin argues, the state may

not forbid abortion to protect that value, no matter how important some people think it is.

This Section describes the role that Dworkin's distinction between fetal rights and intrinsic value plays in his argument for limiting state power. Section B disputes Dworkin's claim that most people think of fetal life as inherently valuable, in much the same way that they think art or natural species have value; a more common objection to abortion is that a fetus has a moral claim not to be killed that is similar to, though perhaps weaker than, an adult's right to live. Section C questions Dworkin's claim that the government may sometimes induce women to reflect on the morality of a contemplated abortion, but that it may not restrict access to early abortion based on widespread convictions about the intrinsic value of fetal life.

### 1. *Dworkin's Distinction*

The morality of abortion usually is said to depend, Dworkin notes, on a joust of rights. The pregnant woman's right to control her body is pitted against the fetus' asserted right to live. Objections to abortion are therefore *derivative* of the supposed moral rights of the developing fetus. In Dworkin's view, the vocabulary of this debate is misleading. An entity can only have a right to something if it has an *interest* in having it, and it can only have an interest in something if it is or has been sentient.<sup>10</sup> Inanimate objects have no rights or interests; only creatures that can suffer pain or experience the world around them do. Thus, Dworkin follows the philosophical mainstream in claiming that rights and interests presuppose consciousness, the exercised ability to distinguish, if only inchoately, between oneself and the external world.<sup>11</sup>

It follows from Dworkin's definitions that fetuses lack rights or interests during, at a minimum, the first half of their gestation. It is ludicrous to think that a fetus is sentient prior to a date near the end of the second trimester, when neurons in the brain's cortex spread and connect to nerve endings in the thalamus.<sup>12</sup> Rudimentary consciousness might not emerge until the cerebrum develops even further. Indeed, any rights or interests a fetus may acquire late in pregnancy by virtue of its sensory or cognitive capacity alone cannot be of much moral significance. Fetal consciousness, if it exists, is almost certainly

---

10. A being that has ceased to be sentient—through unconsciousness or perhaps death—might still have interests that survive the loss of sentience. In the case of group rights, presumably the group's members must be or must have been sentient, so that the right is exercised by, or safeguards the welfare of, conscious subjects.

11. See LIFE'S DOMINION, *supra* note 1, at 16-19; see also BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 14-24 (1992) (arguing that consciousness is both a necessary and a sufficient condition for the possession of interests and collecting supporting sources).

12. See LIFE'S DOMINION, *supra* note 1, at 17-18 (citing medical studies of the course of fetal development).

less complex than that of normal, nonhuman mammals, and the overwhelming preponderance of Americans believes that nonmammalian animals have at most a feeble right to continued existence. Therefore, early abortions cannot possibly be objectionable because they infringe fetal rights, and even late abortions might not be seriously wrong for this reason.

Yet, Dworkin notes, few people greet abortion with equanimity. Many abhor abortions even early in pregnancy. Others undergo abortions with a profound sense of regret, viewing them as the lesser of two evils rather than as no evil at all. They regard abortion as terribly unfortunate for some reason beyond the pain, risk, and expense it entails. In addition, virtually everyone thinks that the later an abortion occurs, the more wrong or regrettable it is.

What explains these attitudes and convictions? Most people, Dworkin says, share a *detached* objection to abortion. Their objection is “detached” because, unlike a *derivative* objection, it does not presuppose—it is detached from the claim—that fetuses have rights or interests.<sup>13</sup> But more than one nonderivative objection to abortion is possible. The particular detached or nonderivative objection Dworkin attributes to the overwhelming majority of people rests on the assertion that human life, even in an incipient form, is sacred or inherently valuable. Abortion is wrong, all else being equal, because it affronts this impersonal value. This belief manifests itself, Dworkin contends, in the exceptions that all but the staunchest opponents of abortion typically make for pregnancies that result from rape or that endanger a woman’s life. No one who believes that a fetus is a person with a right to live could endorse either exception. “It would be contradictory,” Dworkin asserts, “to insist that a fetus has a right to live that is strong enough to justify prohibiting abortion even when childbirth would ruin a mother’s or a family’s life but that ceases to exist when the pregnancy is the result of a sexual crime of which the fetus is, of course, wholly innocent.”<sup>14</sup> Likewise, even if a woman were entitled to defend herself if a pregnancy threatened her life, anyone who believes that a fetus is a person with a right to live could not condone abortions performed by someone else. “[V]ery few people,” Dworkin maintains, “believe that it is morally justifiable for a third party, even a doctor, to kill one innocent person to save another.”<sup>15</sup>

Dworkin neither endorses nor criticizes detached objections to abortion. Indeed, he takes no position in *Life’s Dominion* on the morality of abortion.<sup>16</sup>

---

13. See *id.* at 11.

14. *Id.* at 32.

15. *Id.*

16. Although Dworkin frequently uses the words “we” and “our” in describing what he thinks are popular beliefs about the value of natural creation or human life, he avoids stating his own views about the existence or importance of the intrinsic values to which he refers. For example, he says about the allegedly noninstrumental value of fine paintings and naturally occurring species: “It is not my present purpose to recommend or defend any of these widespread convictions about art and nature, in either their religious or secular form. Perhaps they are all, as some skeptics insist, inconsistent superstitions. I want



Instead, he focuses exclusively on the question of whether the state may prevent or punish abortion. If abortion violates a fetus' right to live, then the state may forbid it, Dworkin assumes; if abortion dishonors an intrinsic value without violating anyone's rights, then the state must permit abortion. In addition to this argument linking state coercion and the moral status of the fetus, Dworkin offers two other arguments for recognizing a right to abortion. These arguments depend not on whether abortion actually infringes the rights or interests of fetuses, but on what people *believe* makes abortion morally suspect. Dworkin's argument that the Free Exercise Clause gives most American women a right to abortion, because they believe, at least implicitly, that abortion in their circumstances best respects the sanctity of life, turns on the correctness of Dworkin's account of people's hatred of or uneasiness about abortion. A free exercise claim can be made only on the basis of someone's actual beliefs, not on hypothetical beliefs that *could* support her decision. Likewise, Dworkin's argument that we ought to permit abortions for the same reason that we tolerate diverse religious convictions—because women usually seek abortions for reasons that are essentially religious in character—depends on the accuracy of his description of people's intentions. I shall therefore begin by assessing Dworkin's claim that most people's concern over abortion is in his sense "detached," then consider his arguments about the state's limited authority to restrict abortion, which build on this premise.

## 2. *Is Dworkin's Description Accurate?*

The surface evidence belies Dworkin's descriptive claim. Legions of people who block access to abortion clinics or who campaign against pro-choice politicians denounce abortion as the slaughter of innocent children, a murderous attack upon the unborn's right to live. Even women who have abortions despite misgivings frequently characterize the moral question as a conflict of rights. Hence, to bear out his claim that "[a]lmost everyone who opposes abortion really objects to it, as they might realize after reflection, on the detached rather than the derivative ground,"<sup>17</sup> Dworkin must "distinguish

---

only to call attention to their complexity and characteristic structure . . ." *Id.* at 81; *see also id.* at 207.

I am not sure what to make of Dworkin's unwillingness to endorse or criticize the convictions he describes. Perhaps he thinks that announcing his own moral views would distract readers from his argument about the limits to state power, which in his opinion does not depend on which account of intrinsic value is correct so long as some such account forms the basis of most people's convictions about the morality of abortion. I am not certain that Dworkin can avoid taking a stand. If what underlies most people's objections to abortion is the view that a fetus acquires, early in pregnancy, a moral claim that is as strong as a baby's right not to be killed, it seems that only by denying the truth of the majority view could Dworkin vindicate a universal right to early abortion. However, Dworkin might think that the moral question can be sidestepped if public opinion is deeply divided about whether a fetus has a moral claim to protection with the same force as a child's right not to be killed, and a government ban on abortions would have too severe an impact on women who desire them. *See infra* Part II.C.2.

17. LIFE'S DOMINION, *supra* note 1, at 13.

the public rhetoric in which people frame their opinions from the opinions themselves, which can sometimes be recovered only by a more careful examination than polls and demonstrations provide."<sup>18</sup>

Notice that Dworkin's description of people's beliefs relies not on what people *say* is their reason for thinking abortion wrong or unfortunate, but on what he believes they *would accept* as an explanation of their opposition if they listened to his reasons for not ascribing rights to fetuses. Dworkin does not ask what people's views on abortion would be if they attended carefully to *all* the relevant philosophical or religious arguments regarding abortion. Perhaps their views would change if they thought more searchingly. Nor does he consider the possibility that what people would say might not accurately account for a substantial degree of their discomfort with abortion. Some people's views about the permissibility of abortion might be best explained, for example, by their conception of the proper roles of men and women and their image of what a family should be. Dworkin does not analyze sociological studies probing people's motives to determine how salient the religious or philosophical views they espouse really are as wellsprings of attitude and action.<sup>19</sup> He also does not take seriously the possibility that a considerable number of people believe, or would decide after examination, that there is *no* convincing justification for the feelings they have. They might think that their response to abortion resists rationalization, as feelings of guilt attending premarital sex sometimes survive the loss of the religious faith that instilled them. Dworkin assumes without discussion that few people do or would reach this conclusion.

I mention these features of Dworkin's argument because some readers might object to basing a conclusion about abortion regulation on what people would presumably say in a counterfactual situation that questions only some of their articulated commitments. I shall not pursue possible methodological worries, however, because Dworkin does not stray far from people's declared beliefs, and because the most important challenges to his argument survive even if his interpretive project is methodologically sound.

The first step in Dworkin's argument is easy. Because he *stipulates* that rights and interests presuppose a conscious subject to whom they belong, it is, as he says, "scarcely comprehensible . . . that an organism that has never had a mental life can still have interests."<sup>20</sup> Showing that legislators, religious leaders, and common citizens do not believe that a fetus is conscious until

---

18. *Id.* at 20.

19. See, e.g., FAYE D. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* (1989) (describing extensive interviews with women opposing and supporting the opening of a North Dakota abortion clinic); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984). For a superb review of Ginsburg's book, see Nancy (Ann) Davis, *The Abortion Debate: The Search for Common Ground, Part 1*, 103 *ETHICS* 516, 526-39 (1993).

20. LIFE'S DOMINION, *supra* note 1, at 20.

perhaps the last third of a normal pregnancy is straightforward when all of the medical evidence points to this conclusion. People cannot voice a derivative objection to abortion because, given Dworkin's terms, they agree that fetuses do not have the required interests.

But this is only the first, definitional step. It cannot settle issues of philosophical substance. From the fact that few would offer a derivative objection to abortion, as Dworkin defines that term, it hardly follows that most people would regard fetuses as having some inherent value that is religious or that is too weak to justify state curbs on abortion. There is more than one possible nonderivative objection to abortion. People might think that fetuses have a moral claim to protection that exerts the same force that rights do (even if Dworkin's definitions rule out their having full-fledged rights) by virtue of their capacity to develop into self-conscious human beings. In Section B, I suggest that most people would *not* in fact explain the moral wrongness of abortion in terms of its affront to some intrinsic value. They would, rather, appeal to a fetus' right-like claim not to be injured. First, though, it is worth reviewing why no other derivative objection to abortion is convincing or can fully explain people's opposition to abortion.

One might try to base a derivative objection to abortion on what it does to people other than the fetus, people with rights and interests whose lives are affected by participating in abortions or are influenced by the effects of abortions on those who participate in them. Compare dueling. We ban dueling even between consenting adults in part because stray bullets endanger passersby and, more importantly, because we believe that consent cannot excuse the infliction of terrible harm for such petty ends, as consent cannot render a slavery contract enforceable. But we are also concerned about the practice's more roundabout effects: the prickly sense of dignity it fosters, its tendency to demote apology or toleration as virtues and to hallow violence, the social pressures it creates to risk grievous loss out of all proportion to the vindication of a strutting sense of honor. Abortions might have similar adverse effects on those who perform or undergo them.<sup>21</sup> By lowering the taboo against killing, other people who are full members of the community could suffer at the hands of those whose moral sensibility has been numbed by participating in or countenancing abortion.<sup>22</sup> This concern is most acute with respect to post-viability abortions, where attitudes towards fetuses and newborns often merge.<sup>23</sup>

---

21. See WENZ, *supra* note 7, at 39-40.

22. This view is eloquently stated in Jonathan Glover, *Matters of Life and Death*, N.Y. REV. BOOKS, May 30, 1985, at 19, 19-20 (book review), and in Glover's reply to objections in Jim Stone & Jonathan Glover, *The Morality of Abortion: An Exchange*, N.Y. REV. BOOKS, Feb. 13, 1986, at 43, 44.

23. See Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 667-68, 670, 678 (1986); S.I. Benn, *Abortion, Infanticide, and Respect for Persons*, in *THE PROBLEM OF ABORTION* 135, 142-44 (Joel Feinberg ed., 2d ed. 1984). Dworkin himself has written that a government's fear of "the impact of widespread abortion on its citizens' instinctive respect for the value of human life

Nevertheless, as Dworkin recognizes,<sup>24</sup> solicitude for people who might suffer if we become brutes cannot moor a strong derivative objection to abortion. This is particularly true of early abortions. There is no evidence suggesting that medical personnel who perform abortions are less kind to others or more likely to commit crimes, nor that societies that permit abortion are therefore more likely to suffer these ills. Some people are, of course, offended by the knowledge that other members of their community act in ways they deem immoral. But offense without more tangible injury is not considered a sufficient reason to prohibit any private conduct, from using contraceptives to worshipping a false god.<sup>25</sup>

Shifting the focus from third-party effects to a paternalistic concern for the damage that someone's character would predictably suffer if she underwent or merely tolerated an abortion also cannot account for our understanding of opposition to it, for this explanation puts matters backwards. Denouncing abortion because of the way in which it allegedly will coarsen us makes sense only if abortion is wrong for some *other* reason. If our characters are scarred by assisting or ignoring abortion, the reason must be that we have failed to respect something that is valuable in its own right.<sup>26</sup>

For these reasons, almost nobody is uneasy about abortion because it tramples someone's rights or interests *if* rights or interests are exclusively the possession of sentient or self-conscious beings. Dworkin seems to me too quick to infer that people think that fetuses lack rights or interests from the exceptions that many people who oppose abortion make for pregnancies resulting from rape or incest or for abortions necessary to save a woman's life. Someone who considers abortion the killing of a living creature endowed with a right to live might nonetheless think that abortion should be permitted in certain situations.<sup>27</sup> Still, if derivative objections require that a fetus be

---

and their instinctive horror at human destruction or suffering, which are values essential for the maintenance of a just and decently civil society," is the most powerful reason for restricting abortion and a sufficient ground for states to forbid post-viability abortions. Ronald Dworkin, *The Great Abortion Case*, N.Y. REV. BOOKS, June 29, 1989, at 49, 52. In *Life's Dominion*, however, Dworkin does not offer this as a reason why governments may prohibit post-viability abortions. See LIFE'S DOMINION, *supra* note 1, at 170.

24. See LIFE'S DOMINION, *supra* note 1, at 115-16.

25. These reasons for rejecting a ban on abortion based on third-party interests are by no means original. See, e.g., JOEL FEINBERG, *Sentiment and Sentimentality in Practical Ethics*, in FREEDOM AND FULFILLMENT, *supra* note 7, at 121-23.

26. Censure of abortion based on its effects on character could conceivably have other grounds as well, such as a belief that abortion sometimes contributes to callousness, selfishness, or imprudence. This possible belief obviously accounts for at best a minute fraction of the opposition to abortion.

27. Somebody might think that abortion assaults a creature with interests of its own, but not believe that the law should proscribe abortion, for any number of reasons: because she is uncertain whether her moral objection is sound, and is therefore unwilling to force others to live by it; because her fear of the civil strife that might ensue if abortion were forbidden is greater than her outrage at the wrong that abortion does; because she deems it inappropriate to ask as much of a woman as pregnancy and childrearing do when pregnancy was forced upon her, or when the law does not demand the same sacrifices of other citizens; because she thinks that making abortion illegal will only drive it underground, thereby augmenting the danger to desperate women and enhancing their subordination to men; because she realizes that outlawing abortion will in practice only amplify the injustice that many poor women already suffer; or

*sentient*, opponents of early abortion necessarily will state their objections—some of which closely shadow rights-based objections—in terms Dworkin defines as detached.

### 3. *The Significance of Distinguishing Detached from Derivative Objections*

Why distinguish derivative from detached objections to abortion? If there were a convincing derivative objection to abortion, Dworkin contends, a legislature could ban abortion to protect a fetus' rights and interests.<sup>28</sup> Indeed, in his view the Constitution might require such a ban.<sup>29</sup> However, these conclusions do not follow if only detached reasons can be offered against abortion.<sup>30</sup>

Dworkin's claim about the state's duty to protect a fetus' rights or interests *if* there were a derivative objection to abortion seems to me doubtful on two points. First, it assumes that if a fetus had rights or interests, they would carry the same moral force as those of the pregnant woman. That might be so, but many people would deny it. If a fetus' sensory and cognitive powers do not exceed those of animals well down the evolutionary chain, its right not to be killed might be far weaker than that of a normal adult human being. It might even be weaker than a woman's interest in avoiding a minor inconvenience. If a derivative objection to abortion were possible, Dworkin would therefore need a further premise about the strength of a fetus' rights or interests to show that abortion must be banned. It might prove difficult to establish that premise if popular intuitions are authoritative.

Second, even if a fetus' right to live were as strong as an adult's right, it is by no means clear that a state could justifiably prohibit abortion, let alone that it would be required to do so. People are not generally thought to have a moral duty to save others at serious cost to themselves. They need not do so even if they have already begun supplying help, so long as they did not prevent other people from rescuing the person in peril and they are not responsible for that person's predicament.<sup>31</sup> Dworkin tries to differentiate

---

because she believes that a fetus' right to live is much weaker than that of a baby, let alone a normal adult, and that this difference reduces abortion's wrongness and magnifies the importance of the preceding objections to its prohibition. Many people would also say, I think, that abortion providers may kill one innocent person to save another *if* that innocent person's right to live is weaker than that of the woman whose life, health, or psychological well-being is endangered. Just as an intelligent animal might have a right not to be killed that can be outweighed by certain human needs, so a fetus' right to live might be outweighed by a woman's countervailing interests. Dworkin does not discuss these possible ways to reconcile the belief that abortion violates a fetus' right to live with tolerance of abortion's legality.

28. See LIFE'S DOMINION, *supra* note 1, at 151.

29. *Id.* at 110.

30. I later consider whether a legislature is in fact precluded from banning abortion if objections to it are typically detached. See *infra* Part II.C.2.

31. An early, provocative statement of this view was Judith Jarvis Thomson's imaginative example of a woman attached against her will to a famous violinist, who will die if she detaches herself during the

abortion from the absence of a duty to lend burdensome assistance by noting that abortion involves a “physical attack” on a fetus and by arguing, on the assumption that a fetus has the same right to live that adults do, that abortion would violate the heightened duty that parents have to care for their children.<sup>32</sup> However, Dworkin’s compact argument is unlikely to persuade anyone not already receptive to his view. Dworkin’s claim that the Constitution might require the prohibition of abortion if a fetus had rights or interests is

---

next nine months. See Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). Thomson did not claim that a woman who became pregnant voluntarily may rightfully terminate her pregnancy if fetuses are persons. See *id.* at 57-59. But a much more detailed treatment of the morality of abortion, employing Thomson’s assumption about the weakness of our duty to aid strangers, offers support for that conclusion. See F.M. KAMM, *CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY* (1992). Kamm explores with admirable care the merits and possible defects of an argument that Thomson does not mention and that Dworkin does not take up: that aborting a voluntarily conceived fetus does not wrong, because, relative to the baseline of its unconscious existence, abortion does not harm it. See *id.* at 78-95, 124-85. Consider this analogy: you encounter somebody who is unconscious and who will die in a remote desert unless you carry him to a place where medical care is available. If you leave him, he will die before help arrives. Suppose that you begin carrying him but later, finding that the strain is too great, you abandon him to his death. If nobody else could have saved him, have you done wrong by leaving him to die halfway to salvation? Would your action become any less permissible if he would have died earlier had you not given him emergency medical aid when you first found him? For a critical analysis of Kamm’s argument, see Jeff McMahan, *The Right To Choose an Abortion*, 22 PHIL. & PUB. AFF. 331 (1993) (review essay).

32. Dworkin writes:

[A]bortion normally requires a physical attack on a fetus, not just a failure to aid it, and, in any case, parents are invariably made an exception to the general doctrine because they have a legal duty to care for their children. If a fetus is a person from conception, a state would have no justification for generally allowing abortion but forbidding killing infants or abandoning them in fatal circumstances. The physical and emotional and economic burdens of pregnancy are intense, but so are the parallel burdens of parenthood.

LIFE’S DOMINION, *supra* note 1, at 111 (footnote omitted).

The first of Dworkin’s objections will strike many as unconvincing. Surely it makes no moral difference whether, in Thomson’s violinist case, see *supra* note 31, the woman refuses to be hooked up to the violinist or whether, in her sleep, she is hooked up and told that the only way not to provide aid is to sever the cord connecting her to the violinist. It is true that some people would declare it worse to bludgeon the violinist to death, if that were the only way to escape, than to snip the cord, even though the result is the same and equally inevitable. See KAMM, *supra* note 31, at 31-33; McMahan, *supra* note 31, at 333. But few, I think, would or should decide that killing is impermissible.

