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# Liberalism and Paternalism: A Critique of Ronald Dworkin

*Christopher Wolfe*

Leading liberal theorist Ronald Dworkin builds a case against paternalism, rooted in his liberal ethical theory, especially the requirement of ethical integrity. But his case is successful only against less sophisticated forms of paternalism. His argument focuses too much on profound ethical convictions, failing to recognize the frequency with which people hold relatively unreflective convictions and the inevitable role of the law in helping to shape convictions. He makes concessions regarding paternalistic actions that come to be endorsed by the persons who are subject to them, but then tries to impose arbitrary limits on such endorsement. Finally, he rests his case against paternalism on the denial of transcendent standards, but is unable to avoid employing such standards himself. Building a case for certain forms of paternalism in a pluralistic liberal democracy is a difficult but necessary task, that can only proceed after removing fallacious objections like Dworkin's.

One of the central issues between classical and modern political philosophy is the question of the purpose and scope of government. Classical political philosophy understood the goal of the polity as the fostering of a life of human excellence for the community and its citizens. Modern (especially Anglo-American) political philosophy has tended to narrow the scope of civil society's concerns dramatically, focusing on the protection of human rights to "life, liberty, and the pursuit of happiness." And within modern political philosophy, there has been a tendency over time to narrow further the scope of legitimate government concerns, as the contrast between Locke and Mill suggests.

American law has been influenced to some extent by classical political thought and both forms of modern liberal democratic thought. The common law Americans inherited from England, for example, could not be neatly categorized as reflecting classical or modern political philosophy, but contained elements of

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both. Over time, however, there has been a tendency among legal scholars to “purify” American law of its less modern elements, either in the direction of a more “neutral” liberal democracy or in the direction of more radical Marxian thought and various derivatives from it.

One element of the liberal purification of American law has been the critique of paternalism, the idea that government can legitimately engage in regulation of individual activity for the sake of preventing individuals from harming themselves, apart from any direct impact such activity may have on others. This line of liberal thought, expressed powerfully in Mill’s *On Liberty*, has its contemporary representatives as well, among them Ronald Dworkin.

This article examines Dworkin’s case against paternalism. It begins with a summary of Dworkin’s argument, drawing largely on two of his articles: “Liberal Community” (cited as LC) and “Foundations of Liberal Equality” (the Tanner Lectures on Human Values, cited as TL).<sup>1</sup> I then try to show how Dworkin’s critique works only in the case of less nuanced paternalistic views, while it does not have much force against the more substantial arguments in favor of some paternalistic government action.

### Dworkin on Paternalism

#### VOLITIONAL AND CRITICAL INTERESTS

Dworkin’s discussion of paternalism begins with a key distinction between what he calls volitional interests and critical interests. “Someone’s volitional well-being is improved whenever a person has or achieves something he wants,” whereas “critical well-being is improved only by his having or achieving those things that he should want, that is, achievements or experi-

1. I do not think that my argument is affected by anything that Dworkin subsequently wrote in *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), at least in part because in that book Dworkin presents his argument more as a dialectical analysis of others’ views rather than as his own (though his own views eventually intrude). See Gerard V. Bradley “Life’s Dominion: A Review Essay” *Notre Dame Law Review* 69, no. 2 (1993): 329-91.

ences that it would make his life a worse one not to want" (LC 484).

Dworkin clarifies this distinction in two ways. First, from the subjective viewpoint, a person may want certain things without thinking that his life would be a poorer one without them, for example, good food, fewer trips to the dentist, or being a better sailor, while other interests might be regarded as essential to a good life, for example, a close relationship with one's children or some success in work. The former are volitional interests, the latter critical ones. Second, from an objective viewpoint, people may fail to see their own critical interests, as one might say that someone has a poorer life because he has no regard for friendship or religion or challenging work, while volitional interests by definition are what a person wants.

Dworkin is at pains to point out that the critical/volitional distinction is *not* a "distinction between what is really in my interests and what I only think is." Volitional interests are genuine, not just present judgments about my critical interests that may turn out to be wrong. A person can want something (a volitional interest) without thinking that it is essential for a good life. In fact, someone who wants only what he considers his critical interests would have "a sad, preposterous mess of a life" (LC 485 n.12).