Dworkin’s second point is more interesting. He notes the obvious rejoinder: that even assuming a fetus is a person, a distinction could be drawn between infanticide and abortion because babies can be put up for adoption but fetuses cannot be transferred between wombs. For such an argument, see, e.g., Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1597-98 (1979). Dworkin replies that parents are not legally permitted to kill their children or let them die even if adoptive parents cannot be found. LIFE’S DOMINION, *supra* note 1, at 249 n.5. So if infanticide is impermissible because a newborn is a person, abortion cannot be permitted either if a fetus is a person.

Dworkin’s point is important, but not necessarily decisive. First, his comparison of the burdens of pregnancy to those of parenthood is misleading, because the question is whether the enormous burdens of pregnancy, *in addition to* the burdens of parenthood, are too much to ask. It does not follow from the assumption that A is not an excessive burden that A + B is not excessive. Second, as Regan notes, the legal imposition of physically invasive burdens and physical risks has been disfavored. Parents have no duty to donate organs to their children or to risk serious injury to save them. This marks an important distinction between childbearing, which is physically invasive, and childrearing, which is not. See Regan, *supra*, at 1583-91, 1598. Third, it is worth asking whether the duties that the law imposes on parents would be weaker if abortion (or contraception) were *not* permitted and if adoption were *not* available in almost all cases. If those duties would be weaker, then Dworkin cannot build a strong argument on current legal obligations.

also questionable. The Equal Protection Clause, for example, might afford a right to abortion if a state did not enjoin citizens generally, or men in particular, to furnish help to people in need at a personal cost equal to that which women typically bear in carrying a child and either raising or relinquishing it.<sup>33</sup>

Whether Dworkin is right about the moral strength of any rights a fetus might possess or the implications of our limited duty to aid others hardly matters if his argument that the state may not proscribe abortion on the basis of nonderivative values succeeds. If his argument fails, however, these points could grow in importance. Even if they are not decisive, they could contribute to a case for the permissibility of abortion if opposing arguments based on the intrinsic value of fetal life or some other moral claim that fetuses might have are weak or uncertain.

Two other claims depend on Dworkin's assertion that people object to abortion for the detached reason that human life is intrinsically valuable even in a preconscious form. The first is that if people share this core conviction, there is hope of resolving their differences over abortion policy. The idea that human life is intrinsically valuable, Dworkin argues, is fundamentally a religious belief, or tantamount to one. Most people hold this belief, even though they disagree about its content and significance. Because Americans and Europeans have learned to tolerate religious convictions they reject, he says, they might choose to tolerate abortion even though they despise it, once they realize that their disagreement over the morality of abortion is at heart religious:

Seeing the abortion controversy in the fresh light I described will not, of course, end our disagreements about the morality of abortion, because these disagreements are deep and may be perpetual. But if that fresh light helps us to identify those disagreements as at bottom *spiritual*, that should help bring us together, because we have grown used to the idea, as I said, that real community is possible across deep religious divisions. We might hope for even more—not just for greater tolerance but for a more positive and healing realization: that what we share—our common commitment to the sanctity of life—is itself precious, a unifying ideal we can rescue from the decades of hate.<sup>34</sup>

---

33. Numerous writers have argued that, as a matter of American constitutional law, assigning the burden of childbearing, alone or in conjunction with the burden of childrearing, to women without imposing an equally onerous duty on men violates the Equal Protection Clause. See, e.g., Regan, *supra* note 32, at 1619-39; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 272-85 (1993). Dworkin does not consider this argument, outside the passage quoted in note 32, *infra*. A searching discussion of these issues is offered in Davis, *supra* note 8, at 743-66.

34. LIFE'S DOMINION, *supra* note 1, at 101.

Even if Dworkin is right in claiming that most people regard fetal life as intrinsically valuable, rather than a source of moral claims resembling personal rights, one might well wonder whether his hope for concord is wishful. Adherents of rival sects may no longer murder one another routinely in most of the Western world, but hate crimes against Jews and Muslims are still common. Religious differences are not always accepted with equanimity, especially if they affect behavior and not merely belief. Salman Rushdie lives in hiding; Santerians face attempts to outlaw their ritual sacrifice of animals; Native Americans have been prosecuted for ingesting peyote as part of a religious ceremony; bigamy and polygamy may be punished, regardless of their religious pedigree.<sup>35</sup> Abortion is surely no less controversial. We are, moreover, most apt to tolerate behavior we think wrong if somebody alleges that he will suffer a manifestly serious religious sanction from acting otherwise—hellfire or an unenviable reincarnation, for example, or some significant spiritual rupture in this life. But few maintain that *not* having an abortion will occasion these spiritual ills.

There is no way to know with certainty, I suppose, whether opponents of abortion would cease their efforts to ban it if they saw abortion providers and women who solicit their help as disagreeing with them about a religious issue on which they share some common views. But the vehemence with which many people defend prenatal life hardly engenders optimism about their willingness to capitulate politically. Dworkin seems not to appreciate the force of conviction that motivates many of abortion's enemies.

Dworkin's second claim based on the distinction between detached and derivative objections is directed primarily to judges. Early abortions, in Dworkin's view, find legal shelter under the aegis of the Religion Clauses, because beliefs about abortion's moral permissibility are essentially religious: they proceed from convictions about how to venerate life's sacred or inherently valuable character.<sup>36</sup> If the dispute is, by contrast, over whether fetuses have rights, he apparently thinks that the Religion Clauses cannot assist abortion's defenders.<sup>37</sup> Likewise, if many people's reasons for criticizing or regretting

---

35. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (sustaining free exercise attack on law targeted at Santeria ritual animal sacrifice); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (rejecting free exercise objection to state law forbidding peyote use that extended to Native American religious ceremonies); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding antipolygamy statute against free exercise challenge).

36. This is true regardless of whether these convictions are based on the tenets of an established religious faith, because a belief counts as religious for constitutional purposes, Dworkin says, if "it is sufficiently similar in content to plainly religious beliefs." *LIFE'S DOMINION*, *supra* note 1, at 155. I shall not discuss Dworkin's Free Exercise Clause argument in this essay, or question the doctrinal basis for these claims. I should, however, note that in his view the Free Exercise Clause does not guarantee a right of abortion during the final trimester, because a fetus might be conscious and have interests at that time. A state may nevertheless permit abortion during that period because a fetus is not a "person" for the purposes of the Fourteenth Amendment's Due Process or Equal Protection Clauses. See *LIFE'S DOMINION*, *supra* note 1, at 109-12, 169-70.

37. It is not clear that this conclusion follows if a fetus' rights are less weighty than a child's. The



abortion is not premised on beliefs about life's sanctity, but are moral beliefs of some other sort or unexplained emotional reactions, then the Free Exercise Clause offers no protection for a woman's liberty to choose whether to bear a child.<sup>38</sup> Finally, if beliefs about the moral status of the fetus are not essentially spiritual, the Establishment Clause apparently does not prevent the state from prohibiting abortions or mandate that the government pay for poor women's abortions if it provides general health services to indigent citizens.

Dworkin's constitutional argument and his appeal to our tradition of religious toleration therefore hinge on his demonstration that most people's objections to abortion are not merely nonderivative, but are based on a belief about the sacred value of fetal life. I shall devote little attention to Dworkin's innovative reading of the Religion Clauses; by Dworkin's admission,<sup>39</sup> his reliance on the Religion Clauses to derive a constitutional right to abortion is superfluous except in the case of state funding of abortion.<sup>40</sup> Those who wish

Free Exercise Clause might be read to permit ritual animal sacrifice, for example, even though animals have interests that may be protected.

38. LIFE'S DOMINION, *supra* note 1, at 165.

39. *Id.* at 160, 166, 252 n.15.

40. Dworkin's assertion that the Establishment Clause compels the state to pay for poor women's abortions is, he recognizes, inconsistent with a long line of Supreme Court rulings that the government need not assume that cost even if it covers the expenses of childbirth. But he suggests that a fresh look might be appropriate in view of what he regards as a change in the Court's understanding of *Roe v. Wade*, 410 U.S. 113 (1973), based on its decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816-21 (1992). See LIFE'S DOMINION, *supra* note 1, at 175-76. Dworkin offers this suggestion even though none of the *Casey* opinions mentioned the possibility that the Establishment Clause might require or bar abortion funding.

Dworkin's argument seems to me unpersuasive in this skeletal form. Objections centered on the overarching question of what role the Religion Clauses play in the Constitution's design are too cumbersome to confront in a footnote, although their importance is plain. On a less abstract level, if Dworkin were to defend his thesis more thoroughly he would need to address at least the following points. First, Dworkin's conclusion that *Casey* embodied a significantly revised understanding of *Roe* is based on a selective reading of a plurality, not a majority, opinion. Dworkin needs to explain why a merely implicit plurality view should be regarded as the Court's view, particularly when all three Justices in the plurality accept the Court's longstanding denial of a constitutional duty to fund abortions. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991) (upholding an executive "gag order" on abortion counseling in part on the basis of earlier funding decisions, in an opinion in which Kennedy and Souter joined); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507-11 (1989) (upholding a denial of funding in an opinion in which Kennedy joined); *Webster*, 492 U.S. at 523-24 (O'Connor, J., concurring in part and concurring in judgment) (same). Dworkin needs to explain these Justices' myopia if he wants to claim that they really did embrace the major tenets of his theory. A further source of difficulty for Dworkin's assertion that the Court's position has shifted in a way congenial to his reading of the Establishment Clause is that Justice Stevens, who has explicitly relied on the Establishment Clause in declaring unconstitutional a legislative preamble stating that life begins at conception, see *Webster*, 492 U.S. at 560-72 (Stevens, J., dissenting), has regularly rejected the claim that states must fund nontherapeutic abortions for poor women if the states pay the medical costs associated with childbirth. See *Maher v. Roe*, 432 U.S. 464 (1977) (upholding government refusal to fund nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297, 349 (1980) (Stevens, J., dissenting) (arguing that majority erred in extending *Maher's* rule to therapeutic abortions); see also WENZ, *supra* note 7, at 214-17 (arguing that the Religion Clauses yield a right to early abortion but that state funding, though permissible, is not constitutionally required).

These exegetical concerns are perhaps of small importance. By any measure, *Casey* does not provide a sufficient basis for a lower court to depart from the Court's longstanding holding that states need not fund abortions, and there is little point in speculating about whether the Justices will themselves abandon this holding in a later case. Much more important is a second point: Dworkin needs to set forth the implications of his Establishment Clause claim for state funding in other areas. Integrity, he recognizes, requires broad

to examine his constitutional argument, though, will find it necessary to assess Dworkin's claim that most people's attitudes towards abortion are corollaries to more fundamental convictions about life's sanctity. More important, determining the truth of Dworkin's claim is crucial in specifying the implications of popular objections to abortion for the state's power to regulate it, not only in the United States (if Dworkin's constitutional arguments founder) but in liberal societies beyond its borders, where the Constitution commands no allegiance.

### B. *In What Sense Is Life Sacred?*

If a fetus has no rights that abortion can infringe, the regrettability of abortion must stem from its failure to respect some other value. But what value can the life of a fetus have if it lacks interests of its own? Fetal life might be valued because prospective parents or other people desire the child's birth or because it will in time benefit them. But this type of value erects a weak moral impediment to abortion if the child's prospective parents do not wish to have it, because the child's possible beneficial impact on others' lives is speculative and by no means sufficient to ground a duty to procreate. Life may also be valuable to the creature who leads it, as a precondition to feelings or achievements it desires. Because life has value for that creature, others have a duty to honor whatever interests it has by virtue of its self-awareness. This is the foundation for basic personal rights. The life of a fetus is not valuable in this way, however, because a fetus is not aware of itself or its surroundings before at least the last third of pregnancy, and then barely if at all. So, if a fetus contributes little or nothing to others' lives and it lacks subjective experiences, what value can its life possibly have that makes abortion regrettable or immoral?

#### 1. *Dworkin's Argument*

Dworkin claims that most of us believe that human life "even in its most undeveloped form" is intrinsically valuable, by which he means that "its value

---

consistency across constitutional domains. DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 225-58. Here, consistency might be obtained only at too high a price. Michael McConnell has argued trenchantly, for example, that if the Constitution mandates state funding for abortions, it equally mandates state support for sectarian private schools. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991). State funding for abortions might entail funding for euthanasia as well. See *infra* text accompanying note 141. It is not obvious that Dworkin would welcome these implications, or that he can show that they do not follow from his view.

Finally, Dworkin needs to square his proposal with the Supreme Court's resolute rejection of constitutional challenges to government inaction, as opposed to constitutionally based attacks on state conduct. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (finding no due process right to government protection from parental abuse). This is a highly general and well-entrenched principle that, under Dworkin's theory of interpretation, cannot easily be unseated.

is *independent* of what people happen to enjoy or want or need or what is good for them.”<sup>41</sup> He begins his defense of this claim by attempting to show that people similarly ascribe intrinsic value to many other things: “much of our life is based on the idea that objects or events can be valuable in themselves.”<sup>42</sup> Consider outstanding paintings. Many people think they must be preserved, Dworkin says, “because of their inherent quality as art, and not because people happen to enjoy looking at them or find instruction or some pleasurable aesthetic experience standing before them.”<sup>43</sup> The same, he thinks, is true of “any distinctive form of human culture”: “We create museums to protect and sustain interest in some form of primitive art, for example, not just because or if we think its objects splendid or beautiful, but because we think it a terrible waste if any artistic form that human beings have developed should perish as if it had never existed.”<sup>44</sup>

Dworkin next divides the class of intrinsically valuable objects or experiences. Some things are *incrementally* valuable: each addition to human knowledge enhances the value of the sum of our knowledge. Others are *sacred* or *inviolable*: “The hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because—and therefore only once—it exists.”<sup>45</sup> Art is sacred in this way. Once a marvelous painting exists, its destruction would be a “desecration.” But less ill would befall the world if it never came into existence: “I do not myself wish that there were more paintings by Tintoretto than there are. But I would nevertheless be appalled by the deliberate destruction of even one of those he did paint.”<sup>46</sup> We take a parallel attitude, Dworkin claims, towards the natural world: “we tend to treat distinct animal species (though not individual animals) as sacred,” and we would incur considerable expense to prevent their demise at human hands.<sup>47</sup> We wish to save natural species, Dworkin avers, not primarily because we expect to learn from individual animals or because we delight in watching them, but simply because we “consider it a kind of cosmic shame when a species that nature has developed ceases, through human actions, to exist.”<sup>48</sup>

---

41. LIFE'S DOMINION, *supra* note 1, at 71. Dworkin also uses without explanation a weaker, included definition of intrinsic value that does not require an entity's or experience's intrinsic value to be independent of whether it is objectively good for people. He says, for example, that a painting's intrinsic value may lie “in the kind of experience it makes available . . . because [that value] does not depend on any creatures' actually wanting that kind of experience,” even if the painting would be without value if nobody ever perceived it. *Id.* at 248 n.1. It is a complicated question, not worth pursuing here, whether these two accounts are consistent.

42. *Id.* at 69.

43. *Id.* at 72.

44. *Id.*

45. *Id.* at 73-74.

46. *Id.* at 74.

47. *Id.* at 75.

48. *Id.*

Whence comes the sanctity that paintings, cultures, and natural species possess? It comes not from their symbolic association with something that radiates value, the way flags and crosses gain their sacred character. It comes rather from their history, from the way they were formed. "We protect even a painting we do not much like," Dworkin says, "just as we try to preserve cultures we do not especially admire, because they embody processes of human creation we consider important and admirable."<sup>49</sup> The same is true of natural species: "We see the evolutionary process through which species were developed as itself contributing, in some way, to the shame of what we do when we cause their extinction now."<sup>50</sup>

That line of thought reaches its apex in the case of the human species. We think it supremely important, Dworkin claims, that humanity continue and thrive. But our concern for future people cannot be explained by our caring about their rights or interests, for they have none. According to most belief systems, there are no possible people loitering in a mystical space waiting to be born, whose right to existence would be stymied if we allowed the race to die out. Nor do we have duties to particular future people, because their very identity depends on how we act now. In Derek Parfit's famous example, if we adopt a wasteful energy policy, the many economic, social, and technical changes that result will affect who has sex with whom and when, and thus determine who is born. Adopting a less spendthrift policy could neither profit those who are born nor ignore their rights, because its adoption would mean that they would never see daylight: other people would be born instead.<sup>51</sup> Accepting Parfit's argument, Dworkin writes:

It hardly makes sense to say that we owe it to some particular individual not selfishly to squander the earth's resources if that individual will exist only if we do squander them. Or, for that matter, only if we don't. Our concern for future generations is not a matter of justice at all but of our instinctive sense that human flourishing as well as human survival is of sacred importance.<sup>52</sup>

---

49. *Id.* at 74-75. Dworkin does not try to reconcile this claim with the passage I quoted in note 41, *supra*, in which he affirms that a painting's intrinsic value may lie "in the kind of experience it makes available."

50. *Id.* at 76.

51. See DEREK PARFIT, REASONS AND PERSONS 351-79 (1984) [hereinafter PARFIT, REASONS AND PERSONS]. Most people's intuitions do not echo Parfit's conclusion, which has inspired philosophers to hunt for flaws in his argument. See, e.g., John O'Neill, *Future Generations: Present Harms*, 68 PHILOSOPHY 35 (1993); Matthew Hanser, *Harming Future People*, 19 PHIL. & PUB. AFF. 47 (1990); James Woodward, *The Non-Identity Problem*, 96 ETHICS 804 (1986); Derek Parfit, *Comments*, 96 ETHICS 832, 854-62 (1986) (replying to Woodward); James Woodward, *Reply to Parfit*, 97 ETHICS 800 (1987). There is no philosophical consensus on the strength of these ripostes to Parfit's reasoning.

52. LIFE'S DOMINION, *supra* note 1, at 78. Dworkin does not explain how he would reconcile this view with his earlier essay on government funding for the arts, which appears to premise state subsidies on what we owe to future people: "We inherited a cultural structure, and we have some duty, out of simple justice, to leave that structure at least as rich as we found it." RONALD DWORCKIN, *Can a Liberal State Support Art?*, in A MATTER OF PRINCIPLE 221, 233 (1985); see *id.* at 229 (referring to those now alive as "trustees

What unites our judgments about art and species and cultural achievement? “[T]he nerve of the sacred,” Dworkin states, “lies in the value we attach to a process or enterprise or project rather than to its results considered independently from how they were produced.”<sup>53</sup> What these processes and projects have in common is creativity. We value the creative activity of individual artists as we value the collective creation of cultures; in like fashion, we respect God’s creation if we are conventionally religious, and honor nature’s blind purposiveness “in some primal way” if we are not.<sup>54</sup> Of course, Dworkin says, we do not treat all art, or all of nature’s products, as equally valuable. Their intrinsic value—not just their instrumental value in satisfying people’s preferences—comes in degrees. Destroying a Bellini is a more serious waste of intrinsic value than destroying the work of a minor Renaissance artist, he says, and stamping out the Siberian tiger would be a greater insult to natural creation than causing the extinction of some beautiful species of exotic bird. In addition, Dworkin claims, some human and natural creations have no intrinsic value at all. Art is inviolable, but cars are not. Likewise, killing off the rhino would be horrible, but nobody should regret the annihilation of some scourge, like the AIDS virus.<sup>55</sup>

Following these reflections, Dworkin asserts that most people believe that human life has a special intrinsic value, one that is “very similar, though in some important ways different” from, the intrinsic value of natural species and works of art.<sup>56</sup> What is most strikingly different about the intrinsic value of fetal life is that it results from the *combination* of a natural or divine contribution, of the sort that natural species possess, and a human contribution, which gives art much of its value. Both conservatives and liberals regard the “waste” of these “investments” (Dworkin uses these terms repeatedly) as regrettable. But our regret at someone’s death is not proportional to the span

---

for protecting the richness of our culture for those who will live their lives in it after us”). Dworkin may have repudiated what appears to have been his view that future people have claims of right against those now alive. Or he may give a different sense to his earlier statements than has been ascribed to them. See Samuel Black, *Revisionist Liberalism and the Decline of Culture*, 102 *ETHICS* 244, 253-60 (1992) (treating Dworkin’s argument as one about intergenerational justice). Dworkin might say that because of the intrinsic value of cultural advance, we should ensure that those who come later will be able to improve the culture we pass on; talk of a duty of justice and of our being trustees for the interests of future people was only a loose way of referring to the objective importance of helping people who have no claims against us to achieve something valuable in its own right.

53. *LIFE’S DOMINION*, *supra* note 1, at 78.

54. *Id.* at 79. Dworkin says of respect for the chance products of natural forces:

Perhaps future generations will mock the idea as ridiculously sentimental. But it is nevertheless very widespread now, and there is nothing irrational or disreputable about it. It is no more sentimental to treat what nature has created as an investment we should not waste than it is to take the same view of an ancient work of art, whose unknown author perished many centuries ago, or of some ancient language or craft created by people who never thought they were investing in anything.

*Id.* at 79-80.

55. *Id.* at 80.

56. *Id.* at 81.

of time that the decedent loses. An early abortion is less bad than a later one, and the death of a three-year-old child is worse than the death of an infant and less bad than the death of an adolescent.<sup>57</sup> Waste and regret depend not only on what some creature might have had or contributed. They also depend on the magnitude of the investments that nature, the decedent, and others have made in the decedent's life up to the time of her death.