#### PATERNALISM

These two kinds of interests can be viewed as the basis for two different kinds of paternalism: volitional paternalism, whereby coercion helps people to "achieve what they already want to achieve," and critical paternalism, whereby coercion tries to "provide people with lives that are better than the lives they now think good" (LC 485). An example of the former is seat belt laws, since "the state makes people wear seat belts in order to keep them from harm it assumes they already want to avoid" (TL 77). This volitional paternalism tries to make people better only against their will, not against their convictions. Dworkin does not seem to object to volitional paternalism in principle, though he does not discuss the matter in detail.

In the same Tanner Lectures, Dworkin later notes forms of paternalism that seem to be related to, or forms of, volitional paternalism: a "superficial paternalism" that forces people to

take precautions that are reasonable within their own structure of preferences, and a deeper paternalism of this sort that, for example, would justify forcing people to high culture, on the grounds that its pleasures, for those trained to appreciate them, are more satisfying than any other form of pleasure, as Mill argued (TL 85). Again, Dworkin does not discuss the legitimacy of this kind of superficial paternalism in detail, though he says in passing that “it is easily defended” (TL 85). The main focus of his discussion and objections is coercive critical paternalism.

Dworkin is skeptical that much coercion is really based on paternalism, a genuine concern for the well-being of others. In the Tanner Lectures, he doubts that the “motive for coercion has ever been of much practical importance” and certainly not in our own time: “theocratic colonizers aim at their own salvation, not the well-being of those they force to convert and sexual bigots act out of hatred, not concern for those whose behavior they find immoral.” He concedes, however, that “some political movements do . . . want to compel people to act in civic ways, for example, on the ground that civic minded people lead better lives” (TL 77-78). On the other hand, in “Liberal Community,” Dworkin expressly embraces the communitarian view that “a true political community must be more than a Hobbesian association for mutual benefits”—it must be “an association in which each takes some special interest in the well-being of others for its own sake” (LC 484).

#### ADDITIVE AND CONSTITUTIVE VIEWS OF THE GOOD LIFE

Dealing with critical paternalism forces us, says Dworkin, to confront the important philosophical issue of how to evaluate a person’s life. This evaluation can be done in two ways. First, we can look at the components of a person’s life (events, experiences, associations, and achievements) and ask whether in our view they—in the combination we find them—make the life a good one. Second, we can ask how the person himself judges those components, “whether he regards them as valuable or *endorses* them as serving his critical interests” (LC 485).

If we take the first or “additive” view, then “components and endorsements are separate elements of value” (LC 486). The components of a person’s life give it critical value, and if someone endorses those components then that endorsement adds to

the value. The endorsement itself appears to be another component, but even without it the value of the components remains. The second or "constitutive" view is that "no component contributes to the value of a life without endorsement" (LC 486). For example, if a misanthrope is much loved, but regards love as worthless, then the affection of others for him does not make his life more valuable for himself.

Dworkin argues that the additive view is inadequate and that the constitutive view is the right one. Most importantly, the "additive view cannot explain why a good life is distinctively valuable for or to the person whose life it is" (LC 486). Yet it is "implausible to think that someone can lead a better life against the grain of his most profound ethical convictions than at peace with them" (LC 486). "It seems preposterous that it could be in someone's interests, even in the critical sense, to lead a life he despises and thinks unworthy. How can that life be good *for* him?" (TL 76). "My life cannot be better for me in virtue of some feature or component I think has no value" (TL 77).

One key factor in Dworkin's preference for the constitutive view lies in his conception of a good life, which is developed somewhat in the Tanner Lectures. He distinguishes there between two models of ethics: what he calls a "challenge model" and an "impact model." The impact model focuses on the consequences or objective value of a person's action for the rest of the world, whatever the standards of objective value might be (TL 55). The challenge model sees a good life as having "the inherent value of a skillful performance" (TL 57), apart from any consequences it may have (again, whatever the standards of a skillful performance may be).

The impact model, with its insistence on the full objectivity of ethical value, leads to the additive view. Someone can lead a better life even when he thinks that life much worse than some alternative. The challenge model, on the other hand, leads to the constitutive view rather than the additive view, because "intention is part of performance" (TL 57). We would not give credit to a performance for some aspect that the performer was trying to avoid or would not recognize as desirable (TL 77).

Dworkin ultimately argues that the challenge model does justice more fully to our common ethical convictions. The impact model downplays the inherent value of human activities too

much, making rather common ethical convictions seem silly and self-indulgent (e.g., the desire of many people to play a musical instrument as a pastime, or to know something about a field of learning without being an expert, which will not add much of value to the world), whereas the challenge model makes odd only convictions that few if any people would actually hold (e.g., the idea that one can improve another's life by compelling him to live against his convictions) (TL 55-58).