The range of convictions regarding the morality of abortion can be explained, Dworkin believes, by the relative importance people assign to the natural and human investments in a fetus' life and in the pregnant woman's life. Extreme conservatives (the labels are Dworkin's) think that the loss of nature's investment in a fetus cannot be outweighed by the frustration that giving birth to an unwanted child would work on the natural and human investment in the mother's life. Moderate conservatives allow an exception for pregnancies resulting from rape, because forcing a woman to bear a child begun in a way that affronts God or nature's investment in her life as well as her own investment in that life is a wrong more terrible than abandoning God or nature's investment in the fetus' life. Liberals endorse additional exceptions. They believe, Dworkin says, that abortion can also be justified if a child will lead a meager existence because of physical or mental infirmity, or if the pregnant woman's own life would be significantly harmed were she to carry the child to term against her will. The divine or natural investment in a fetus' life sometimes pales beside the later frustration that bearing and raising a child would cause.

Nevertheless, liberals and conservatives are arrayed along the same spectrum of concern about fetal and maternal life. They agree, Dworkin thinks, on the values in jeopardy, even when they judge their importance differently. This unifying conviction about life's sanctity, he believes, gives hope for a respectful tolerance of abortion that has so far eluded America. At the very least, it promises women the freedom to choose whether to abort or continue their pregnancies, as an expression of their constitutionally protected religious convictions about the value of human life.

## 2. *Questionable Analogies*

I wish in this subsection to make four points about Dworkin's argument. The first is that his account of the allegedly intrinsic value of art, human cultures, and natural species is at best incomplete. If abortion is wrong largely (if not entirely) because a fetus possesses the same sort of intrinsic value as these other human and natural creations, then Dworkin's account of fetal value is likewise incomplete. Second, the notion of investment, which figures prominently in Dworkin's explanation of the value of art, culture, and species,

---

57. See *id.* at 86-87.

seems to me of little help in accounting for popular intuitions about abortion and procreation. Third, a better explanation of the value that people commonly attach to art and natural entities is available. It includes most of Dworkin's explanation, while adding to it. I offer a very crude sketch of this more complete explanation to see whether Dworkin's project of accounting for opposition to abortion can be carried through if his account of the intrinsic value of art, culture, and species is refined. Fourth, the more refined account is no more successful than Dworkin's proposal in explaining why most people object to abortion. The next subsection offers what seems to me a more accurate rendering of the beliefs that animate most nonderivative objections to abortion.

The main shortcoming of Dworkin's account of the intrinsic value of art, culture, and natural species is that it does not explain the differences in value most people recognize. We prize some species over others—Siberian tigers over insects, to use one of his examples.<sup>58</sup> We count certain cultures vile—the Nazis offer only one recent illustration—no matter how novel they were or how ingenious their champions. We acclaim Bach more than Bartók. In these and like cases, Dworkin says that we regard natural or artistic creations as having different *intrinsic* values. The variation in the values we assign to them is a product of their inherent worth, rather than of their differing utility in satisfying our preferences. This descriptive claim appears accurate in many of the cases Dworkin discusses. But a bare reference to nature's investment in species or to the human contributions poured into cultures or art cannot explain these differences. All natural phenomena share a common source: none is any less natural, and on that account less valuable, than the rest.<sup>59</sup> Likewise, all human creations embody craft and energy, but their intrinsic value bears no obvious relation to the magnitude of these investments. Smashing a truckload of bicycles squanders the vast effort that went into them. But even if Van Gogh spent a fraction of that time and concentration turning paint into sunflowers, the loss of his masterpiece would dwarf, as a loss of intrinsic value, the destruction of fleets of bicycles.

Appealing to natural or human investment as a source of inviolability also cannot explain why some products or processes have no intrinsic value

---

58. *Id.* at 80.

59. Dworkin's explanation displays an affinity to many accounts of the alleged intrinsic value of various natural processes and entities propounded by recent writers on environmental ethics, and the objection outlined above would apply equally to such claims. For a map of the varieties of intrinsic value that have been attributed to nature, see Eugene C. Hargrove, *Weak Anthropocentric Intrinsic Value*, 75 *MONIST* 183 (1992). Beginning in 1979, the journal *Environmental Ethics* has provided a steady stream of articles defending and occasionally attacking the idea that natural entities or life forms possess inherent worth. Three books that faithfully reflect the dimensions of this flourishing debate are EUGENE C. HARGROVE, *FOUNDATIONS OF ENVIRONMENTAL ETHICS* (1989); HOLMES ROLSTON, III, *ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD* (1988); PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* (1986). A useful set of essays is contained in Symposium, *The Intrinsic Value of Nature*, 75 *MONIST* 119 (1992).

whatsoever or ought to be thwarted. The fact that some naturally occurring disease, rather than human carelessness, has brought a species to the brink of extinction does not weaken the case for rescuing that species: it makes rescue more imperative. The flourishing of Nazi culture does not enhance the respect we owe it; on the contrary, it magnifies its danger, making it a more fitting target for attack.

The same explanatory gaps open in Dworkin's account of the value of fetal life derived from the natural investment in its development. Virtually no one identifies the natural with the normative in any strong sense. The prospect of a healthy fetus' miscarrying *spontaneously*, for example, does not furnish a reason not to intervene: it makes blocking nature's workings critical. Moreover, if abortion should be reviled because of its interference with some natural reproductive process, why should contraception not earn the same denunciation? It interferes with the same result. Some people do, of course, believe that contraception and abortion are morally equivalent. But Dworkin assumes that most people do *not* share this belief, and it is their differing intuitions about the morality of contraception and abortion that he is attempting to explain by reference to the idea of nature's investment. So how can the distinction be drawn? Pregnancy does, to be sure, mark a longer extension of the reproductive process than does the imminent union of sperm and egg. But the fact that a natural process is nearing completion is not necessarily a reason to allow it to finish. Consider again the impending extinction of some species by natural means. Some explanation of our differing judgments about the value of these processes is needed, and an explanation that simply appends the honorific adjective "natural" to whatever processes or outcomes we deem desirable renders references to nature explanatorily empty. The same goes for Dworkin's related concepts of investment and frustration. As it stands, Dworkin's explanation of people's convictions in these terms fails to account for the variations we allegedly discern in an intrinsic value arising from natural teleology or investment.

The notion of investment as an explanation of widespread views about abortion is unappealing in other ways, too. First, it carries connotations of a directed effort that seems out of place in describing natural processes, except in an animistic view of nature. The explanation seems to do little better if one assumes that a personal God is the source of life, for the notion of "waste" suggests (if it does not directly imply) that what makes a late abortion worse than an early abortion is that more of God's scarce energy has been squandered—an image of the divine few would approve.

Second, the notion of investment seems an odd lens through which to view the human contribution to a developing fetus. In referring to the human investment, Dworkin presumably means the woman's or couple's intentions, because he identifies the human investment with the creative aspects of a



decision to have a child.<sup>60</sup> But it would be strange to hold that the abortion of a planned pregnancy is morally worse than the abortion of an unplanned pregnancy, if the woman who intended to become pregnant changed her mind and wanted, at the time of abortion, to end her pregnancy as much as someone who did not plan to become pregnant. If abortion is wrong in either case because of what it does to the fetus, it is equally wrong in both cases. Prior intentions are irrelevant.

Dworkin's account of the nonincremental value of art, nature, and fetuses thus seems to offer at best a partial explanation of the attitudes he assumes people have. Some people would no doubt supplement that account by appealing to their understanding of God's wishes, or by reference to religious insights that resist expression in general terms. But Dworkin assumes that many people would not answer in this way, and that it is possible to articulate some broader account of intrinsic value that most people would embrace—one that starts from the value of paintings and animal species and that proceeds to explain the value of fetuses. Let me therefore offer, in a sympathetic attempt to complete Dworkin's project, what seems a more attractive explanation of many people's beliefs about the value of art, culture, and natural species. I shall then ask whether it helps to explain why many people object to destroying fetal life.

My explanation, admittedly oversimplified, has four components: The importance of respecting divine, natural, and perhaps human creation; the value of certain experiences or achievements independent of the degree to which people desire them; the utility of objects or information in advancing human purposes; and scarcity.

Dworkin emphasizes the first component. Some people believe that the naturalness of an entity or a process entitles it to respect, because it is God's handiwork or perhaps because of a reverence for nature that lingers when religious allegiance wanes. This conviction may account for some of the uneasiness people feel at interfering with ecological systems, although fear of doing unforeseen harm to our own interests or those of other sentient beings is intertwined with this uneasiness and perhaps impossible to separate psychologically. Blind respect for nature, or belief in a benign spiritual force animating it, might also explain why some people would deem naturally occurring species more valuable than humanly created ones, if in fact Dworkin's speculation that they would is accurate. Of course, other explanations are also possible—concerns about replaceability<sup>61</sup> or a desire for

---

60. See LIFE'S DOMINION, *supra* note 1, at 83.

61. Some might be inclined to accord less value to species that people have fabricated, because they assume that these species could be recreated if they died out, whereas natural species could not be restored. Suppose, however, that these assumptions were false. Imagine that natural species could be reintroduced if they became extinct, or that some humanly engineered species could not be replicated if extinction overtook it. Those who held the attitudes Dworkin describes might then not discriminate based on a species' natural or artificial origin. Compare the way most people think of dogs: breeds created by human

continuity of experience<sup>62</sup> might also carry weight—and disentangling them in anyone's mind might be surpassingly difficult. But Dworkin's explanation of popular attitudes is plausible. The crucial point is that natural investment alone does not account for the differences in value we discern within the class of natural species or processes,<sup>63</sup> nor does any nontrivial notion of human investment explain why some paintings or cultures are more valuable than others.

The second part of this summary explanation appeals to a different account of inherent worth. That account asserts that something is intrinsically valuable insofar as (though not necessarily because) it is capable of improving people's experiences or attainments, where improvement is measured along some objective scale rather than in terms of people's actual preferences or those they would have if they possessed better nonevaluative information. This conception of intrinsic value is widely accepted. It lies behind the familiar claim that some

design are not valued less, are not thought less worthy of existence or of smaller inherent worth, than those that developed through evolution (to the extent that we can still tell the two apart). Needless to say, these predictions are highly speculative, because people do not now create animal species, although they do breed animals to amplify certain traits. The puzzle, for those who repudiate the predictions, is explaining why naturally occurring species should be preferred to man-made species. After all, human beings are themselves part of nature, making whatever they produce no less natural than species brought to life through the fateful actions of other animals or natural forces. A person with theistic beliefs might regard people as competing with God if they create new species, and therefore reject their creations as hubristic and inferior. But somebody who did not take this view could not venture a similar explanation for favoring species that arise by chance rather than by design.

62. The mere fact that an object has been cherished by generations who preceded us is frequently thought a special reason to ensure that those who follow us have a chance to enjoy it, too. The force of this reason is often believed to increase with time, as the historical web spun around the valued object grows more intricate. Consider the special reverence accorded heirlooms, which many people are loath to part with, even in exchange for a more beautiful replacement. We might, in the same way, think it specially important that walrus survive, even if we could set less ungainly creatures in their place. To alter the example, we might agree with Burke that it is important that certain cultural forms continue, simply because they have endured this long and embody an unfolding narrative that is improved by its length and the interrelations of its parts.

63. An unexamined, and probably unjustifiable, distinction between actions and omissions also seems to pervade the popular attitude towards species preservation that Dworkin reports. Most people think it especially regrettable if human actions drive a species into oblivion. If that species were to die out without human involvement, the result would be less horrible. People are therefore under a stronger duty, in this view, not to make a species extinct than to prevent it from becoming extinct on its own.

What explains this distinction? Numerous moral philosophers (though there is spirited opposition) have derided the act/omission distinction as a guide to moral appraisal, noting that in many instances knowingly failing to act is as bad as performing a different action to achieve the same result. *See, e.g.,* MICHAEL TOOLEY, *ABORTION AND INFANTICIDE* 184-241 (1983) (criticizing the act/omission distinction); *but see* Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 *PHIL. REV.* 287 (1989) (defending the distinction). It is true that harmful actions frequently deserve harsher moral criticism than omissions that produce identical outcomes, because of a difference in intention or in the certainty of the undesirable outcome when the act or omission took place. But that is not always so, and we can assume that these factors do not differ in Dworkin's comparison. So why should it be worse to exterminate the condor than not to prevent its natural demise?

One answer might be that, if the condor dies naturally, it must be God's will or a just (because fated) end; if people kill it off, the blame lies with us. But unless one alleges insight into divine intentions or one attributes a normative purposiveness to natural processes exclusive of the process that constitutes human action (but why this exclusion?), this explanation falters. It could be that many people's attitudes are simply inconsistent with the more fundamental moral principles which they endorse.

things are good for people regardless of whether people desire them; people ought to desire those things because they are good for them, even if they do not expect to enjoy the experiences to which they give rise.<sup>64</sup> The claim is not necessarily that something is intrinsically valuable *because* it works some objective improvement in people's lives or is capable of having that impact. It could be that its having that potential or that effect is a *sign* of the value it has independent of that potential or effect. I see no reason, for purposes of this account, to choose between these two possible claims. The point is that this dimension of something's inherent value can be measured, or at least indicated, by its potential to affect the lives of conscious beings in some objectively desirable way, even if that value is not constituted by the possible or actual effect.<sup>65</sup>

Although Dworkin does not dwell on this conception of intrinsic value, it seems the best explanation of why some artistic creations are honored, whereas most manufactured articles are not. Great art's intrinsic worth inheres in or is indicated by its capacity to ennoble, inspire, or otherwise better people's lives in some objective sense independent of what they want under nonevaluative descriptions. The same is true of some plants and animals. Individual plants and animals—not species as abstract entities—have intrinsic value to the extent that they are capable of expanding people's imaginative resources in some objectively valuable way through their individual characteristics or collective variety, or if they exhibit aesthetic excellence or distinctiveness in their form or behavior,<sup>66</sup> or if they are able to help us to understand the world better in some nonutilitarian respect. Cultures also manifest this form of value, if the capacity for fostering moral or spiritual advance is added to their capacity to yield insight or beauty.

The third element in this abbreviated explanation of the value of art, culture, and species is *instrumental* value, the capacity to satisfy the desires of sentient creatures. Many human and natural creations are valued not because, or not only because, they are beautiful or can stimulate objectively valuable insights or because of their origins, but simply because they please people. The Grand Canyon exhibits all these types of value. Many plant species, by contrast, are valuable solely as sources of food, pharmaceuticals, and clothing.

---

64. Many philosophers have argued for the objectivity or preference-independence of value based on the phenomenology and use of evaluative statements. See, e.g., DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 222-36 (1989); JAMES GRIFFIN, *WELL-BEING* 27-30 (1986). Others have shown, by noting that few people would agree to be hooked up for the rest of their lives to a machine that would give them wondrous experiences while their bodies remained inert, that human well-being is not solely a function of what people experience; it depends as well on what they themselves actually are and what they do, in particular on what they add to others' lives. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 42-45 (1974); JONATHAN GLOVER, *WHAT SORT OF PEOPLE SHOULD THERE BE?* 91-113 (1984).

65. This view seems to correspond to one of Dworkin's accounts of the intrinsic value of art. See *supra* note 41.

66. See Lilly-Marlene Russow, *Why Do Species Matter?*, 3 *ENVTL. ETHICS* 101 (1981) (tracing the intrinsic value of species to the aesthetic value of individual members of those species).

Along with aesthetic and other forms of intrinsic value, the ability to fulfill people's desires helps account for the differences that Dworkin claims most people find in the value of various species—putting tigers above the AIDS virus, for instance<sup>67</sup>—though he himself appears to think this instrumental relation plays no part in explaining these evaluative judgments.

Scarcity is the fourth factor in this account. It can add to something's value, whether that value is intrinsic or instrumental.<sup>68</sup> A single condor is prized more than a dozen cows, not because condors are more natural or on a higher rung of creation than cows, nor because they are more inspiring or beautiful creatures, nor because they furnish people with more of what they need, but because cows are far more abundant.<sup>69</sup> Marvels of architecture and the visual arts are preserved and guarded because they are rare and cannot be replaced. Paperback copies of *War and Peace* do not receive the same respect, because more can easily be printed without any loss of literary value.

This outline of the ways in which natural and human creations acquire value is rough and incomplete. But these four elements, some of which seem implicit in Dworkin's argument, together account for virtually all of the beliefs he reports about the relative value of works of art and culture and the importance of preserving natural species. The one alleged belief for which they make little room—and this is a crucial difference—is Dworkin's contention that most intrinsically valuable entities are valuable only once they exist, and that while there is a strong reason to preserve them, there is no equally powerful reason to bring them into existence.<sup>70</sup> This claim is central to Dworkin's attempt to develop a univocal account of intrinsic value that includes fetuses without generating even a weak duty to procreate. It is certainly true of human beings and other creatures to the extent that we regard them as conscious subjects entitled to our respect—and thus as having rights against others—rather than merely as valuable objects that might gladden or otherwise improve others' lives. But Dworkin's contention seems to me false as applied to art, cultures, and species, except in cases in which people think these things especially valuable because they maintain an ongoing narrative<sup>71</sup> or possess a divine origin or blessing.<sup>72</sup> Subject to these qualifications,

---

67. LIFE'S DOMINION, *supra* note 1, at 80.

68. More precisely, scarcity does not affect something's intrinsically valuable properties, but it often affects the likelihood of that entity's giving rise to intrinsically valuable experiences in people or other conscious subjects.

69. See Thomas Hurka, *Value and Population Size*, 93 ETHICS 496 (1983).

70. See *supra* text accompanying notes 45-48.

71. See *supra* note 62.

72. Suppose that Tintoretto, fresh from his last canvas, offered to paint a still better work, but only on the condition that his latest effort be destroyed. (Perhaps he did not think the painting worthy of his talent.) Would you reject his offer out of hand even if you were certain that he would produce a finer painting, explaining that his last painting had considerable intrinsic value whereas a possible masterpiece that has not yet been painted is perforce of comparatively trifling worth? Surely not. You might try to dissuade him from making the first painting a casualty of the second. But if you could not overcome his obstinacy, you would commission the new work.

Dworkin's distinction between sacred and incremental value seems to parallel the distinction between the respect that a moral person commands, which ordinarily makes killing that person wrong, and the value that all other things possess by virtue of (or as manifested by) their potential contribution to the lives of conscious subjects, whether by satisfying their preferences or by making their lives objectively better. Dworkin's distinction seems misplaced within the realm of inanimate intrinsic value; it should rather mark the divide between that realm and the kingdom of rights and interests. If that is so, however, then Dworkin cannot easily liken pre-sentient fetuses to intrinsically valuable entities valued for paradigmatically detached reasons without recognizing at least a weak duty to have children. Such a duty might readily be overridden in our populous world, but it would be a duty nonetheless. The alternative, if we believe that fetal life is intrinsically valuable, is to think of fetuses in the same way that we think of living people: as beings who are not, in Dworkin's terms, incrementally valuable, and whose moral claims are ordinarily stronger than those supported by detached reasons.

I have tried to round out Dworkin's account of the value of nonliving and abstract entities to better explain the phenomena he considers. Do these additional features, if indeed they improve his account, also provide a better understanding of why many people object to abortion? I think not. Inanimate and conceptual entities' potential to contribute to people's lives either constitutes or signals those entities' intrinsic value and, albeit in a very different sense, their instrumental value. These notions of value therefore do not help to explain why many people think abortion morally suspect. People do not object that abortion destroys some valuable entity whose value inheres in or is revealed by what the fetus might add to *other* people's lives, nor that the child's birth would satisfy other people's preferences. They claim, rather, that abortion wrongs the fetus itself. Nor can a concern about scarcity explain abortion's wrongness, because human beings are hardly in short supply. An attractive account of the value of art, cultures, and species therefore fails, I think, to explain why many people deem abortion immoral.

---

We favor what we have primarily because of our inability to imagine fully and vividly what we might acquire instead and because of our uncertainty about getting it. The so-called endowment effect reinforces this tendency. People often attach a higher value to something if they own it than if they must bid for it in the marketplace, even if it represents a small portion of their wealth and there is neither a failure of imagination nor uncertainty about its acquisition. See, e.g., Don L. Coursey et al., *The Disparity Between Willingness To Accept and Willingness To Pay Measures of Value*, 102 Q.J. ECON. 679 (1987); W. Michael Hanemann, *Willingness To Pay and Willingness To Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635 (1991). Whether or not the endowment effect is rational, it might help to explain why people attach more value to the paintings and felines we have than to art and species that are merely possible.