#### THE CRITIQUE OF VARIOUS FORMS OF PATERNALISM

If we adopt the constitutive view, says Dworkin, that will lead us to reject paternalism, the view that "it is proper for the state to try to make people's lives better by forcing them to act in ways they think make their lives worse" (TL 77).

*Crude Paternalism:* First, we can reject the "crude or direct form" of paternalism (LC 486), the idea "that a person's life can be improved just by forcing him into some act or abstinence he thinks valueless" (TL 78). Exponents of this form believe that "coercion is justified on the ground that the behavior implanted is good or the behavior excised is bad for people" (TL 79). For example, take someone who would like to live a homosexual life but does not do so out of fear of punishment. Since he never endorses the life he leads as superior to the one he would like to lead, his life has not been improved in the critical sense by the paternalistic constraints he hates. Accepting the challenge model, with its emphasis on performance rather than mere external result, requires a right motive as well as action, and therefore such a life would actually make a person worse off (TL 78).

*Endorsed Paternalism:* A second, more subtle form of critical paternalism tries to get around the initial objection by aiming at obtaining endorsement. For example, the state might deploy "a combination of constraints and inducements such that a homosexual is converted and does in the end endorse and appreciate the conversion" (LC 486). Is his life improved? The key question here is the "conditions and circumstances of genuine endorsement" (LC 486). Dworkin argues that the defect in paternalism "can be cured by endorsement if the paternalism is sufficiently short-term and limited that it does [not] significantly constrict choices if the endorsement never comes" (TL 78). A child forced "to practice music is very likely later to endorse the coercion by

agreeing that it did, in fact, make his life better; if he does not, he has lost little ground in a life that makes no use of his training" (TL 78-79). The important point is that the endorsement must be genuine, which is not the case if someone "is hypnotized or brainwashed or frightened into conversion" (TL 79). One minimal requirement for acceptable circumstances of endorsement is that the mechanisms we use to secure the conversion not lessen the person's "ability to consider the critical merits of the change in a reflective way" (LC 486). But "threats of criminal punishment corrupt rather than enhance critical judgment," so even if they secure sincere conversions, they cannot be counted as genuine ones.

*Substitute Paternalism:* A third, more sophisticated form of paternalism is "substitute paternalism," which "justifies a prohibition not by pointing to the badness of what it prohibits but to the positive value of the substitute lives it makes available" (TL 79). The example used here is more complex. Suppose those in power consider a life of religious devotion a waste of time and therefore prohibit religious orders. Someone who might have been in a religious order chooses therefore to go into politics instead, and is successful and valuable to others in a way that he agrees makes his life a better one—though he still thinks it worse than the life he would have had as a religious.

If we agree that a religious life is wasted, should we not think that the life of politics he has actually led was better? He has, after all, been responsible for the various acts and decisions within it, even though he has never endorsed—indeed, still denies—the superiority of that life compared to the religious life he would have preferred.

But, Dworkin asks, "how can the life he led be better *for him* when he goes to his grave thinking it has been worse?" (TL 79-80). If we accept the challenge model, we insist on the priority of "ethical integrity" in any judgment about how good someone's life is. Ethical integrity "is the condition someone achieves who is able to live out of the conviction that his life, in its central features, is an appropriate one for him, that no other life he might live would be a plainly better response to the parameters of his ethical situation rightly judged" (TL 80). Accepting the priority of ethical integrity means more than merely saying that disappointment and regret mar a life. (The benefits of the "substitute



life" might outweigh the negative components of disappointment and regret.) The priority of "ethical integrity makes a merger of conviction and life a *parameter* of ethical success, and it stipulates that a life that never achieves that kind of integrity cannot be critically better for someone to lead than a life that does" (TL 80).

Ethical integrity, applied to third parties, requires that I take their settled convictions into account in my judgment about what kinds of lives they should lead. In the example above, I can think it would be better if a person who wanted to live a religious life changed his mind and entered politics. But if his conviction that religious life is the best does not change, then I should recognize that his living a religious life that I consider a waste is actually better than his bowing to the advice of others against his own convictions. (If someone had convictions that were terrible or base, we would not encourage him to live in accord with them, but "that is because a wicked life is bad for other people, not because we think a life against the grain would be better for him" [TL 82].)

*Conceptual Paternalism:* A final, deeper, more subtle and academic form of critical paternalism is possible. In various forms, it can be called cultural or conceptual paternalism, and it aims not so much at directly controlling actions as indirectly influencing them through control over people's access to knowledge about different options.