### 3. *Fetuses as Potential Persons*

Is there a better account of popular opposition to abortion than Dworkin's or my theory of the intrinsic value of certain inanimate entities? One obvious alternative suggests itself. It asks us to ignore whatever intrinsic value we ascribe to paintings or other nonliving entities, and to focus instead on the respect we owe to conscious subjects, in particular to other people. After all, it seems odd to try to explain what many regard as the more evident moral claim of a fetus by focusing on the supposedly noninstrumental value of a Bellini Madonna or a species of tiger. If Dworkin's explanation of the value of fetal life were correct, moreover, we should perhaps expect people to ascribe rights to paintings and to animal species (though not to individual animals), as they do to fetuses. But nobody does. What makes abortion morally questionable or loathsome, for those who think it so, is that it kills a discrete living being that would in time have the same capacities and rights that we do—one that in their view has *already* been added to the world, even though it has not yet been born. That is why the abortion debate is usually characterized as one over when human life begins.<sup>73</sup>

The central objection to abortion rests on the belief that a living being's moral claims against others depend at least partly on its potential to acquire more powerful rights to assistance and noninterference by virtue of its future self-consciousness and capacity to reason and act morally. A newborn's cognitive abilities are little different from those of many nonhuman animals. Yet many people think that an infant deserves the same protection as older people because of what it could become. Its murderer may be punished as harshly as the murderer of an adult human being. To impose the same penalty on somebody who killed a kitten, even though both kittens and infants have rights and interests, would be outlandish. But what about killing a fetus? A fetus' potential is the same as an infant's, and both are linked—physically, genetically, perhaps in small measure psychologically—to the rights-bearing person they will develop into if they are not killed. This fact motivates most moral distress over abortion and leads people to attribute rights, or something very close to rights, to a fetus at some point in its development.<sup>74</sup>

---

73. Frances Kamm captures this point nicely:

Suppose the cells on your hand, which you now destroy by scratching, could have been cloned and turned into many persons. Would we bemoan the waste? It is, rather, the fear of interfering with (or perhaps not assisting) a life form that on its own is developing that worries many about abortion.

KAMM, *supra* note 31, at 86-87. The same point is frequently made using the example of fertilized ova that never implant or that are spontaneously aborted. See, e.g., FEINBERG, *supra* note 7, at 74.

74. This chain of reasoning has, of course, been criticized. If potentiality matters, it is said, then failure to conceive is just as bad as aborting. Early abortion is no less reprehensible than late abortion. On reflection, however, most would not endorse these implications. Some carry this argument further, concluding not only that potentiality cannot have much relevance to reproductive decisionmaking, but that it has no moral relevance whatever. In this view, only actual, exercised abilities ground rights to protection.

Those who oppose abortion do so for reasons that, in Dworkin's terminology, are not derivative. But neither are most people's reasons for protecting fetuses like those that flow from the value of inanimate objects or abstract entities such as species. The debate over the morality of abortion mainly seems to be over whether the preceding argument from fetal potentiality is compelling, rather than over the comparative importance of God's, nature's, or humanity's investment in fetal life versus the effect of abortion on these investments in a woman's life. As I noted earlier, interfering with natural processes is not always even slightly wrong, and some external source of value must be consulted to accord positive significance to only some of what nature does. Moreover, protecting the human investment in a fetus is a peculiar reason to oppose abortion when the "investor" herself wants to end her pregnancy. For these reasons, Dworkin's description of the way conservatives and liberals alike would thoughtfully describe their differences strikes me as implausible. A better explanation of many people's dissonant views would instead highlight their disagreement over the importance of a fetus' potential to become a rights-bearing subject of experiences and the significance of its physical and psychological links to that future subject.

This analysis suggests that the sharp dichotomy Dworkin draws between detached and derivative reasons, on which he builds an equally categorical distinction between mildly coercive and highly intrusive measures the government may adopt, is hard to sustain in the case of abortion. An argument against abortion based on what a fetus might become, and thus in some people's minds based on the person it already is, straddles the line separating detached from derivative reasons. For those who accept it, the argument not only operates separately within the realm of interests and the realm of intrinsic value but links the two realms. The detached value of an embryo or a presentient fetus flows mainly from what it might become. If an embryo's development were arrested, so that it could not grow into a child, its intrinsic or sacred value would be lessened. Likewise, the rights commonly attributed

---

See TOOLEY, *supra* note 63, at 165-241 (1983); Mary Warren, *Do Potential People Have Moral Rights?*, in OBLIGATIONS TO FUTURE GENERATIONS 14 (R.I. Sikora & Brian Barry eds., 1978); FEINBERG, *supra* note 7, at 47-51; Peter Singer & Karen Dawson, *IVF Technology and the Argument from Potential*, 17 PHIL. & PUB. AFF. 87 (1988). But see Werner S. Pluhar, *Abortion and Simple Consciousness*, 74 J. PHIL. 159 (1977). Arguing backwards in time from what a fetus might become can also be criticized for assuming that the later, rights-bearing child or adult is morally the same person as the fetus. That assumption is questionable if there is little or no psychological continuity between fetal and postnatal life, and thus no unbroken line of consciousness along which rights can travel from a possible future to the present. See *infra* Part III.C.3 (discussing a similar argument concerning the effect of senile dementia on personal identity and personal autonomy). Nevertheless, the assumption that personal identity continues between fetus and adult has its supporters. See, e.g., Don Marquis, *Why Abortion Is Immoral*, 86 J. PHIL. 183 (1989); Warren Quinn, *Abortion: Identity and Loss*, 13 PHIL. & PUB. AFF. 24 (1984). But see Peter K. McNerney, *Does a Fetus Already Have a Future-Like-Ours?*, 87 J. PHIL. 264 (1990) (criticizing Marquis). One reason that many people are disinclined to assert that only present abilities are morally significant is that this assertion leads to a position that they find difficult to accept: infanticide is not seriously immoral, except to the degree that it injures parents or others who care about an infant or, as a practice, weakens society's regard for human life.

to infants and, by some, to sentient fetuses stem in large part from the capacities that the infant or fetus might later develop. If the cognitive and experiential abilities of a newborn or a seven-month-old fetus were frozen, so that its mental life would never enlarge beyond that of a very primitive animal, it would not, in most people's view, possess the strong right to live that adult human beings enjoy. But if the moral claims of both preconscious fetuses and conscious fetuses or infants owe much of their strength to what fetuses or infants might become, why is the advent of sentience of great moral significance, especially when the psychological links between a fetus or infant and the person it might become are at best tenuous?<sup>75</sup> Dworkin's rigid division between detached and derivative reasons seems untrue to the gradually increasing moral importance that many people attach to the advancing stages of prenatal human development. For that reason, as I shall consider in the next section, it seems an insufficient foundation for an equally firm break between broad and narrowly limited state powers to regulate abortion.

If these observations are correct, Dworkin needs to confront at least two salient issues if he is to preserve the structure of argument he uses in *Life's Dominion*. First, he must prove that disagreement about the moral importance of a fetus' potential to acquire the characteristics upon which rights are typically based is best characterized as a *religious* disagreement. Both his nonconstitutional argument for allowing women to choose abortion, premised on the toleration that religious sects typically accord one another, and his constitutional argument for a woman's right to choose, grounded in the Religion Clauses, require this showing. Because Dworkin interprets the main debate over abortion's morality differently, *Life's Dominion* does not try to make this demonstration, and constructing the argument might be difficult if Dworkin were to attempt it.<sup>76</sup> There seems little to distinguish this question about potentiality from many other moral issues that cannot easily be described as religious for constitutional or other purposes.

Second, Dworkin needs to ask whether his principal nonconstitutional argument for a woman's right to choose succeeds if disputes about the moral status of the fetus are essentially over whether the fetus' potential to grow into

---

75. Bonnie Steinbock argues that a fetus or a newborn can acquire a right to live by virtue of its potential, even though it has no such right prior to the onset of sentience. See STEINBOCK, *supra* note 11, at 68-71. Steinbock does not explain why potentiality should have this significance only after consciousness begins, or why potentiality matters at all as far as a right to live is concerned, when in other cases potentiality is irrelevant to a being's moral rights. That I am a potential heir does not entitle me to somebody's estate now or in the future, unless I do in fact become an heir.

76. For an argument that any attempt to do so would fail, see JAMES T. BURCHHELL, *Very Small Fry*, in RACHEL WEEPING AND OTHER ESSAYS ON ABORTION 61, 113 (1982) (concluding that there seems to be "no public acceptance for the claims that abortion law would enshrine sectarian dogma (principally that of the Catholic church), legislate morality on a matter disputed among the churches, or rest on nonsecular beliefs about unborn humanhood"). A contrary conclusion forms the basis for defenses of abortion rights grounded in the Establishment Clause. See *supra* note 7. Dworkin could rely on these defenses, although they represent a minority view.



a conscious, reasoning being gives it a moral claim as powerful as the right to live that such a being possesses. I now turn to Dworkin's main nonconstitutional argument, which encounters objections (though less serious ones) even if his understanding of the central dispute over abortion's morality is correct.

### C. *What May the State Do To Protect Fetal Life?*

If abortion is objectionable because a fetus is a person with rights or interests, Dworkin says, "then of course the state's dominant goal must be to protect it, just as it protects all other people."<sup>77</sup> But suppose that those who execrate abortion come to see their opposition as grounded in their interpretation of a detached value—the sacredness of human life—that abortion's defenders also recognize but conceive of differently. They should then realize the inappropriateness of compelling people to act in conformity with their understanding of that value, particularly where, as here, the content of that value is highly controversial. The destructive effect of coercion on pregnant women is too pronounced, Dworkin contends, and people's views about the moral significance of human life are too central to their "overall moral personalities" to license state control of a woman's decision if only a detached and sharply contested value is jeopardized.<sup>78</sup> Because of the importance of this value, the state may encourage women to decide responsibly. It "might aim that its citizens treat decisions about abortion as matters of moral importance; that they recognize that fundamental intrinsic values are at stake in such decisions and decide reflectively, not out of immediate convenience but out of examined conviction."<sup>79</sup> But if abortion menaces no right or interest, the government may do no more.

#### 1. *Government Measures To Encourage Reflection on Abortion*

If a fetus lacks rights or interests, why may the state attempt to induce citizens to treat abortion as a morally significant action? Dworkin offers no justification for his claim that it may, beyond saying that he "can think of no reason why government should not aim that its citizens treat decisions about human life and death as matters of serious moral importance."<sup>80</sup> Many of his readers might also find this proposition self-evident. After all, the state may interfere in people's lives with apparent propriety in other instances to encourage them to think carefully about the effects of their actions. Government educational programs to reduce teenage pregnancy and drug abuse

---

77. LIFE'S DOMINION, *supra* note 1, at 151; see also *id.* at 157.

78. *Id.* at 154-55.

79. *Id.* at 150.

80. *Id.* at 151.

are commonplace, and public service announcements detail the health risks of alcohol use and the dangers posed by drunk driving.

The education of minors, however, offers a weak analogy, given their immaturity and the state's accepted role in the development of their minds and characters. Government warnings about alcohol, moreover, can be justified by their limited intrusiveness, as well as by an important paternalistic concern for the physical well-being of users and the hazards that alcohol consumption can pose to innocent people. Several of these reasons for encouraging adults to behave deliberately might, of course, also apply to abortions. Some women are no doubt poorly informed about fetal development or are unaware of the serious regret or depression that often follows an abortion. They might benefit from informational materials or counseling. Women who are bullied by parents, husbands, or boyfriends might be grateful for a legal check on hurried decisions.<sup>81</sup> But these reasons all appeal to a woman's psychological welfare, in particular to feelings she is likely to experience if she later learns of facts that would have altered her decision or if she acts impulsively. In some cases, they also build on the possible consequences to other people, as do some justifications offered for spousal notification requirements.

Dworkin's justification is different, and its threat to individual liberty appears far more serious. If the state may constrain people's choices, not for their own nonmoral benefit or because other people might be adversely affected by their decisions, but because the morality of their decisions turns on intrinsic or sacred values they might not adequately appreciate, it appears that governments may adopt measures to encourage reflection that many people would consider unacceptable. Would it be permissible for the government to fund compulsory religious instruction or advertising designed to lead people to recognize the seriousness of their religious choices?<sup>82</sup> Could it forbid homosexual cohabitation unless partners still wished to live together after mandatory counseling? Could listening to a lecture on personal virtue be made a prerequisite to buying *Penthouse*?<sup>83</sup> Dworkin might have some argument for

81. See Michael W. McConnell, *How Not To Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1195-97 (1991) (discussing findings that some pregnant women are inadequately informed as they make their decisions about abortion).

82. Thomas Scanlon also mentions this possibility, although he points out that in the United States advertising of this kind would probably contravene the Establishment Clause. See T.M. Scanlon, *Partisan for Life*, N.Y. REV. BOOKS, July 15, 1993, at 45, 48 (book review). It is true that the Supreme Court has upheld tax breaks for religious organizations against constitutional challenges, and that these can be viewed as subsidies funded in part by nonadherents of the faiths that benefit. But the tax exemptions approved by the Court were justified by the broader secular benefits that religious organizations were thought to provide along with many other nonprofit groups; the Court did not base its ruling on a claim by the state that it is important to promote private reflection on the divine. See, e.g., *Texas Monthly v. Bullock*, 489 U.S. 1, 11-17 & nn.2-3 (1989) (plurality opinion); *Walz v. Tax Comm'n*, 397 U.S. 664, 672-74 (1970).

83. Some will view the regulation of pornography as easily distinguishable, because of pornography's possible adverse effects on models and women generally. Dworkin notes, however, that there is no generally accepted evidence that pornography causes sexual crime. See Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS, Oct. 21, 1993, at 36, 38 & n.4 (book review). The chief objection to its dissemination, in his view, is that pornography is demeaning to its consumers and disgusting to others. See

distinguishing these cases from measures intended to make women think seriously about the intrinsic value of fetal life. But I am not at all sure what distinction he might draw. That is why justifications based on women's nonmoral well-being (if any suffice) seem to me sounder and, as precedents, less dangerous.

To be sure, in the United States the Constitution might limit government initiatives to promote meditation on issues the majority believes can be resolved only by consulting intrinsic values. In the case of abortion regulation, for instance, Dworkin claims that restrictions ostensibly enacted to deepen reflection pass muster only if they do not appear, on balance, designed to deter women from having abortions.<sup>84</sup> As Dworkin interprets this test, it is unclear whether any constraints on abortion would survive scrutiny. Nowhere in *Life's Dominion* or in his other publications does he describe a requirement that might serve the goal of responsible choice without illegitimately deterring women from having abortions. Dworkin's criticism of the Supreme Court's decision in *Casey*, which upheld a twenty-four hour waiting period against a facial challenge, strongly suggests that no waiting period could satisfy his own interpretation of the test he proposes, because "most women seeking abortion will already have reflected at length over the step they are taking."<sup>85</sup> Dworkin also appears to endorse the Court's decision to invalidate the spousal notification requirement at issue in *Casey*,<sup>86</sup> and it seems unlikely that he would read the Constitution to permit any other spousal notice rule. Hence, his claim that the state may encourage responsible reflection about the intrinsic values at stake in abortion seems not to permit *any* regulation in the United

---

*id.* at 40. And this objection, Dworkin has long argued, is an insufficient basis for outlawing most pornographic representations of adults. People have, he affirms, "the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong." RONALD DWORKIN, *Do We Have a Right to Pornography?*, in *A MATTER OF PRINCIPLE* 335, 353 (1985). This example of a possible precondition to buying pornographic materials (set aside constitutional objections) should therefore give pause to those who share Dworkin's views about pornography.

84. *LIFE'S DOMINION*, *supra* note 1, at 173. Whether a restriction is "designed" to impose an excessive burden on women seeking abortions depends, Dworkin says, not on the motives of the legislators who voted for it, but on whether, "given what the statute does, and what those who proposed and defended it said in official statements before and during its passage, it makes interpretive sense to attribute that purpose to it." *Id.* (footnote omitted). Dworkin rightly stresses that the actual coercive effect of a statute is important evidence of its intended purpose. *Id.* Dworkin's most complete statement of the inquiry he *appears* to support (his own views are difficult to separate from his reading of the Court's decision in *Casey*) is the following:

Judges deciding whether some regulation of abortion has a coercive purpose must take three things into account: the degree to which the restriction could reasonably be expected to make a woman's deliberation about abortion more reflective and responsible, the risk that it will prevent some women who have responsibly decided on abortion from acting on that decision, and the possibility that the expected improvement in the responsibility of decisions about abortion could have been achieved in some different way with less coercive consequences.

*Id.*

85. *Id.* at 173.

86. *Id.* at 153.

States, at least as Dworkin understands the conditions he appends to that claim.<sup>87</sup> Of course, others might read the Constitution differently, or repudiate Dworkin's test for the permissibility of legal regulation. The possibility that Dworkin's moral and constitutional principles for restricting personal choice could be used to justify tighter constraints on individual freedom than Dworkin proposes might lead liberals to prefer different principles—principles based on people's nonmoral welfare rather than on the alleged intrinsic values implicated by their decisions.

## 2. *Prohibitions on Abortion*

Now turn the coin over. Whether or not the state may attempt to compel women seeking abortions to think about the sanctity of life, what prevents it from prohibiting abortion if only a detached value is threatened? This query addresses the strand of Dworkin's argument that derives a right to early abortion from an understanding of the proper role of the liberal state, rather than from the First Amendment. This strand is important, because many will reject Dworkin's constitutional analysis or show no shyness about amending the Constitution. Still others live outside the United States, where they lack whatever shield the First Amendment may afford.

Assume that Dworkin is correct in saying that most people believe that the morality of abortion turns on whether it respects or insults an intrinsic value. The state, he acknowledges, may place some intrinsic values above individual liberty, notwithstanding disagreement about the importance or even the existence of those values. Governments may, for example, force people to pay taxes to support museums, or stop them from harming endangered species.<sup>88</sup> Thus, it does not suffice to show that objections to abortion are grounded in beliefs about intrinsic value. Dworkin also needs to show that denying women the right to an abortion differs from other constraints based on intrinsic value, such as mandatory taxes for controversial programs or rules preventing owners from altering historic property.

He attempts to do so by comparing the burdens of different regulations. Forcing a woman to bear a child may destroy her life; by contrast, "[p]rotecting art or historic buildings or endangered animal species or future

---

87. Dworkin does commend a French law under which the government pays between 70% and 100% of the cost of an abortion if a woman declares herself "in distress" and accepts minimal counseling. *See id.* at 63-64. But his approval of the counseling requirement appears premised on his belief that it is a mere formality, so that "[t]he practical effect of the French law may . . . be almost the same as if it had explicitly allowed abortion on demand for ten weeks." *Id.* Dworkin says nothing about the law's requirement that women wait an entire week after their initial request and two days after counseling before an abortion will be performed. *Cf.* MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 17 (1987). Nor does he say whether a requirement that women undergo counseling before being allowed to have an abortion that they pay for themselves is permissible. Dworkin's criticism of waiting periods suggests that mandated counseling would in his view be superfluous and therefore unjustified.

88. *See* LIFE'S DOMINION, *supra* note 1, at 149, 154.

generations is rarely as damaging to particular people, and might well be unconstitutional if it were.”<sup>89</sup> Moreover, Dworkin says, “our convictions about how and why human life has intrinsic importance, from which we draw our views about abortion, are much more fundamental to our overall moral personalities than our convictions about culture or about endangered species . . . .”<sup>90</sup> He concludes:

A state may not curtail liberty, in order to protect an intrinsic value, when the effect on one group of citizens would be special and grave, when the community is seriously divided about what respect for that value requires, and when people’s opinions about the nature of that value reflect essentially religious convictions that are fundamental to moral personality.<sup>91</sup>

Dworkin does not unpack this compound requirement. Must all three conditions be present before the state’s power can be constrained? Dworkin seems to think not. In a note to this passage, he asserts that “a significantly stronger right” of personal autonomy, one that is “broader” than the right he describes, can be shown to flow from the best interpretation of the Constitution, although he does not make that showing in *Life’s Dominion*.<sup>92</sup> Which of these conditions does Dworkin consider indispensable? Apparently, only the first. To justify a curb on state power, it seems unnecessary to show that the values at stake reflect “essentially religious convictions that are fundamental to moral personality,” given Dworkin’s claim that protecting art or landmark buildings might be unconstitutional if the burden on owners rivaled the burden of involuntary pregnancy. To see that deep community divisions are also unnecessary, suppose that a community were *not* seriously divided about how to respect life’s sanctity, so that only a small group of women, who suffered terribly from a ban on abortion, objected to it. Would the prohibition be permissible? Presumably, Dworkin would say it was not. Although the second and third conditions might buttress his conclusion that the state should not interfere in a woman’s decision, I surmise that Dworkin considers the first condition—a grave impact on one group of citizens (I am not sure what “special” adds)—sufficient to preclude the state from limiting individual freedom to protect an intrinsic value.

Dworkin is certainly right to insist that any law that severely burdens only some citizens on the basis of what others value deserves careful scrutiny. We do not require people to donate a kidney or bone marrow, even to save another life, and the burden of carrying a fetus to term and raising or abandoning a

---

89. *Id.* at 154.

90. *Id.*

91. *Id.* at 157. Although Dworkin identifies this right to personal autonomy as *constitutionally* based, he appears to think that it also exists as a matter of political morality.

92. *Id.* at 252 n.15.

child may easily outweigh the burden of kidney or marrow donation. But Dworkin's proposed limit on state coercion is not above criticism. One question that his proposal raises is why the effects of a regulation on a *group* of citizens, rather than its effects on *individuals*, any one of whom may claim an exemption if gravely affected by it, should determine whether the regulation may stand. Dworkin's proposed principle has what many would consider the merit of protecting all women from being forced to bear a child, even if the injury any particular woman would likely sustain from continuing an unwanted pregnancy were less than the grave harm that many *other* women would suffer in the same circumstances. But it is not apparent why the boundaries should be drawn to include the less-affected in the protected class if what matters is personal rather than collective harm. Individualized exemptions from a rule forbidding abortion would naturally be more costly to administer than a universal permission; exemptions would also be hard to apply fairly. But presumably Dworkin would want a more morally substantial explanation for making abortions available to all who want them.

The two principal objections to Dworkin's argument lie elsewhere, however. First, Dworkin grants that the burdens of pregnancy and of caring for or parting from a child later do not always outweigh the intrinsic value he assumes is at stake in abortion. He agrees that third trimester abortions may be banned, primarily because a pregnant woman has by that time already had ample opportunity to decide whether to abort.<sup>93</sup> Indeed, he says that prohibiting abortion at some point *before* viability would also be "acceptable," although only "if it was still late enough to give pregnant women enough time to exercise their rights to terminate an unwanted pregnancy, and if realistic exceptions were allowed for women who did not know that they were pregnant."<sup>94</sup> However, if the difficulty of avoiding the burdens of pregnancy and childrearing is what should be weighed against the supposed intrinsic value

---

93. See *id.* at 169. Dworkin also believes that viability marks an important break because it is *possible* that the fetus then experiences a "primitive form of fetal sentience." *Id.* But this additional consideration cannot itself count for much, in Dworkin's scheme of value or in most Americans' minds, as a reason for not killing a fetus. Most animals enjoy greater sensibility and more robust consciousness than do fetuses even late in pregnancy. Yet Dworkin does not suggest, and most of his readers would not accept, that it is seriously wrong to kill even highly intelligent animals for unimportant human purposes, such as to add variety to the dinner table or to fashion more luxurious clothing. See, e.g., Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 609-10 (1991) ("[W]hat . . . is the legal status of a housepet? . . . I doubt very much that the interest in protecting an animal, rather than a human, could be said to be of sufficient weight to force a woman to bear a child against her will."). The fact that Dworkin believes that banning abortion at some point prior to the onset of fetal sentience would be morally acceptable, see LIFE'S DOMINION, *supra* note 1, at 170-71, shows that sentience provides only minimal support for using viability as a cut-off. It is true that most fetuses, if allowed to develop further, would *later* acquire more complex powers of sense and intellect than nonhuman animals possess. But claims based on a fetus' possible future appeal not to its present rights or interests, which Dworkin invokes here, but to the respect owing to a being that could acquire those powers. See also *id.* at 89 (the belief that late abortions are morally worse than early abortions cannot be explained by noting that fetuses may be sentient late in pregnancy).

94. LIFE'S DOMINION, *supra* note 1, at 171.

that abortion insults, why may the state not outlaw abortion when pregnancy results from a failure to use contraceptives?<sup>95</sup>

*Life's Dominion* does not answer this question. Several passages suggest that, in Dworkin's opinion, most people do not believe that the intrinsic value of a fetus is sufficiently great, early in pregnancy, to warrant banning abortion no matter how pregnancy came about.<sup>96</sup> That is probably true. But the proof of what people believe is what they do. If a community *did* ban abortions in certain cases, on the basis of the majority's proclaimed respect for life's sanctity—as have Guam, Louisiana, and Utah in recent years<sup>97</sup>—one could not object on the ground that most people *really* believed something else. Dworkin could still insist that women must be given an easily available opportunity to avoid pregnancy. However, many people would regard contraceptives—and perhaps abortifacients that act shortly after fertilization, such as intrauterine devices and RU-486—as providing that chance. If the state may not protect intrinsic values at all, or if a fetus does not possess intrinsic value or exert some other moral claim, then of course the state could not outlaw aborting pregnancies that resulted from a failure to use contraceptives. Given Dworkin's assumptions, though, the argument that the state could ban these abortions cannot easily be dismissed.<sup>98</sup> To be sure, there would be an overwhelming practical obstacle to enforcing a ban only on aborting pregnancies that resulted from a failure to use contraceptives: it is hard to imagine how the government could prove that contraceptives were not used, or how, if the burden of proof were on the woman, she could prove that she

---

95. Even if a couple could have avoided a dangerous pregnancy by using contraceptives, abortion to prevent serious injury or death could be justified on the basis of a right of self-defense, greater concern for the pregnant woman, the interests of the potential father or siblings, or the disparity in intrinsic value between a woman's life and that of an unborn child. Such a hypothetical statute would also permit abortion if a pregnancy resulted from rape, incest, or contraceptive failure.

96. See, e.g., *LIFE'S DOMINION*, *supra* note 1, at 170.

97. See *id.* at 9.

98. Consider this possible reply:

Though it may be legitimate for the state to encourage people to engage only in "responsible" sexual activity (that is, abstain, contracept, or engage in sexual acts that are nonprocreative), it is clearly problematical for the state to make a concerted attempt to deter people from engaging in "irresponsible sex" by linking the availability of abortion to participation in "responsible" sexual activity. It is not the woman alone who is to blame when pregnancy occurs as a consequence of "irresponsible" sexual behavior, and it is not the "irresponsible" parties alone who suffer the consequences if abortion is proscribed. The suggestion that abortion should be restricted, or even proscribed, for women who have behaved "irresponsibly" is thus *prima facie* punitive and unjust, both to the women and their future children.

Davis, *supra* note 19, at 522-23. Although this argument will appeal to many, it seems unable to meet the objection I outlined. That blame is shared is important. One might, however, see it as a reason for requiring other responsible parties to share in the burdens their carelessness created, not a reason for allowing abortion. Davis is also right in saying that it is important that a child may lead a poor life if it is not wanted, and that its unhappiness might detract from the lives of other people. But if most people believe that preventing abortion is the greater service to life's value, despite these misfortunes, and if the protection of that value is a legitimate goal, this objection would not give them any reason to relent.

or her partner took precautions. But this practical hurdle does nothing to alleviate the theoretical difficulty that Dworkin's argument encounters.<sup>99</sup>

The second main objection to Dworkin's account is more fundamental; it goes to the heart of certain forms of liberal political theory. I shall say little about it, not because the objection is unimportant, but because the issues it raises are too large to discuss profitably in one or two paragraphs. The objection is that it is inappropriate to look solely to the burden on one group of citizens in judging the permissibility of a measure designed to promote some non-rights-related value that the community prizes. One ought to consider the importance of the value as well.<sup>100</sup> There is no difference, in justifying restraints on individual liberty, between appeals to rights or interests and appeals to other values. In both cases, one value must be weighed against another. People's rights or interests ordinarily carry more force in limiting or mandating state action than do detached values. But, the objection runs, this is not necessarily *always* so. Some actions are wrong even if they do not harm other parties against their will—sponsoring or participating voluntarily in gladiatorial combat to the death for cash before shouting crowds, in Irving Kristol's famous example—and may be prohibited even if nobody can complain that these actions violate his rights.<sup>101</sup> In some instances, vindicating a detached value can even be more important than avoiding the serious frustration of some citizens' desires. And the value of a nascent human life—a life little different from that of a baby whose slaughter is rightly punished as murder—is precisely such an overriding value. It is therefore appropriate for citizens to strive to protect fetal life through politics, and for a majority to compel those who disagree to honor that value. Contrary to Dworkin's assumption, the objection concludes, interests deriving from present capacities do not occupy a privileged place as justifications for coercive legislation. Other values sometimes matter equally, and there is no warrant for discounting them as justifications for restricting individual liberty.

---

99. A parallel argument could be offered with regard to sex-selective abortions. Even Dworkin's paradigmatic liberal believes that it is wrong to abort a fetus because one is unhappy about its sex, see *LIFE'S DOMINION*, *supra* note 1, at 33, and the burden of raising a girl rather than a boy, or vice versa, would surely not count as a grave imposition in the United States today. A ban on sex-selective abortions alone would be impossible to police, of course. But Dworkin's argument appears to permit one in theory.

100. See, e.g., Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989) (arguing that the justice of laws against abortion and homosexual sodomy depends at least partly on the morality of those practices).

101. See JOEL FEINBERG, *HARMLESS WRONGDOING* 126-33, 328-31 (1988) (discussing Kristol's example and other challenges to the liberal principle of tolerating apparently evil acts that do not harm people against their will). Dworkin might not be discomfited by Kristol's imaginary combat, because he asserts that the state may protect some intrinsic values if doing so does not gravely burden people, and denying people the opportunity to fight to the death for money or to observe the slaughter would in his view probably not count as a grave imposition. But Dworkin's view invites a different objection: if detached values can take precedence over minor rights or unimportant interests, why is it inconceivable that truly weighty detached values should have priority over more substantial rights or interests?



This objection appears even stronger if Dworkin's account of the main opposition to abortion is mistaken and if fetuses are thought to have a moral claim to life that closely parallels an adult's. Setting their perceived claim against individual liberties might conceivably oblige the state to forbid abortion in many instances.<sup>102</sup>

This is a forceful challenge, whether it relies upon the alleged intrinsic value of the fetus or a right-like claim the fetus supposedly possesses. Dworkin does not speak to this objection in *Life's Dominion*, although he has addressed similar arguments in other writings.<sup>103</sup> He also has attempted to counter a related claim that majorities may work their will, as part of the best normative portrait of democracy rather than merely as a drab political reality.<sup>104</sup> I will not assess Dworkin's responses here. I believe, however, that these are the

102. Dworkin also argues that if a state were free to forbid abortions because a majority of voters thought them an affront to life's sanctity, then a majority could also *require* abortions if, for example, a fetus were deformed and the majority believed that giving birth to deformed children insulted the sanctity of life. At least this would be so "if abortion had become physically as safe as, for example, the vaccinations and inoculations we now expect our governments to require." *LIFE'S DOMINION*, *supra* note 1, at 159. Because coerced abortions would be unacceptable, Dworkin argues, it follows that a state may not proscribe abortion to protect the inherent value of life. But if a fetus had *rights*, not merely inherent value, a state could ban abortion even though it would lack the power to require abortions. *See id.*

Dworkin's argument is reminiscent of Justice Goldberg's claim, in his concurrence in *Griswold v. Connecticut*, 381 U.S. 479, 496-97 (1965), that if couples had no constitutional right to use contraceptives, they would also have no constitutional right to resist sterilization by the government. It is no more convincing. Notice first that the issue here has nothing to do with *majority beliefs*. If a majority mistakenly believed that infants lack rights, Dworkin would not say that the majority could require infanticide. His claim must be that pre-sentient fetuses *in fact* have neither interests nor rights, and that the intrinsic value of pre-sentient fetal life can not only limit exercises of state power, as rights can, but can equally justify state compulsion. But why should anyone accept this claim? If Dworkin is not making an assertion about the relation between the permissibility of state action and majority beliefs, but rather offering a thesis about the relation between state action and what morality genuinely requires, then his claim is implausible. If a fetus has a moral claim to protection that is tantamount to a right, because it stems from the future capacities of a particular living being, then a state might be able to ban abortion without being able to require it, for the same reason that it may ban infanticide without being able to require it. Dworkin's argument from the potentially horrifying implications of accepting the argument that the state may ban early abortion out of respect for a detached value works only if one fails to keep apart two quite separate determinants of state action: majority beliefs and substantive moral principles.

Part of the force of Dworkin's argument seems to depend on his readers' ignoring his explicit assumption that being forced to abort is no more invasive and burdensome than being forced to carry a pregnancy to term. If the two really did stand on a par, Dworkin would not need to introduce the example of forced abortion. The point of introducing it is that most people consider forcing a woman to abort worse than preventing her from obtaining an abortion. Political morality and constitutional law typically make coerced action more difficult to justify than coerced inaction, because requiring somebody to act usually infringes his bodily autonomy and personal freedom more than does compelling him to refrain from acting. The government can more easily forbid somebody from selling one of his kidneys than it can require him to sell one to the state. The government can ban obscene publications even if it cannot require people to pen edifying verse. Dworkin uses the example of forced abortion precisely because blocking abortion is *not* as unacceptable in most people's minds as coercing it. The difference in burden that makes the rhetorical point undercuts Dworkin's equation of banning and coercing abortions; the greater burden imposed by forcing abortion could make it wrong even if banning abortion were not.

103. *See* Ronald Dworkin, *Foundations of Liberal Equality*, in 11 *THE TANNER LECTURES ON HUMAN VALUES* 1 (Grethe Peterson ed., 1990); Ronald Dworkin, *Liberal Community*, 77 *CAL. L. REV.* 479 (1989) [hereinafter Dworkin, *Liberal Community*]; Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 *IOWA L. REV.* 1 (1987).

104. *See* Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 *U.S.F. L. REV.* 1 (1987).

most pressing issues to resolve in determining what form abortion regulation may take. Philosophical and religious writing about the morality of abortion is crucial in guiding people's use of the freedom the law offers them. Insofar as moral considerations are relevant to legislation, philosophical writing is also important in deciding what freedom they should have. But deep divisions are likely to persist. The pivotal question is therefore how a community that is passionately in conflict should, or may, resolve its differences.

This is a complicated question of law and morality, to which *Life's Dominion* provides only a partial answer. It hopefully suggests that people who are willing to tolerate their fellow citizens' misguided religious beliefs should also tolerate their fellow citizens' killing of preconscious fetuses if the killings are motivated by misguided beliefs about the value of fetal life. Many will find this suggestion unattractive, however, because in their view a fetus deserves much of the respect and protection due the person it might later become, or because they think the impersonal value of fetal life is high. The state must either act or not act to safeguard fetuses; it cannot avoid taking a stand on abortion that one side will applaud and the other side will deplore. The hard task is convincing those who lose that a more basic commitment they have, or should have, to a form of governance or to an ideal of personal choice outweighs what they see as a moral loss. In this book, Dworkin assumes the existence of a commitment of this kind—one that tracks the distinction between detached and derivative reasons in placing some matters outside the scope of government intervention—without arguing for it directly. In its defense of abortion rights, *Life's Dominion* thus marks only the first step in a longer argument about the place of moral beliefs and individual freedom in a liberal democracy.

### III. CRITICAL INTERESTS AND EUTHANASIA

From life's first flickerings, Dworkin turns to some of the most difficult issues attending its extinction. These issues are by no means new, but modern medicine poses them more sharply and frequently than ever before. Physicians can and do keep alive, sometimes for weeks or even years, people

who are near death or horribly crippled, intubated, disfigured by experimental operations, in pain or sedated into near oblivion, connected to dozens of machines that do most of their living for them, explored by dozens of doctors none of whom they would recognize, and for whom they are not so much patients as battlegrounds.<sup>105</sup>

---

105. LIFE'S DOMINION, *supra* note 1, at 180.

Many long for death. Others, unconscious, would want their useless, inhuman condition ended if they still could choose.<sup>106</sup> Yet tens of thousands of patients, denied assistance in hastening their end, are dragged forward each year—drugged, in pain, or unaware—until death claims them. Is it morally permissible for patients facing eventual death or a mental void to take their lives to escape suffering or indignity? May others help them? And, whatever morality demands apart from the law, should we punish assisted suicide or euthanasia in some (or all) cases? Should we instead facilitate them, by decreasing what we spend on dying patients or by shielding participating health care workers from legal liability?

These questions confront, with growing urgency, not only doctors and their most desperate patients, but people planning for the future, insurers, legislators, prosecutors, and voters. Dworkin does not offer complete answers to any of these questions in the closing chapters of his book. Instead, he describes a framework for thinking about the values and interests in conflict, in particular for understanding that how a person dies might gild or stain his life. Dworkin contends that the same belief in life's sanctity that underlies most of the distress over abortion explains enmity towards suicide and euthanasia. And he suggests, as before, that the alleged intrinsic value of prolonging somebody's life cannot justify the government's preventing her from meeting death sooner if she reasonably prefers that course. Personal autonomy prevails if its exercise would not offend any rights or interests, but only detached values. Dworkin further argues, without saying exactly what the law ought to require, that the earlier, autonomously formed preferences of a person who has since become irreversibly demented have a strong claim to guide her care when she can no longer make medical decisions competently. Those preferences present a strong claim, in Dworkin's judgment, even when they ordain the easily avoidable death of the disoriented, yet apparently happy, person she is now.

In the following sections, my aim is twofold. First, I shall summarize and test Dworkin's account of the mixed considerations that any public policy governing euthanasia and assisted suicide should address. Dworkin's reflections contribute greatly to understanding the values at issue, even if, as I argue, they leave many hard questions unexplored. Second, I wish to press Dworkin's claim that a severely demented person's care should probably be determined by the desires she expressed before her reason eroded. Dworkin's claim is consistent with the emphasis he places on individual autonomy in making other life-defining choices. There is, moreover, little doubt that most people would want the opportunity to decide what will become of them once their minds are largely gone. But it is less clear that Dworkin is right in saying that one can generally improve a person's life by preventing her from living on in a

---

106. Dworkin cites an unnamed expert's estimate that there are between five thousand and ten thousand people in persistent vegetative states today in the United States alone. *See id.* at 187.

demented state. Her life's achievements are not obviously lessened by contented senility. Perhaps more importantly, the psychological discontinuity between a badly demented person and her competent predecessor gives reason to wonder whether the predecessor's earlier desires carry the moral authority Dworkin assigns to them. If the psychological chasm is wide enough, those prior wishes appear to have no more claim to respect than the preferences of any other competent individual. Admittedly, the comfort that aging people sometimes derive from knowing that they can control their treatment if their reason wanes is a prominent ground for honoring advance directives. The question is whether that ground suffices when comfort comes from directing the treatment of somebody best described as a *different* person—somebody much like one's child—rather than from choosing one's own care.

#### A. *Experiential and Critical Interests*

Scholars writing about assisted suicide or euthanasia address a panoply of issues: Whether doctors should be permitted to kill patients or let them die if patients ask for a lethal injection or request that they not be treated; how to determine what a patient wants, particularly if her decision changes with her mood, medication, or the supplication of friends or relatives; whether earlier wishes should govern later treatment if a person can no longer make a responsible choice; what care should be given to patients who have never expressed a preference for or against life-sustaining treatment, particularly when, as in the case of anencephalic infants, their organs might be used to save other lives; and the danger that a plan for legalizing euthanasia might result in abuse or mistakes that lead to undesired deaths.<sup>107</sup> Medical professionals often ponder, as well, whether they ought to disobey laws that forbid them from assisting suicide or taking life intentionally.<sup>108</sup> Others question the compatibility of killing with the life-sustaining mission of health care workers and hospitals, and worry that sick people might avoid treatment rather than risk an accelerated death if hospitals become associated with ending and not only prolonging life. Virtually everyone is concerned about the huge

---

107. For painstaking discussions of these questions, see generally ALLEN E. BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* (1989); JOEL FEINBERG, *HARM TO SELF* 344-74 (1986).

108. The moving account of a doctor who helped a young leukemia patient take her life ignited much of the recent debate over the legal and moral obligations of physicians whose competent patients reasonably desire to use lethal doses of prescription drugs to obtain the quickest release from life possible without using more distasteful or less certain methods of suicide. See Timothy E. Quill, *Death and Dignity*, 324 *NEW ENG. J. MED.* 691 (1991). Quill was later criminally prosecuted—unsuccessfully—and the state medical board declined to impose other sanctions. *Doctor Not Charged in Patient's Suicide*, *N.Y. TIMES*, Apr. 13, 1991, at A28 (reporting grand jury's refusal to charge Quill); Lisa W. Foderado, *New York Will Not Discipline Doctor for His Role in Suicide*, *N.Y. TIMES*, Aug. 17, 1991, at A25. More provocatively, Dr. Jack Kevorkian has helped over a dozen patients take their lives, sometimes in defiance of laws enacted specifically to restrain him. Nancy Gibbs, *Rx for Death*, *TIME*, May 31, 1993, at 34.

cost of caring for patients in their last days, about how expensive services should be rationed (for some rationing is inevitable), and about the reform of insurance markets.<sup>109</sup>

When one steps back, it is stunning how rarely contemporary philosophers and doctors grapple with the insistent, overwhelming question that consumes terminal patients and people contemplating advance medical directives: is it good or right for them to die, by deadly act or the withdrawal of aid, when medical wizardry could still sustain them?<sup>110</sup> Perhaps doctors and philosophers think that this question falls within the ken of religious sermons or self-help manuals, which professionals should not presume, or deign, to touch. Or perhaps the heterogeneity of circumstances deters comment; people's personal situations vary enormously, and their spiritual views and conceptions of an admirable life might differ too sharply to make counsel useful to many. Dworkin, to his credit, rejects the view that it is unseemly or vain to confront the question of how it is best for us to die, although in *Life's Dominion* he does not return to his earlier writing on this subject.<sup>111</sup> His ambition in the last two chapters of his book is not to say whether people *ought* to end their lives, but to remove "a confusion about the character of the interests people have in when and how they die."<sup>112</sup> He hopes to show how somebody can be harmed by being kept alive against his will or, if he lacks consciousness, against whatever values informed his active life. Dworkin further argues that respect for life's sanctity need not prohibit doctors from killing patients at the patients' urging: it might well demand the reverse. Although Dworkin does not state his own convictions in detail, the unmistakable intent of his argument is to advance the case for enhancing personal autonomy—including the final liberty to slip life's grasp.

We deem it supremely important, Dworkin thinks, "that life ends *appropriately*, that death keeps faith with the way we want to have lived."<sup>113</sup> Although Dworkin may exaggerate the significance that most people attach to their final weeks or days, some do think that the way they die and their attitude towards death bear crucially on the value of their lives. Some people rage against the gathering night, testifying to the pluck, the determination,

---

109. I offer prescriptions for allocating medical resources and transplant organs in a just society in ERIC RAKOWSKI, *EQUAL JUSTICE* 88-106, 167-95, 310-32 (1991). Although in my view it is morally permissible to kill some people to save others in certain situations, this is rarely if ever true in health care settings. See Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1129-32 (1993). For alternative approaches to both rationing health care and allocating transplant organs, see F.M. KAMM, *MORALITY, MORTALITY* 75-330 (1993).