Suppose, for example, that critical paternalism is defended in terms of its effects not on the present generation, but on future ones. For example, laws prohibiting homosexual acts could be said to aim at eliminating homosexuality as part of "the conceptual menu" so that future generations will not even be able to imagine such a life. While it is dubious that this attempt could succeed, would it be in the interests of those who would have led such a life if it had been on their conceptual menu? Dworkin concedes that some conceptual paternalism would be in the interests of *justice* (e.g., eliminating genocide or racism from the conceptual menu). But he still considers it "odd to think that a person's *own* life could be made a better life to have lived, in the critical sense, by constricting his imagination" (LC 487 n. 13). In the Tanner Lectures, Dworkin considers "cultural paternalism: the suggestion that people should be protected from choosing wasteful or bad lives not by flat prohibitions of the criminal law

but by educational decisions and devices that remove bad options from people's view and imagination" (TL 83). Since people choose lives not in a moral vacuum, but in a cultural environment that makes certain lives available by way of possibility and example and recommendation, why shouldn't we make that environment as sound as we can?

Dworkin acknowledges that circumstances such as the ethical vocabulary and example of our culture affect our ethical responses, so we must ask what these circumstances should ideally be. Paternalists argue that "the circumstances appropriate for ethical reflection are those in which bad or wasted lives have been screened out collectively so that the decisions each individual is to make are from a deliberately restricted menu" (TL 84). But Dworkin denies that this desire for collective screening is compatible with a sensible view of ethical reflection: "a challenge cannot be more interesting, or in any other way a more valuable challenge to face, when it has been narrowed, simplified, and bowdlerized by others in advance, and that is as much true when we are ignorant of what they have done as when we are all too aware of it" (TL 84).

Dworkin imagines a paternalist responding "that the challenge is more valuable when the chances of selecting a truly good life are improved, as they would be if the list of possibilities was filtered by wise collective rulers" (TL 84). The problem with this response, says Dworkin, is that it misunderstands the challenge model by confusing "parameters" and "limitations." Limits are those circumstances that make for a lesser life, while parameters are those circumstances that help to define what life would be right for me. The impact model tends to regard all circumstances as limits on the ideal life of creating as much independent value as a human being conceivably can. The challenge view, which treats living well as responding in the right way to one's situation, treats many circumstances as parameters. "Living well includes defining what the challenge of living, properly understood, is. . . [but we] have no settled template for that decision. . . and no philosophical model can provide one, for the circumstances in which each of us lives are enormously complex" (TL 67). If one assumes, with Dworkin (see below), that ethics is not transcendent—that is, as Dworkin puts it, if I do not think one life would be the greatest for all human beings who will ever have

lived—then some of the facts that distinguish my life from others are parameters rather than limitations. Dworkin considers as good candidates “biological, social, and national associations, those I was born or fell into.”

The paternalist errs in assuming “that we have some standard of what a good life is that transcends the question of what circumstances are appropriate for people deciding how to live, and so can be used in answering that question, by stipulating that the best circumstances are those most likely to produce the really correct answer” (TL 84). Because, however, living well is responding appropriately to circumstances rightly judged, we would be begging the question if we argued that people will lead better lives if their choices were narrowed. (We would need some independent ground for thinking that it is better for people to choose in ignorance of lives that other people disapprove of.) Dworkin’s rejection of conceptual paternalism, then, rests on his rejection of an independent, transcendent picture of ethical value, a picture rejected by the challenge model of ethics.

To develop this argument more fully, we should note that Dworkin had earlier in the Tanner Lectures argued that the challenge model leads to the view that ethical value is “indexed” rather than transcendent. It seems irresistible, he says, that living well, judged as a performance, means among other things living in a way responsive and appropriate to one’s culture and other circumstances. He uses the analogy of artistic value, arguing that part of the challenge of art is defining as well as securing success; likewise, part of the challenge of living well is to define what it is to live well. There is no settled view of what artistic achievement is, and likewise there is no settled canon of skill in living. It is implausible to think that artistic value is transcendent (that there is one absolutely greatest way to make art), for an artist’s circumstances enter into the parameters of the challenge he faces. Living well is similarly a response to one’s situation: it requires a personal response to the full particularity of situation, not the application, to that situation, of a timelessly ideal life (TL 63-66).

### **A Paternalist Response**

I want to try to defend one particular form of paternalism against Dworkin. That is, I do not want to give an unqualified

defense of paternalism, since many forms of paternalism are misguided. My only aim is to show that not all forms are.