110. Paul Menzel's argument that patients in the last stages of life have a duty to die cheaply is one exception. See PAUL T. MENZEL, *STRONG MEDICINE: THE ETHICAL RATIONING OF HEALTH CARE* 190-96 (1990).

111. I discuss below Dworkin's thoughts on the undesirability of being kept alive if one suffers from pronounced senility. See *infra* text accompanying note 157.

112. *LIFE'S DOMINION*, *supra* note 1, at 216.

113. *Id.* at 199.

perhaps the optimism that animated their lives. Others of us hope to approach death with less sorrow or rancor. We pray, to borrow Nietzsche's simile, that we might take leave of life as Ulysses parted from Nausicaa—blessing it rather than in love with it. Still others wish to meet death in harness, without fanfare, doing what has roused them from sleep each day, or to accept their end humbly as the wise decree of the God they revere. Likewise, as Dworkin remarks, few people are indifferent as to whether their biological life continues after their mind is blank. They worry about the impact of "life's last stage on the character of [their] life as a whole, as we might worry about the effect of a play's last scene or a poem's last stanza on the entire creative work."<sup>114</sup> Though they could not then suffer, they would now ensure at some cost, if they could, that they not end as a tended vegetable, breathing placidly but pointlessly thanks to tube-fed meals and an iron lung.

Dworkin accepts these wishes and worries, as he does discomfort about abortion, as facts to be explained, not sentiments to be applauded or ridiculed. His explanation turns on the distinction between *experiential* and *critical* interests. Although the terms are new, Dworkin's point is familiar. Some things we want because of the pleasure, depth, or simple joy they bring to our experiences. Other things we want because we believe they would make our lives better, regardless of how exhilarated they would leave us feeling. Somebody might think it good, to use Dworkin's example, that he develop a close relationship with his children, not *because* he wants the experiences that accompany intimacy, but because "a life without wanting it would be a much worse one."<sup>115</sup> Sometimes people even desire things that cannot possibly affect their conscious lives except by way of fantasy—such as posthumous fame.

Dworkin mentions these commonplace phenomena to remind his readers why people sometimes want to hasten or to postpone their deaths. Experiential interests are part of the story. Some people want to die before the last throes of their illnesses to avoid terrible anguish; others want to press on, despite pain, to experience some event, such as a birth or a wedding. But critical interests play a salient part as well. Freud refused analgesics to keep his mind clear, so that he might work as long as life allowed, his suffering notwithstanding. Others reject continued life because of the conditions on which it is offered: helpless dependence on other people, for example, in a way they consider degrading. Of course, people often have reasons other than self-interest for not wanting to live as long as possible. They might think the final stage of their illness would prove an unnecessary trial for their friends or for those who must feed and clean them, or leaving a larger estate might appeal to them more than undergoing uncomfortable medical procedures and piling

---

114. *Id.*

115. *Id.* at 202.

up hospital bills. But some notion of dignity or self-respect is typically at work too, particularly concerning their views about the possible divorce between bodily and mental life. Many detest the prospect of their becoming plants, viewing that twilight existence as an insult to the active, helpful lives they have led. Others wish to struggle forward, even mindlessly, in defiance of death, to bear witness to the values that inspired their lives. "None of us," as Dworkin says, "wants to end our lives out of character."<sup>116</sup>

People's critical interests in dying or staying alive are frequently overlooked, Dworkin argues. Opponents of euthanasia often contend, he says, that patients who experience little pain, perhaps because they have lost consciousness forever, suffer no harm if they are kept alive. The Supreme Court relied on this contention, for example, in upholding Missouri's rule forbidding hospitals from terminating life support unless they had "clear and convincing" proof that a patient, prior to entering a coma, wanted treatment suspended if she became permanently comatose.<sup>117</sup> The Justices apparently ignored the possibility, Dworkin maintains, that keeping somebody alive who would have preferred death might *harm* that person, even if she felt no pain and suffered no serious setback to her experiential interests.<sup>118</sup> The assumption that an unbroken coma cannot harm somebody is unwarranted, however.<sup>119</sup> Similarly, arguments against legalizing assisted suicide premised on the danger that vulnerable people might be strong-armed into consenting to end their lives "fail[] to recognize that forcing people to live who genuinely want to die causes serious damage to them."<sup>120</sup> In addition, "the 'slippery slope' argument that the law should license no euthanasia because it may end by licensing too much, and the claim that doctors will be corrupted and their sense of humanity will be dulled if they are asked and allowed to kill," do not necessarily prevail. They too are predicated on the "fallacious and dangerous" assumption that people cannot be harmed by being kept alive without pain or sensation.<sup>121</sup>

These are salutary reminders.<sup>122</sup> Euthanasia's foes may sometimes unduly discount the injury that keeping somebody alive against his wishes does to him and those he loves, even if his pain is largely suppressed. There is a natural tendency to belittle the costs we inflict on others in pursuing our values or interests; as Rochefoucauld warned, we all have strength enough to endure

---

116. *Id.* at 213.

117. *See Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

118. LIFE'S DOMINION, *supra* note 1, at 197.

119. *Id.* at 197, 216-17.

120. *Id.* at 197.

121. *Id.* at 216-17.

122. Dworkin's point that compelling someone to live may harm him is not new, of course. As Dworkin recognizes, *see id.* at 196, Justice Brennan voiced this complaint in his *Cruzan* dissent, *see* 497 U.S. at 301, 320. Joel Feinberg, among others, has developed and defended this view with care. *See* JOEL FEINBERG, *An Unpromising Approach to the "Right to Die,"* in FREEDOM AND FULFILLMENT, *supra* note 7, at 260.

others' misfortunes.<sup>123</sup> My sense, however, is that most people who see suicide and euthanasia as mistakes do not dispute that many grievously ill patients who are prevented from dying experience genuine distress. Nor do they typically assume that people have no critical interests that can be advanced or slighted by the timing or manner of their death. What opponents of suicide and euthanasia often believe, instead, is that people *ought* to approach death in a different spirit, and that the law should encourage them to await nature or God's quietus. Alternatively, they might assert that the risks of bullying or wrongful killing overwhelm the unhappiness or setback to their critical interests that some patients must tolerate.<sup>124</sup> Many objections are rooted in a religious belief that individuals have no right to dispose of their lives, like chattel, when those lives are the gift of a higher power.<sup>125</sup> And some simply assert that morality forbids willing one's own death, whatever good might come of it.<sup>126</sup>

Although one of Dworkin's main claims is that some critics of assisted suicide and euthanasia fail to see that people have critical interests that might be implicated in any decision to live or die, he does acknowledge the cogency of the preceding arguments, none of which suffers from that failing.<sup>127</sup> An enemy of euthanasia might argue, consistently, that because patients who seek death are deluded about their critical interests, or because suicide or the administration of lethal drugs betrays life's sanctity, people should not be allowed to die when they wish and those who assist them should be punished.<sup>128</sup> This argument, Dworkin says, parallels in structure and impulse

123. DUKE DE LA ROCHEFOUCAULD, *THE MAXIMS OF THE DUC DE LA ROCHEFOUCAULD* ¶ 19 (Constantine FitzGibbon trans., 1957).

124. For a forceful refutation of this argument in the case of euthanasia, see JOEL FEINBERG, *Seven Modes of Reasoning that Can Justify Overlooking the Merits of the Individual Case—When the Facts Are Right*, in *FREEDOM AND FULFILLMENT*, *supra* note 7, at 283.

125. John Locke was one prominent exponent of this claim. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* II § 135 (1698).

126. This, famously, was Kant's view. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 38-39, 46 (Lewis W. Beck trans., 2d ed. 1990) (1785) (AK 421-22, 429). Although Kant repeated this argument from *Foundations* in *The Metaphysics of Morals*, he there asked, as a "casuistical question" to which he offered no answer, whether somebody would really act immorally if, after being bitten by a rabid dog and feeling the onset of a disease from which he knew of no recovery, he took his life to spare others unhappiness or harm. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 218-20 (Mary Gregor trans., 1991) (1797) (AK 422-24).

127. See *LIFE'S DOMINION*, *supra* note 1, at 198, 214. Dworkin contends that the opinions of Justices Rehnquist and Scalia in *Cruzan* reveal that they believe a state may constitutionally outlaw euthanasia on the rationale that lengthening life best respects its sanctity.

128. Although Dworkin in places distinguishes the question of whether premature death is in somebody's best interests from the question of whether it would offend life's intrinsic value, see *id.* at 194, 213, it is hard to see how a person could conceive of his critical interests (or those of others) without regard to his opinion about whether continued life is objectively valuable. Dworkin's considered view seems, reasonably, to be that best interests and intrinsic value cannot be kept apart: "Someone's convictions about his own critical interests are opinions about what it means for his *own* human life to go well, and these convictions can therefore best be understood as a special application of his general commitment to the sanctity of life." *Id.* at 215. The conflict between best interests and life's intrinsic value only arises, it seems, if one wrongly confines one's consideration of a person's interests to his experiential interests.



objections to abortion built on the claim that life in any form is sacred or intrinsically valuable. It declares that “the natural investment in a human life is dominantly more important than the human investment, and that choosing premature death is therefore the greatest possible insult to life’s sacred value.”<sup>129</sup> Dworkin continues:

If we adopt the view congenial to many religious traditions, that nature’s investment in a human life has been frustrated whenever someone dies who could be kept technically alive longer, then any human intervention—injecting a lethal drug into someone dying of a painful cancer or withdrawing life support from a person in a persistent vegetative state—cheats nature, and if the natural investment, understood in that way, dominates the sanctity of life, then euthanasia always insults that value. That argument, I believe, forms the most powerful basis for the strong conservative opposition to all forms of euthanasia throughout the world.<sup>130</sup>

I wonder whether the parallel between abortion and euthanasia is as strong as Dworkin appears to maintain. It is true that religiously inspired opponents of both might tender the same reason: all unprovoked killing is sinful because it contravenes God’s will. But most people who believe that abortion and killing the badly ill or unconscious at their behest are *permissible* (along with some who oppose both) do not think of the morality of these actions in the same way. Abortion presents a possible opposition between two creatures’ interests; euthanasia does not. One can imagine balancing the blow abortion deals to a fetus’ life against the blow not aborting deals to a woman’s life. But there seems no counterweight to—no separate harm to balance against—whatever net personal benefit suicide or euthanasia would bring to someone contemplating death. Outside of a theistic world view, and often within one, the idea that some independent existence does or might exert a moral claim that constrains one’s actions is importantly different from the notion that one has a duty to oneself not to die. One can force the two decisions into the same linguistic mold, as Dworkin does, using the highly plastic concept of investment. But phenomenologically the two decisions differ, especially to nonreligious people, many of whom find voluntary euthanasia easier to justify than abortion. One may think that, religion apart, abortion is wrong because it would end a fetus’ life, even though it would be best for the

---

129. *Id.* at 214.

130. *Id.* In describing popular convictions, Dworkin might have emphasized that some people distinguish assisted suicide and euthanasia from the withdrawal of life support. To be sure, the line between killing and letting die is blurred in some instances, and many philosophers think that the division between actions and omissions is morally unimportant. *See supra* note 63. It nevertheless remains true, as a descriptive matter, that many critics of assisted suicide and euthanasia do not object, or do not object nearly as vociferously, to the withdrawal of aid. If a person dies without human intervention, they believe, his death is natural or divinely ordained, and thus is not the result of an intentional action that is insulting to creation or to a Creator.

woman obtaining the abortion. In contrast, many people would conclude that it makes little sense to think that euthanasia is wrong because it would destroy a person's life, even though it is best for that person.<sup>131</sup>

Whether the parallel between abortion and euthanasia is strong or weak might not matter for Dworkin's argument. His response to the foregoing claim that people may rightly be kept alive against their wishes, because it is best to keep life's fire ablaze as long as possible, seems to me powerful regardless of whether most people conceive of the morality of euthanasia in the way that Dworkin describes. Indeed, his response might be even more forceful if the parallel I have questioned does not hold. That response runs as follows. Perhaps the best understanding of life's value, Dworkin grants, counsels against suicide and euthanasia.<sup>132</sup> The fact remains that people disagree passionately about this issue, as they do about abortion. "We cannot sensibly argue that [somebody facing a radically impoverished, unwanted life chained to a machine] must sacrifice his own interests out of respect for the inviolability of human life," Dworkin declares, when "he thinks dying is the best way to respect that value."<sup>133</sup> Thus, the same moral and constitutional questions about the permissibility of collective coercion return, applied to "the most central, personality-defining judgments" people make about their lives.<sup>134</sup> Although Dworkin does not address those questions, he seems to suggest that they deserve the same answers he gave in the case of abortion. Personal autonomy is to be favored when the impact of regulation on people's lives is pronounced, unless the interests or rights of other individuals are threatened. Procedural constraints on choosing death surely would be necessary. But it is impossible to believe, after Dworkin writes that "[m]aking someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny,"<sup>135</sup> that he would find a blanket ban on assisted suicide or euthanasia either morally or constitutionally tolerable.

## B. *Unanswered Questions*

Dworkin's defense of an individual's right to decide when to die is much briefer than his argument for a right to early abortion. He leans towards a policy that would permit physician-aided suicide for people nearing death, and that would allow active euthanasia if a permanently comatose patient would

---

131. For further reflections on the greater difficulty of separating a concern for somebody's interests and concern for life's sanctity in the case of euthanasia than in the case of abortion, see Scanlon, *supra* note 82, at 49-50.

132. Dworkin's own view of a valuable life does not exclude suicide or euthanasia. See *infra* text accompanying note 157.

133. LIFE'S DOMINION, *supra* note 1, at 216.

134. *Id.*

135. *Id.* at 217.

probably have wished it. However, he marshals no detailed argument for this conclusion. Of course, one book cannot settle every issue, and it is no criticism to say that Dworkin leaves some questions unanswered. But let me mention a few topics that he would have to address if he were to defend more fully the policy he seems to approve.

One question that arises, as Dworkin realizes,<sup>136</sup> is the extent to which assisted suicide and euthanasia may be limited because of the danger they pose to other people. If these procedures were legal, some patients might be killed against their wishes; some could be subtly coerced into consenting. Public perceptions of hospitals and health care workers might change for the worse, perhaps deterring some people from seeking treatment. These are genuine concerns that a comprehensive proposal would have to assess. Some constraints on autonomy might be warranted.

Another question is whether other people's need of transplant organs can justify keeping a permanently comatose person alive against her wishes and perhaps those of her family, so that she can be killed when suitable organ recipients appear. This difficult question is outside the ambit of *Life's Dominion*. It forces us to confront the importance of any distress people might feel from knowing that they lack control over their post-conscious lives, as well as the moral significance of their worries that their friends and relatives might see and remember them as helpless vegetables or suffer emotional strain from their delayed deaths. In addition, it raises controversial issues of a person's property rights in her organs, of distributive justice, and of the importance of religious convictions as a reason for exemption from a rule of mandatory donation.<sup>137</sup> The question also conjures up the hoary philosophical issue of whether people have interests that survive them.<sup>138</sup> Many people think that disregarding someone's wishes after she has died or lost consciousness forever can wrong her, but how can that be, if her experiences, her deeds, and her intentions can no longer be affected? If I slander Cleopatra now, has she been injured in any way? Do only certain types of post-conscious wrongs sting? Of those that do, are we to imagine that they injure via causal chains that proceed *backward* in time? Questions about posthumous interests and the nature of individual well-being might seem distant from the debate over euthanasia policy. But we cannot determine whether there is anything wrong with sustaining somebody who has lost consciousness irretrievably to obtain organs for transplant until we settle these issues.

The third question that Dworkin's account provokes is whether preventing a willful death could possibly be justified paternalistically. We routinely

---

136. See *id.* at 182, 216.

137. See RAKOWSKI, EQUAL JUSTICE, *supra* note 109, at 167-95; KAMM, *supra* note 109, at 201-330.

138. The leading publications on this subject include JOEL FEINBERG, HARM TO OTHERS 79-95 (1984); Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341 (1987); Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243 (1981).

prevent people from taking their lives if they are physically healthy, on the ground that they do not recognize what is best for them. Dworkin raises no objection to this policy, which the great majority of people endorse.<sup>139</sup> What licenses or compels intervention in these cases? One might claim that the only legitimate ground for intervention is to ensure that suicide is a deliberate choice by a sane person, because any other reason would require taking a side in what Dworkin regards as a religious debate. But Dworkin at least appears to reject this claim in the case of smoking:

I am assuming . . . that it can be in a person's overall best interests, at least sometimes, to force him to act otherwise than as he wants—that it can be in a person's overall best interests, for example, to be made not to smoke, even if we acknowledge that his autonomy is to some degree compromised, considered in itself, as against his interests.<sup>140</sup>

Could prolonging someone's life advance his overall best interests enough to outweigh the unhappiness that is likely to attend that life and the loss of autonomy that forcing it to continue entails?

I am not sure what general answer Dworkin would give to this question, though he plainly thinks the answer is no if the person who wants to die is fatally ill or badly demented. Perhaps he would distinguish paternalistic measures calculated to advance somebody's nonmoral interests—such as a plan to stop someone from smoking—from those aimed at improving somebody morally. Or he might say that suicide is *sui generis*, because its permissibility turns on the value of life itself rather than the value of all that might occur within a life. However, both of these distinctions are slippery. They also prompt the same objection that might be raised against Dworkin's nonconstitutional argument for a right to abortion: why should a community be much more constrained, in the face of competing moral claims, in protecting the non-rights-based values it prizes than in protecting its understanding of individual rights?

Perhaps the best response is to say that people have a right to choose death, without financial or legal penalty to themselves or those they love, because the values on which this decision turns are almost always central to their personality and ethical outlook, because a decision to die in these trying circumstances is easily intelligible even to those who think it mistaken, and because this decision does not cause physical injury to other people or inflict

---

139. See *LIFE'S DOMINION*, *supra* note 1, at 192-93. Although he does not object, Dworkin also does not say how far he thinks people may go—though I read him to say they may do something—to prevent the suicide of a healthy person or to restrain somebody's autonomy in order to make his life better.

140. *Id.* at 257 n.15. This passage is confusing, because Dworkin says elsewhere that even if people smoke, knowing that smoking is not in their best interests, "respecting their autonomy means allowing them to act in this way." *Id.* at 223. I am not sure how these passages can be reconciled.

psychic harm against which others may claim protection. A community that grants its members this liberty, as part of the respect it accords their capacity to judge responsibly and as part of the concern it evinces for their subjective well-being, is for that reason a better one in which to live. If people should be free to choose their occupations and their most intimate friends, to leave their country by emigration, and to make all manner of trivial decisions, they certainly should be free to end their life when continued existence becomes intolerable to them. Freedom carries costs, of course, such as the risk of fatal mistakes, of involuntary killings, and of unwelcome pressure on ailing patients to die sooner than they wish in order to save others money, irritation, or time. On balance freedom seems worth that price.

This response is compatible with Dworkin's account, but sets aside two of Dworkin's claims. It does not suggest that virtually everyone views the morality of suicide or euthanasia in terms of the natural and human investments in someone's life. It treats Dworkin's claim that they do as irrelevant. It also does not depend on societal disagreement about the morality of suicide or euthanasia, unlike Dworkin's defense of a right to choose. Assisted suicide and euthanasia on request should be permitted even if a large majority deems them immoral. If Dworkin views these elements of his account as furnishing additional, but not essential, reasons for his conclusion, perhaps he would accept these modifications.

The preceding questions press beyond the boundaries of *Life's Dominion*. There is, however, one topic that Dworkin should have addressed in order to complete his account: the implications of his constitutional arguments with respect to assisted suicide and euthanasia. Do Americans have a free exercise right to euthanasia, as Dworkin argues American women have a free exercise right to abortion? Bear in mind that most people do not insist on taking their lives or having themselves killed because they believe they have a religious *duty* to cut their lives short; they do so because they wish to die and see no moral or religious reason that prevents them from doing so. This reasoning does not closely parallel the typical free exercise claim, which is premised on a religious *obligation* to act in a certain way. Notice, too, that the state's secular interests in preventing coerced and mistaken killings is strong and weighs against finding a free exercise right. As for the Establishment Clause, would keeping somebody alive in a vegetative state out of respect for life's sanctity constitute an unconstitutional establishment of religion in Dworkin's view? Are poor people constitutionally entitled to lethal injections or some other form of euthanasia at state expense, as Dworkin argues that poor women are entitled to state-funded abortions under the Establishment Clause, if the state regularly provides medical care to the poor? Dworkin does not raise these

questions himself.<sup>141</sup> But they arise naturally from his account, and their answers are important in determining whether his constitutional analysis, which cannot logically be limited to the issue of abortion rights, is worthy of adoption.

### C. *Precedent Autonomy and Irreversible Dementia*

Everyone desires to live long, Jonathan Swift observed, but no man would be old.<sup>142</sup> Age's woes are not confined to small aches and lost allure, wizened limbs and slower wit. People lose their minds. Between one-quarter and one-half of all Americans over eighty-five, and many younger people, suffer from Alzheimer's disease, and the annual cost of that disease (mostly for custodial care) is perhaps \$80 billion.<sup>143</sup> As the disease progresses, it typically erases almost all memory of a patient's past. After a time, most Alzheimer's patients cannot recognize people they once knew or even recall what occupied them only a few minutes before. Speech becomes halting or lame; the capacity to plan for the future apparently is lost. The last chapter of *Life's Dominion* asks what would best serve the interests of people who have become severely demented, in particular whether their own wishes regarding that care, formed before their competence ebbed, should determine how they are treated.<sup>144</sup>

#### 1. *The Sovereignty of Prior Preferences*

Dworkin contends that all adults of normal competence possess three salient rights: a right to autonomy, a right to beneficence, and a right not to suffer indignity. Their right to autonomy is "a right to make important decisions defining their own lives for themselves," even if those decisions are silly or shortsighted.<sup>145</sup> People's right to beneficence is their right, if they

141. For an argument that the Free Exercise Clause yields a constitutional right to decide in advance whether one's life support should be withdrawn if one ends in a permanent vegetative state, and that the same clause grants that right to family members if a comatose person did not formally announce a preference, see Stacy, *supra* note 7, at 557-90.

142. JONATHAN SWIFT, *Thoughts on Various Subjects, in SATIRES AND PERSONAL WRITINGS* 406, 414 (William A. Eddy ed., 1932).

143. See LIFE'S DOMINION, *supra* note 1, at 219-20.

144. Dworkin does not discuss whether insurance against mental deficiency should be mandated, or who should pay to care for the demented if they neglected to insure. He takes up these issues in an unpublished paper prepared for the Office of Technology Assessment, to which he refers in *Life's Dominion*. See RONALD DWORKIN, U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, PHILOSOPHICAL ISSUES CONCERNING THE RIGHTS OF PATIENTS SUFFERING SERIOUS PERMANENT DEMENTIA 60-105 (1987), *microformed on* Philosophical, Legal, and Social Aspects of Surrogate Decisionmaking for Elderly Individuals, CIS No. OTA J952-30 (Cong. Info. Serv.) [hereinafter OTA REPORT].

145. LIFE'S DOMINION, *supra* note 1, at 222. Although the contribution autonomy makes to the value of a person's life is undisputed, it is a separate question whether that value is enhanced by a liberty to make immoral or wrongheaded choices. Joseph Raz argues forcefully that in many cases it is not. See JOSEPH RAZ, THE MORALITY OF FREEDOM 380-81, 410-12 (1986).

have been entrusted to another's oversight, to have a fiduciary act in their best interests with whatever resources are available for their care.<sup>146</sup> People's right not to suffer indignity is a right "not to be treated in ways that in their culture or community are understood as showing disrespect."<sup>147</sup> In some instances, these rights collide. A person's right to autonomy might be limited out of a paternalistic concern for his best interests when a fiduciary is authorized to constrain his choices.<sup>148</sup> And a person's right not to suffer indignity, which is more fundamental and wider in scope than a right to beneficence, might require others to attend to certain of his needs even if, like prison authorities, they restrain his autonomy and neglect his best interests.<sup>149</sup>

Individuals in advanced stages of dementia lack the mental competence that is an essential precondition to a right to autonomy. Because they are beyond feeling self-esteem or self-respect, one might also think that they can suffer no indignity, and so have no right to be free of it. Nevertheless, demented people still prefer some experiences to others. One thus might infer that their right to beneficence enjoins their caretakers to keep them comfortable and to provide them with whatever medical assistance the resources committed to their care can buy, so long as their lives seem on balance contented.

Dworkin argues that this superficially beguiling approach is mistaken. All three rights have their say, he contends, and they rebuff in unison this straightforward argument for giving badly demented patients a painless but vacuous life. It is true that a seriously demented person has no right to determine what form her care should take, because she has lost the capacity to choose responsibly. But if she had some preference regarding her later care *before* she became demented, *that* exercise of autonomy deserves respect. The point of respecting autonomy, Dworkin writes, is to "encourage[] and protect[] people's general capacity to lead their lives out of a distinctive sense of their own character, a sense of what is important to and for them."<sup>150</sup> Honoring their earlier wishes when they are no longer competent serves precisely that end, for it allows their own judgment to determine the overall shape of their lives.

May somebody's right to beneficence outweigh her right to autonomy if she expressed a desire when competent that she be denied life-saving treatment should she become demented? Dworkin denies that a conflict arises, *if* a right to beneficence is a right to have others act in accordance with what one *believes* to be one's critical interests. A severely demented person might have an experiential interest in remaining alive. Dworkin seems to say, though, that her *critical* interest is in leading a life structured by her autonomous choices.

---

146. See LIFE'S DOMINION, *supra* note 1, at 229.

147. *Id.* at 233.

148. *Id.* at 257 n.15.

149. *Id.* at 233-34.

150. *Id.* at 224.

That critical interest trumps her interest in enjoying whatever experiences she might still have:

If I decide, when I am competent, that it would be best for me not to remain alive in a seriously and permanently demented state, then a fiduciary could contradict me only by exercising an unacceptable form of moral paternalism. A doctor is no more justified in contradicting a competent adult's judgment about dementia than in contradicting his judgment about permanent unconsciousness.<sup>151</sup>

A person's right to be treated with dignity generally reinforces this conclusion, for that right, Dworkin says, "is the right that others acknowledge his genuine critical interests: that they acknowledge that he is the kind of creature, and has the moral standing, such that it is intrinsically, objectively important how his life goes."<sup>152</sup> One best serves what somebody perceives as her critical interests, Dworkin has just said, by deferring to her autonomous choices. It follows that if somebody asked before sliding into dementia that she not receive necessary medical care in that condition even if it is inexpensive, and if she judged her critical interests correctly, we respect all her rights and her most important interests by allowing her to die. Dworkin realizes that allowing the demented elderly to die when they could easily be saved will strike some readers as "troubling" or "shocking."<sup>153</sup> He recognizes that they—"we"—might want to draw back. But he emphasizes that if the law requires that demented patients be kept alive in this situation—and Dworkin never says whether he believes this *ought* to be the law—it is either because of some extraneous, unformulated moral conviction or for the sake of others; it is not for the sake of the demented patients.<sup>154</sup>

## 2. *Best Interests and Autonomous Desires*

Dworkin notes that no conflict can arise between a competent person's informed choices concerning her later care and what she *believes* to be in her best interests after her reason has left her. Clearly, though, a conflict may exist between her right to autonomy and her right to beneficence, construed as a

151. *Id.* at 231.

152. *Id.* at 236.

153. *Id.* at 226. He elsewhere says that he expects people to be "outraged" by it. Ronald Dworkin, *Autonomy and the Demented Self*, 64 *MILBANK Q.*, Supp. 2, at 4, 13 (1986).

154. Dworkin writes:

We might consider it morally unforgivable not to try to save the life of someone who plainly enjoys her life, no matter how demented she is, and we might think it beyond imagining that we should actually kill her. We might hate living in a community whose officials might make or license either of those decisions. We might have other good reasons for treating [a severely demented person] as she now wishes, rather than as, in my imaginary case, she once asked. But still, that violates rather than respects her autonomy.

LIFE'S DOMINION, *supra* note 1, at 228-29.



right to have a fiduciary act in what is *truly* in her best interests, not merely what she thinks would best advance her interests. Dworkin recognizes that this might happen when he acknowledges that paternalistic restraints might sometimes be justified by the importance of protecting somebody's best interests.<sup>155</sup> We stop perfectly sane people from shooting dangerous rapids, from snorting cocaine, and from driving without seat belts. Why would ignoring a demented person's earlier wishes constitute "an unacceptable form of moral paternalism"?<sup>156</sup> At least in cases in which a person is kept alive despite her earlier wishes that she be killed or allowed to die, one of the principal arguments against paternalistic restraints—the psychic frustration that coercion typically calls forth—gains no foothold. A demented person cannot resent having her earlier wishes overridden when she is unaware of it.

One might have expected Dworkin to respond to these questions as he did in defending a right to assistance in committing suicide and to euthanasia: by arguing that any decision about whether it is best to continue living with severe dementia turns on an essentially religious premise, hence that a person's earlier, competent preference should be followed without hesitation. But for reasons that are not entirely clear, he does not offer or consider this reply. If paternalism is not ruled out at the start because the decision whether to continue living unavoidably turns on a view of life's sanctity or intrinsic value, however, it is not obvious why Dworkin believes it should be ruled out as regards the proper treatment of permanently comatose patients and perhaps even conscious patients suffering from terminal illnesses.

Dworkin's claim that paternalism is not acceptable here can best be understood, I think, by separating his answers to three questions. First, what would best serve a person's critical interests if he became irreversibly and seriously demented? Second, how should we determine, after someone has lost the power to reason, what he wanted done to him before he lost his competence to decide? Third, what should the law permit or require if a person's critical interests pull in the opposite direction from his earlier autonomous preferences regarding his care? I shall consider these topics in turn.

What would be best—continued care or certain death—for an Alzheimer's sufferer whose mental life has no internal coherence but who seems otherwise satisfied? Surprisingly, in *Life's Dominion* Dworkin does not answer this question about the content of people's critical interests. He does, however, address it in an earlier paper:

---

155. See *id.* at 192-93, 257 n.15.

156. *Id.* at 231. In his Office of Technology Assessment Report, Dworkin qualifies this assertion. He says that acting against what somebody believes would best serve his interests, because one thinks his judgment misguided, "is normally an insult to that person—a particularly objectionable form of paternalism—that at least usually cannot be justified." DWORKIN, OTA REPORT, *supra* note 144, at 36 (emphasis added).

The seriously demented stage of a life can contain almost nothing that could plausibly be thought to make that life better in the evaluative [*i.e.*, critical] sense. Experiences in such a life cannot be considered rewarding, because that requires a sense of personality and agency that serious dementia excludes, nor as achievements, because that requires continuity of project and fulfillment. Though I remarked, earlier, that some people think a life better just because it is longer, no matter what the value of the additional life considered on its own, that view seems to demean rather than celebrate life, and most people would reject it. The demented stage of a life can certainly, however, contain experiences that make the life of which it is a part worse. Severe pain or anxiety makes a life worse, and so do the various forms of indignity, to which demented people are especially subject . . . . And we have already noticed other ways in which dementia may make a life worse: dependence, burden and image.<sup>157</sup>

Dworkin draws the ineluctable conclusion: "it is against the evaluative interests of a permanently demented patient to prolong his life."<sup>158</sup> This conviction explains why Dworkin does not see any conflict, in the lone example he gives, between a person's precedent autonomy—his earlier wish not to have his demented life prolonged—and his right to have a fiduciary act in his best interests once dementia sets in. That person's experiential interests are subordinate to his critical interests, and his critical interests point to death, just as his former choice does.

---

157. DWORKIN, OTA REPORT, *supra* note 144, at 47. Unless Dworkin has changed his mind, this passage appears to supply his answer to a question I posed in the last section: whether the state has any interest at all, flowing from a person's critical interests, in keeping him alive in a permanent vegetative state. If life as a demented but experientially happy person is contrary to a person's critical interests, then permanent unconscious existence, which brings even greater dependency with no compensating rewards, is surely an affront to those interests. Because a person's critical interests exemplify or are at least compatible with an overall conception of the intrinsic value of life, *see* LIFE'S DOMINION, *supra* note 1, at 215, it also follows that Dworkin does not believe that nature or God's investment in a life makes it wrong to cut that life short before either reclaims it, notwithstanding his respectful statement of that view.

If bare life, without any structure imposed by consciously chosen purposes, is without value, however, must not the same be said of fetal life before consciousness dawns? Dworkin's reasons for saying that it is not in somebody's interests to remain comatose indefinitely do not suggest any ground for discriminating between the two. If there is no persuasive basis for the distinction, however, it seems hard to explain Dworkin's apparent sympathy for the view that preconscious human life has intrinsic value. If it has none, then it offers no moral obstacle to abortion and cannot justify measures to compel women contemplating abortion to pay proper respect to that alleged value. To rescue the intuitions he believes that many people have and that he might share, perhaps what Dworkin needs is some normatively significant conception of organic or natural wholes: killing incipient life fractures some whole in a way that ending a life that has traversed its full, natural course does not. This is, I think, a view that would appeal to many people. It also seems consonant with some of Dworkin's observations about the extent to which death at various stages of life "wastes" that life. *See id.* at 85-88. The problem, were Dworkin to endorse this view, would lie in reconciling it with his claim that an entity's potential cannot endow it with rights before it is sentient. One would like some explanation of why something or someone's intrinsic value may increase because of what it might become, why a sentient being's rights may also increase in strength because of what it might become, *see supra* text accompanying note 75, but why the pre-sentient fetus cannot acquire the rights that its potential development will confer on it once it becomes sentient. Why doesn't potentiality have normative force *across* the divide between unconsciousness and consciousness?

158. DWORKIN, OTA REPORT, *supra* note 144, at 47.

Notice what follows from Dworkin's view if there is no contrary, competent desire to live and if worries about undue coercion or erroneous killing do not justify a divergence between social policy and the morally proper result in individual cases. If it is against somebody's critical interests to continue living in a seriously demented state, it is not merely in that person's interests to be denied life-sustaining treatment, as in Dworkin's example. It is in that person's interests to be killed. The sooner that occurs once dementia passes the critical point, the smaller the diminution of whatever value the demented person's life had.

Should a patient's caregiver therefore kill her if that is what she requested when competent? Should a fiduciary do so even if she did not request death, provided there is no evidence that she earlier wanted to be kept alive, because her right to autonomy drops out and her critical interests favor death?<sup>159</sup> In *Life's Dominion*, Dworkin acknowledges that respect for somebody's autonomous command that she be killed if she falls prey to severe dementia would indeed be a reason to kill her.<sup>160</sup> In the report from which I just quoted, however, he speculates that a policy of killing demented people at their behest would not be acceptable "in the United States, at least for the foreseeable future, or almost anywhere else."<sup>161</sup> He thinks that Americans and others would reject this policy, because they consider it wrong under any circumstance to kill an innocent human being, if not to let one die through inaction, "even though many philosophers find that distinction untenable," and because they worry that killing might weaken an inbred resistance to taking life that "they think indispensable to civilization."<sup>162</sup> Dworkin does not say whether he considers these objections compelling. He does, however, note that if the law allowed people to issue effective directives that they be killed should they reach an advanced stage of Alzheimer's disease, a person like Janet Adkins, who took her life while still competent after learning that she had the disease, "could have enjoyed years of additional useful life, confident that she would not be allowed to reach the condition she dreaded."<sup>163</sup> He might have added that many others who lack Janet Adkins' courage (or desperation) could go on with less troubled minds knowing that they will not spend their last years under the constant care of other people.

---

159. Dworkin does not discuss the case of people who are incompetent from birth. Should they, too, be killed because of the poverty of their mental lives? Perhaps not. Dworkin might believe that a life that once attained certain heights is marred by a decline into dementia, whereas one that never had those blessings is unblemished by its limitations and should be permitted to wander on its way. He does not, however, endorse or reject this suggestion. Nor does he comment on the intrinsic value of intelligent, nonhuman animal life, which in many ways resembles that of a person with limited mental abilities.

160. See *LIFE'S DOMINION*, *supra* note 1, at 231.

161. DWORKIN, *OTA REPORT*, *supra* note 144, at 77.

162. *Id.* at 78.

163. *LIFE'S DOMINION*, *supra* note 1, at 190.

Dworkin's view of the critical interests of severely demented persons may not be essential to his conclusion that the law should defer to their earlier, autonomous choice to have life-sustaining medical care withheld. He might think autonomy takes priority no matter what would be best for somebody. But his conception of people's critical interests in not living demented lives or in dying to avoid dementia does bear on the way in which demented people who have *not* made earlier choices about their care should be treated. It might also help determine the evidence we should require to conclude that somebody has deliberated about his choice if he decides contrary to what we believe his best interests are. So let me mention two powerful objections to Dworkin's view.

The first assails Dworkin's assumption that people do or ought to care about their lives as if they were, in significant respects, like poems, fugues, or paintings: creative works that should be rounded out to bring the right unity to themes already laid down. Some people do approach living in this spirit, but most have a less novelistic perspective on their lives. They do not live as though Boswell were always at their elbow. Their choices are guided instead by mundane affections, commitments, and personal ambitions. Simple pleasures matter more to them, once their obligations are satisfied, than ensuring that each decision adds verve or symmetry to the canvas of their lives. Dworkin might be right in thinking that the aimless meandering of dementia mars a life's ending. As Thomas Scanlon points out, however, "only a few people give such judgments a dominant role in their lives. . . . [F]or the rest of us the idea of doing what is 'in our best interests' may point more humbly in the direction of comfort and reassurance insofar as these can be provided."<sup>164</sup> Perhaps there are even some people whose critical interests are best served by continued life because of the importance that beating death played throughout their lives.

Dworkin might flatly disagree with the view of people's best interests that Scanlon reports. He might wish to argue further that contented dementia cannot improve the life even of somebody who has fought death doggedly for years. But these are positions he has yet to defend. In the absence of stronger argument, the desirability of allowing doctors to let their incompetent but generally satisfied patients die of pneumonia for lack of penicillin will to most people seem questionable, even if the patients once asked that penicillin be withheld.<sup>165</sup> Dworkin's appeal to precedent autonomy might still carry the

---

164. Scanlon, *supra* note 82, at 49.

165. Sanford Kadish argues that individuals who cannot competently decide on the care they are to receive should always be given inexpensive medical treatment even if they once requested that treatment be withheld, so long as they seem comfortable. Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 871-78 (1992). Compassion for the apparently contented person before us is warranted, Kadish says, by "the universality of the struggle to survive that we perceive in all living things, which makes it odd to justify disqualifying an expressed wish to live simply because of the person's cognitive limitations." *Id.* at 875. Kadish adjudges compassion more important than honoring "an exercise of precedent autonomy which is so far separated and distant from [a demented person's] present

day in the case of demented people who earlier voiced a desire to die if they attained that state. But if his account of people's critical interests proves unpersuasive, that argument will become more difficult than his discussion in *Life's Dominion* suggests. It certainly will not succeed in the case of people who earlier expressed no wish to escape dementia through death, especially when one adds in the possible deleterious effects on health care workers and relatives from letting contented people die.

The second objection concerns people who did not express any preference regarding their care before they became demented. It ties in with the observation I made above—that determining whether keeping somebody alive in a permanently comatose state wrongs her depends upon whether the value of her life can be affected by what happens after all the thoughts, intentions, and voluntary actions for which she might be held responsible have reached their end. Dworkin suggests that it can be in somebody's critical interests to be killed or left to die if she reaches a severely demented state, even if that person had not considered the matter and chosen death in that situation. But how can somebody's life be made better or worse by the actions of *other* people after she has ceased to be a moral agent? Sanford Kadish puts the point well:

Luck may be a factor in permitting a person to lead a good life, but to say that his life is made a better one because a good thing luckily happened to him after he had finished leading his life yields too much to the authority of fortune. It is a bit like flowers on a grave: they make lots of things better, but scarcely the life of the person beneath them. Consider the example of being a burden to others, often given as one among a set of reasons for declining treatment: it is a virtue for a person to permit himself to die to save burdening others, and he makes his whole life a better one for doing so. But it hardly makes

---

circumstances that its entitlement to govern is severely compromised." *Id.* at 876.

This is an appealing view. But it has one drawback and one implication that at least some people might find disturbing. The drawback is that, unlike Dworkin's approach, it fails to solve the problem of Janet Adkins and people like her who powerfully dread a second infancy. They would have no choice but to kill themselves well before they neared this condition, at the loss of perhaps years of life they could accept. Alternatively, they would have to endure the psychic distress of knowing that they will be left to go on living, contrary to their wishes, when their minds deteriorate. This drawback might be acceptable, at least if personal identity is broken when dementia is severe. See *infra* Part III.C.3. Few people respond as Janet Adkins did. In addition, the psychic discomfort that some experience, though occasionally considerable, might sometimes be allayed by a reminder that *they* will cease to be before their body stiffens. But the superiority of Dworkin's view in this regard should not pass unnoticed.

The possibly disturbing implication of Kadish's view is that compassion for even simple conscious life implies that nonhuman animals are entitled to a like concern. We might choose to treat people better than animals with similar cognitive abilities, either out of respect for what they were or because of our affection for them, as our affection for our pets leads us to treat them better than we do other animals. But the moral claims that badly demented people and some animals exert, as beings with their own conscious lives, are the same. Recognition of this fact would entail dramatic changes in the ways in which Americans raise animals for food, clothing, and experimentation. (One could, of course, run the inference the other way—to conclude that severely demented people have no moral right to better treatment than we now give farm animals—but only by rejecting Kadish's view in favor of a much less palatable one.)

his life a better one that a third party decides to sacrifice it for the benefit of others.<sup>166</sup>

In order for Dworkin to carry his conclusion that somebody's life can be improved if she is killed or allowed to pass on when her dementia becomes pronounced, regardless of whether she asked for that fate, he apparently needs to show that moral luck exists to the extent that events following one's mental demise can affect the value of the life one led. That is no mean task.<sup>167</sup> Perhaps a person's life goes better if he chooses not to live on after he has become severely demented, as Dworkin maintains; it is not clear, though, that such a person does wrong to prefer senility to death, and it seems doubtful that *he* benefits if someone else makes that choice for him.

The second question I identified—how should a fiduciary determine what a person wanted done to him before he lost his reason?—is one that Dworkin leaves untouched. The question is worth considering more carefully. Dworkin assumes that a competent person decided how she would like to be treated when demented, and then asks whether her decision should be respected by those who care for her. But why regard a person's earlier choice, as expressed in a living will or a less formal communication, as an authoritative expression of her desires? Consider, by analogy, motorcycle helmet laws. One of their main justifications is bottomed on the belief that riders frequently fail to grasp, poignantly, what their feelings will be if a horrible crash without a helmet leaves them battered or paralyzed.<sup>168</sup> Sometimes it is all but impossible to imagine fully what one will feel. A similar argument might be offered with respect to severe dementia. If the aim is to respect somebody's *own* judgment about what would be best for her, one wants to know what that person would have chosen *after* careful reflection, having surveyed with imagination all the relevant information about dementia. The choices that a person makes in advance of it are in many instances taken in ignorance of what her later life would be like. The prospect of dementia might frighten or disgust her when she is competent, but maybe she has not made vivid how it would seem to her

---

166. Kadish, *supra* note 165, at 886.

167. On the question of moral luck, see Thomas Nagel's and Bernard Williams' essays by that title in THOMAS NAGEL, *MORTAL QUESTIONS* 24 (1979), and BERNARD WILLIAMS, *MORAL LUCK* 20 (1981). Dworkin's claim that someone's life can be improved by being killed or left to die if she becomes severely demented, even if she did not earlier express a preference to die if she reached that condition, is inconsistent with his assertion elsewhere that the critical value of a person's life cannot be increased by changes she does not endorse or appreciate: "[N]o component contributes to the value of a life without endorsement: If a misanthrope is much loved, but disdains the love as worthless, his life is not much more valuable for the affection of others." Dworkin, *Liberal Community*, *supra* note 103, at 486.

168. Donald Regan raises the possibility that substantial changes in a person's attitude as a result of a crash make the post-crash victim in certain morally pertinent respects a *different person* from the earlier one. The prospect of these changes might transform the question of whether to don a helmet from one of prudence into a question of one's duty to somebody else—the *new* person a crash might produce. See Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 122-27 (Rolf Sartorius ed., 1983).

then, from the inside. If she later appears happy, is that not at least strong evidence that her life is—for her and not just for those of us whose sympathies are engaged—worth continuing?<sup>169</sup> And is that not also strong evidence that she would have reached the same conclusion herself had she deliberated more carefully?

Dworkin cannot avoid addressing these issues, for he concedes that the case for respecting someone's earlier choice, viewed as a *prediction* of what would best serve her interests if she becomes demented, is "very weak": "People are not the best judges of what their own best interests would be under circumstances they have never encountered and in which their preferences and desires may drastically have changed."<sup>170</sup> Dworkin makes this acknowledgement in the course of arguing that *if* we honored autonomous choices because people were more likely to predict accurately what would later favor their interests than other people would in the future, we ought not to respect an earlier wish to have medical care withheld when someone turns senile. Only if we respect autonomy because we believe that people should be free to shape their lives, even if that means frustrating their later desires, should we fulfill their wish to die. The conception of autonomy on which Dworkin relies is attractive, but what he appears to overlook is that the reason for respecting autonomy he endorses—a person's right to say how her life should continue or end—is perhaps most naturally understood to assume that a person's choice on a matter of great personal importance is an informed, considered decision. If the choice is made hastily or upon inadequate information, it is as suspect in guiding our conduct with respect to her as any prediction of what the person would later want. Sometimes doing what a person really wants means ignoring what that person says she wants: not letting her walk across a bridge we know, but she does not, will collapse beneath her, for example. In light of Dworkin's admission—which might be wrong—that people who decide that they want to die if they become demented understand poorly what their lives will then be like, he needs to say why their earlier decision to die should be determinative.

Perhaps Dworkin believes that, as a pragmatic matter, the best course is for us to follow a person's stated wishes so long as certain safeguards are met, because of the danger of allowing officials to impose their views on others and

---

169. Sanford Kadish objects to Dworkin's argument on this ground, noting that concern for unforeseen changes in a woman's outlook once she has carried a child and given birth to it is a leading reason for not enforcing surrogacy contracts. See Kadish, *supra* note 165, at 873-74 & n.77. Dworkin might respond to this analogy by saying that a woman's later wish to keep the child constitutes a fresh exercise of autonomy, so that it is unlike the aimless wishes of an incompetent person. But he would then have to explain why people such as a surrogate mother should be denied the chance, as part of their right to autonomy, to make binding commitments. If the answer is that doing so would sometimes not be in their best interests, given the experiences they are likely to have later, then the distinction between surrogacy contracts and advance directives for the care of incompetent patients collapses. For a careful discussion of the limitations of advance directives, see BUCHANAN & BROCK, *supra* note 107, at 98-112.

170. LIFE'S DOMINION, *supra* note 1, at 226.

because of the unhappiness that people will often experience if their actual (rather than their ideal) preferences are disregarded. These are important considerations. Dworkin also might not worry much about whether a desire to be killed or allowed to die was expressed following careful deliberation, because he thinks that people's critical interests usually or always militate against remaining alive in a markedly senile state. But those who dissent from his views about people's critical interests would rightly press this question about the authority of prior choices if a demented patient could be saved at small cost and appears content with her life despite her earlier statement that she would not want even minimal care.<sup>171</sup>

The third question centers on conflicts: what should be done when somebody's earlier autonomous decision runs counter to his critical interests? Dworkin's answer is that "[a] doctor is no more justified in contradicting a competent adult's judgment about dementia than in contradicting his judgment about permanent unconsciousness."<sup>172</sup> Showing compassion toward "the whole person, the person who tragically became demented,"<sup>173</sup> means heeding his earlier choice. Dworkin would presumably endorse this conclusion even when somebody chose *against* his critical interests—which in Dworkin's opinion means choosing to live rather than die if one becomes demented.

If one assumes that the demented person is in fact the same as the person who earlier chose to live or die in that state—a crucial assumption that I shall examine presently—Dworkin's conclusion has considerable force, given its consonance with the freedom to choose we generally accord people. He might have explained at greater length why autonomous choices should take precedence over a person's best interests, particularly in view of the paternalistic restraints that he apparently believes are justified in other cases. But giving autonomy priority seems sensible if identity survives, not least because nobody else's judgment seems more worthy of deference, notwithstanding Dworkin's dim view of people's predictive powers. If the objections I raised to Dworkin's account of a person's critical interests are compelling, the reach of his claim is limited to people who have explicitly chosen to be killed or allowed to die should they become demented. With

---

171. Given his view of people's critical interests, Dworkin himself might have pressed the question in the case of people who earlier asked to be *kept alive* if they became demented. Presumably, he refrained from doing so because most Americans and Europeans would regard it as unthinkable to override an expressed desire to live, and to kill somebody or let her die on the theory that the choice of prolonged life was misguided and probably would not have been made if a person had thought about demented life more searchingly. See *supra* text accompanying notes 161-162. Of course, if somebody did not leave resources to pay for her care, a separate question arises as to whether the community has a duty to honor her wish to live, at a real cost to other taxpayers or to other patients who must settle for less.

172. LIFE'S DOMINION, *supra* note 1, at 231.

173. *Id.* at 232.



respect to these people, however, Dworkin's conclusion holds much appeal.<sup>174</sup>

### 3. *Personal Identity*

Dworkin assumes that a severely demented person is, for purposes of individual morality and social justice, the same person as the competent signatory of the living will purporting to govern his care. Although that assumption is widely held, it is questionable. It constitutes what I believe is the most vulnerable link in Dworkin's argument for giving legal force to precedent autonomy. In *Life's Dominion*, Dworkin does not defend his claim about personal identity. He refers, however, to an earlier defense, which deserves scrutiny.<sup>175</sup>

The challenge against which Dworkin offers his defense of identity runs as follows. Personal identity, the argument begins, depends upon the psychological connections between a body's mental states at different times.<sup>176</sup> Severe dementia may, and often does, sever the connections necessary for identity to subsist. When the essential bands snap, the demented person is not the same person as the competent self who occupied the same body at an earlier time. The advance directives of that former, competent self then lose their force. They are commands concerning the care of a *different* person—a person whose mental life, in extreme cases, is no richer and no more tightly bound to conceptions of that person's past or future than that of nonhuman animals. Those earlier directives, therefore, carry no more authority than the commands of any other person regarding the demented person's care. Precedent autonomy, to which Dworkin assigns paramount value, is divested of its moral authority.<sup>177</sup>

Dworkin realizes that if he is wrong in assuming that personal identity continues between the patient's competent predecessor and her incompetent self, "many of [his] arguments and conclusions about the rights of the demented would have to be abandoned."<sup>178</sup> If psychological continuity is the

---

174. A useful catalogue of arguments leading to the opposite conclusion is Leslie P. Francis, *Advance Directives for Voluntary Euthanasia: A Volatile Combination?* 18 J. MED. & PHIL. 297 (1993).

175. See *LIFE'S DOMINION*, *supra* note 1, at 257 n.12. That earlier response is his Report for the Office of Technology Assessment. See *DWORKIN, OTA REPORT*, *supra* note 144.

176. PARFIT, *REASONS AND PERSONS*, *supra* note 51, at 199-379, provides an influential statement of this view and its moral implications.

177. Rebecca Dresser enlists this argument in behalf of her conclusion that a demented patient's contemporary interests should guide his care, irrespective of what he said he wanted when competent. See Rebecca Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 ARIZ. L. REV. 373, 379-81 (1986); Rebecca Dresser, *Relitigating Life and Death*, 51 OHIO ST. L.J. 425, 431-34 (1990); see also John A. Robertson, *Second Thoughts on Living Wills*, HASTINGS CENTER REP., Nov.-Dec. 1991, at 6 (emphasizing the dangers of heeding advance directives that conflict with an incompetent—and significantly different—person's best interests). But see *Second Thoughts on "Second Thoughts,"* HASTINGS CENTER REP., July-Aug. 1992, at 41 (collecting letters criticizing Robertson).

178. Dworkin, *Autonomy and the Demented Self*, *supra* note 153, at 6.

proper standard, his position must be revised, for Dworkin concedes that psychological continuity “is indeed destroyed in serious and permanent dementia.”<sup>179</sup> But psychological continuity is not the right standard for this purpose, Dworkin contends, even though it is for most others. The destruction of psychological continuity strips advance directives of their authority only if we make a fetish of some formula for deciding when identity survives. On the “Wittgensteinian” view Dworkin favors, “we treat our ordinary judgments about identity as deep, perhaps wired-in, assumptions that are presupposed, individually and socially, in the lives we lead, but that do not necessarily represent or answer to any general rule or formula.”<sup>180</sup> We question those assumptions only if we have some good reason to distrust accepted understandings. But in this case we have none. The commonsense view is that *we* might become demented, that the demented person is the *same* person as the competent person who also bore her name. The inconsistency between this conclusion and the assertion that psychological continuity provides the best general account of personal identity is no cause for worry. The question is: “given the character, point, and efficacy of the complex set of ideas woven around personal identity, is it all things considered better or worse to regard identity as continuing in these circumstances?”<sup>181</sup> Dworkin says that it is better to regard identity as continuing, because most people appear to think that it does. People *are* worried about what care they will receive and whether they will be killed when their minds atrophy. Any change, he says, in favor of finding “unconnected lives” would upset our elaborate legal regimes of inheritance and property and “the dense and complex pattern of emotional life” that surrounds these institutions.<sup>182</sup>

Dworkin is certainly right to ask those who would alter the status quo to produce a reason for doing so. He is also correct in noting that most people would balk at adopting a new understanding that upset important attitudes and institutions. But his defense of received wisdom seems to me overly brisk. As Allen Buchanan and Dan Brock have argued at length,<sup>183</sup> if the threshold of psychological continuity necessary for personal identity to survive is set

---

179. DWORKIN, OTA REPORT, *supra* note 144, at 86.

180. *Id.* at 97 (footnote omitted).

181. *Id.* at 103.

182. *Id.* at 103-04. Mark Kuczewski develops a view, similar to Dworkin's, that treats selfhood and personal identity, in these morally relevant aspects, as social constructions. Mark G. Kuczewski, *Whose Will Is It, Anyway? A Discussion of Advance Directives, Personal Identity, and Consensus in Medical Ethics*, 8 *BIOETHICS* 27, 42-46 (1994).

183. See BUCHANAN & BROCK, *supra* note 107, at 152-89. They conclude that, in cases of severe dementia, in which psychological connections are almost completely sundered, the force of advance directives wanes, though advance directives reacquire their authority, as expressions of surviving interests of the competent self, if the individual becomes so severely demented as to no longer be a person. They recognize that this sliding-scale approach to determining the authority of advance directives will require difficult judgments when advance directives pull in the opposite direction from what most people think would make a demented person's life go best. But they also note that these cases are likely to be rare, particularly if advance directives are followed except in cases of severe (but not absolute) dementia.

low—and there are good reasons, including those Dworkin mentions, for setting it low—saying that continuity of identity is broken in cases of severe dementia need not significantly disrupt our social or legal institutions. That is particularly true in countries that provide universal health insurance. Nor would admitting rare breaks in identity greatly alter the way in which we think about our future or those of people we love. In some cases, such as advanced Alzheimer's sufferers, it would give people pause. Yet it is in precisely those cases that Dworkin's distinction between blinkered reliance on some academic's formula to specify when identity endures and reliance on the inherited, "wired-in" wisdom of common sense seems overdrawn. Cases of severe dementia, in which memory is obliterated, *are* troublesome. Most people would *not* be sure upon reflection, I believe, that in any important sense *they* survive the loss of their minds. Think of how frequently people refer to their badly demented relatives as having become different persons, and not in some shallow figurative sense. Or compare severe dementia to a permanent coma. Many believe that entering a permanent vegetative state spells the evaluatively significant end of a person's life, even if that person earlier cared about how his body would later be treated. Reanimating that body, with a mind containing thoughts that bear little relation to those of the person who entered the coma and no memories to link the two people—imagine a brain transplant, if you can—does not make the first person's end less final. Or suppose that, in the last stage of Alzheimer's disease, the person with your Social Security number murdered someone. Do you think that *you* would have done something wrong, that you would have led a less praiseworthy life?

To be sure, people often have strong preferences about the care that the demented person they become should receive. Most commonly, their wishes concern others. They might not want their confused and broken successor to burden their family, for example. But sometimes their wishes are self-regarding. Many people recoil from the thought of friends or family seeing and remembering them in a state of helpless dotage, and they do not trust others to distinguish the mentally active person they were from the very different person they became through no fault of theirs. These preferences have moral force, not least because of the anxiety that can afflict somebody who is uncertain whether his wishes will later be honored. Nevertheless, the countervailing reason I outlined also presents a powerful, if not a decisive, argument that decisions regarding the care that severely demented people should receive ought to be collective in nature, not left to whoever happened to have been physically continuous with each demented person.<sup>184</sup>

---

184. Dan Brock has argued that even if personal identity does not survive, the more primitive identity of a single human being endures. People are concerned about what will happen to their severely demented successor, as they would be worried if a nonhuman animal into which they were about to be transformed was then going to be tortured. Brock concludes that this prudential concern would in most cases lead people to favor palliative care for their seriously demented successor, but not life-sustaining treatment. *See* Dan

The wired-in wisdom on which Dworkin relies is untrustworthy for another reason. Until recently, few people lived to an advanced age, fewer still contracted Alzheimer's disease, and an even smaller number survived long enough to experience the severe dementia that is becoming increasingly commonplace. The problem posed by radical breaks in psychological continuity is not one with which our institutions have had to cope, or about which most people have thought carefully. When one recalls what once passed for received wisdom regarding the status of women and racial, ethnic, and religious minorities, caution at accepting uncritically the dictates of common sense seems appropriate.

Moreover, if received views were to be our guide, they might well lead away from Dworkin's conclusion. Much depends on how those views are couched. The prevailing ethic has long required that mentally incompetent patients be given sustenance and medical care; most people would be repulsed by the thought that incompetent patients might be left to die, even at their own earlier command. The fact is that Dworkin himself recommends an important change in the way many people think about these matters, by attaching greater significance to a person's earlier competent choices than they would feel comfortable doing. Ironically, one argument *for* adopting psychological continuity as the relevant test of personal identity is that it would prevent what time-tested opinion would regard as the most troubling implications of Dworkin's view.

These brief remarks do not, of course, settle the question of what influence psychological discontinuity should have on the authority of a prior competent self to determine an incompetent person's care. Ignoring prior preferences, as I said, would cause anxiety to people before they became demented if their preferences diverged from those of the majority. There are also strong pragmatic reasons for making prior preferences decisive. Few of us care as much about what happens to a demented person as he himself did when he was still competent. Even if he is now a different person, it might be appropriate to give his earlier self some discretion concerning his care, as we give parents discretion in raising their children. If, furthermore, that person is attended by close friends or family members, perhaps their wishes should be given substantial weight, in view of the far greater impact of his survival or death on their lives than on the lives of oblivious fellow citizens. Finally, if

---

W. Brock, *Justice and the Severely Demented Elderly*, 13 J. MED. & PHIL. 73, 90-92 (1988); *see also* BERNARD WILLIAMS, *The Self and the Future*, in PROBLEMS OF THE SELF 46 (1973) (examining the lessons of thought experiments involving the torture of possible future selves). Brock's argument is similar to Dworkin's argument that people's prudential concerns would lead them to buy insurance that would provide only minimal health care should they become seriously demented. *See* DWORKIN, OTA REPORT, *supra* note 144, at 65-80. Brock and Dworkin's speculations about what people would do seem to me correct. But they do not end the discussion. As Dworkin is aware, they leave unanswered the crucial question of whether severely demented people have some separate claim to medical or other resources because they are not, in fact, the same people as those who bought insurance.

dementia is pronounced, the relation that a competent self bears to his demented successor is more nearly analogous to that of normal adults to nonhuman animals than it is to the relation between parents and their offspring. The loss of memory and of the ability to project oneself imaginatively into the future destroys the self-consciousness that even small children possess.<sup>185</sup> One consequence of this extreme mental deterioration is that people also suffer a corresponding weakening of their right not to be killed or to be kept alive, even though it is wrong to cause them pain or not to relieve their distress at little cost.<sup>186</sup> Thus, as irreversible dementia grows more severe, the danger of abiding by somebody's earlier directions to kill or not to keep alive the demented creature he becomes gradually evaporates, because the potential wrong to his successor grows less grave. To be sure, in these extreme cases, there is still the problem of explaining why his prior preferences rather than somebody else's desires should be decisive, but its importance recedes. These considerations reinforce Dworkin's conclusion, though maybe not sufficiently to dispel the concerns I outlined.

#### IV. CONCLUSION

I have parsed the argument of *Life's Dominion* with care because Ronald Dworkin is our most thoughtful and influential legal philosopher. The book's unifying themes are the claim that almost all of us believe that human life is sacred or intrinsically valuable even in a nascent or unconscious form, and an insistence that each person be allowed to decide for herself how life's inviolability ought to be honored. Freedom, Dworkin says, "is the cardinal, absolute requirement of self-respect: no one treats his life as having any intrinsic, objective importance unless he insists on leading that life himself, not being ushered along it by others, no matter how much he loves or respects or fears them."<sup>187</sup> It is important, for their sakes and for the community's well-being, that people ponder decisions about abortion and suicide. Yet it is likewise essential, Dworkin maintains, that we choose individually how to order our lives and how to reverence the fundamental values we share.

This is an inspiring account of the state's proper role in facilitating reflection on the morality of abortion and euthanasia and in safeguarding people's freedom to act on their choices. I have expressed doubts about whether many people's uneasiness at killing fetuses has the same root as their reluctance to destroy great art or natural species. I have also questioned Dworkin's assertion that the warring views on abortion regulation can best be understood as weighing differently the natural and human investments in fetal

---

185. See Brock, *supra* note 184, at 86-88.

186. See RAKOWSKI, *EQUAL JUSTICE*, *supra* note 109, at 333-34, 348 n.25, 353-63; TOOLEY, *supra* note 63, at 87-146, 300-02.

187. *LIFE'S DOMINION*, *supra* note 1, at 239.

and maternal life. If those misgivings have force, Dworkin's argument for a right to early abortion, based on our commitment to religious toleration and the First Amendment's Religion Clauses, is jeopardized. Likewise, his nonconstitutional argument that women have a right to abort their preconscious fetuses, as part of a more general right to liberty of action if one's conduct does not encroach upon the interests of another conscious being, encounters difficulties. Whether that right extends to all women and to all reasons for abortion might be questioned if a majority judges the intrinsic value of fetal life more important than the hardships of involuntary pregnancy and childrearing. And the force of that challenge to Dworkin's position only increases if the most popular objection to abortion attributes something like a personal right rather than impersonal value to a fetus at some stage of its development. To be sure, that challenge might not succeed. But if the nonconstitutional argument Dworkin advances in *Life's Dominion* is to prevail, it needs further development, as part of a broader conception of liberal democracy.

*Life's Dominion* also defends the attractive claim that each of us should be free to die in the way, and at the hour, he deems right. Dworkin's account of what makes somebody's life better might not persuade everyone that a deliberate decision to die should be respected or that a quick death benefits permanently comatose patients. In my judgment, though, his eloquent case for an individual's right to decide when his life should end, whatever other people might think, is compelling. Justifying deference to a person's prior, competently formed wishes concerning his medical care after he has become irreversibly demented is more difficult than Dworkin suggests. Still, his conclusion that respecting personal autonomy should be our primary (though not our sole) aim in deciding the legality of assisted suicide and euthanasia and in caring for Alzheimer's patients is in my view correct. Naturally, some people will dissent. These debates are not likely to end soon. Perhaps it would even be undesirable if they did. As Dworkin says, "The greatest insult to the sanctity of life is indifference or laziness in the face of its complexity."<sup>133</sup>

---

133. *Id.* at 240.