#### VOLITIONAL PATERNALISM

Dworkin seems to accept the possibility of what he calls volitional paternalism without much difficulty. He says that "superficial paternalism—forcing people to take precautions that are reasonable within their own structure of preferences—is easily defended even from the perspective of volitional interests" (TL 85). From the same perspective, he says, a deeper form of paternalism might be defended, "that people should be forced to high culture, for example, because the pleasures of art are more satisfying to those trained to appreciate them, than any other form of pleasure" (TL 85). Dworkin does not specifically say what he thinks of this deeper sort of volitional paternalism argument, though one assumes that there must be some significant prudential limitations to it.

The distinction between volitional and critical paternalism seems somewhat slippery, at best, and I am a bit puzzled that Dworkin seems to accept the former so readily. Volitional paternalism seems to say that a person wants a certain end, and that he *should* therefore want certain means, which the community (but not the person) considers necessarily related to the achievement of that goal. For example, drivers want to survive, and the community believes that seat belts are a desirable way to accomplish that, while certain individuals either disagree that seat belts are the best means or even believe them to be counterproductive, or believe that seat belts interfere with other goals that are as important as somewhat higher chances of survival, or think at least that the balance of different goals—inconvenience included—favors not wearing them. It seems to me that arguments available against critical paternalism would apply also to volitional paternalism, unless we only care about freedom in the choice of ends and not of means. But, then, most "ends" can be considered as "subordinate ends" (or means) in some sense (*e.g.*, people may seek "survival" as a "means" to happiness) and most means can be considered to involve subordinate ends (*e.g.*, a certain degree of comfort or convenience—not wearing seat belts—may be considered a subordinate end in itself, to be weighed against other subordinate ends such as slightly higher statistical odds of not dying.)

The same problem is even clearer in Dworkin's example of "deeper" volitional paternalism: forcing people to higher culture. If higher culture can be forced on people because the pleasures of art are more satisfying to those trained to appreciate them, does not that line of reasoning justify imposing marital fidelity on people on the grounds that the pleasures of a permanent and exclusive love are more satisfying to those trained to appreciate them? Yet one can confidently assume that Dworkin would not accept that line of reasoning, since it would seem to justify most of the critical paternalism he opposes.

One would like to see a fuller discussion of volitional paternalism by Dworkin. I presume that he would place fairly significant limitations on it, but it is hard to know at this point precisely what the limits would be, and how they would essentially differentiate it from critical coercive paternalism.

#### CRUDE PATERNALISM AND THE CRITIQUE OF THE ADDITIVE VIEW

Let us first rid ourselves of the straw-man case for paternalism that Dworkin rightly rejects: the view that a person's life is better simply because he is compelled to act (or not act) in a certain way. If Hitler wanted to kill all the Jews, but were locked in jail, he would not be a better person simply because he had been prevented from killing anyone. No amount of regulating the external behavior of human beings can make them necessarily better human beings. Only if the external behavior flows from free will can it be a factor in evaluating the moral quality of someone's life. At best, then, regulation of external activity, which is all that laws may accomplish, can only have an indirect effect on the quality of a human life. But there *is* an indirect effect of some importance (discussed below).

Dworkin argues that the additive view (that a person's approval of a component in his life adds more value to his life—in effect, is another component—but that the value of the other components still exists independent of the person's approval) cannot explain why a good life is valuable *for* or *to* the person whose life it is. It is implausible, he says, that a person can lead a better life against the grain of his most profound ethical convictions than at peace with them.

Dworkin makes his argument here more plausible partly by the extreme terms in which he casts it. Living against the grain of

one's *most profound ethical convictions* does seem pretty awful. Moreover, there is no doubt that whatever efficacy paternalistic laws have in achieving their ends would be diluted considerably in the case of people who have strong, deep, settled convictions.

But when sophisticated paternalists make laws they do not think only of that case. In fact, in many areas, the more common case may be that of people with convictions—or, better, beliefs—that are rather superficial. For example, with respect to the question of pornography, one might ask what the “convictions” of most people are. A certain number have deep and settled convictions about pornography: either that it is an evil (*e.g.*, because it goes against some natural end of sexuality and undermines important social institutions such as the family, or because it undergirds a system of oppression of women) or that it is good, or at least unobjectionable (*e.g.*, because it provides a desirable outlet for perfectly natural and healthy desires). But one wonders whether it is fair to say that most Americans have deep, settled convictions of either kind. Many women evince little interest in pornography—either in indulging in it or in interfering with others’ indulgence in it—and many men seem to have ambivalent attitudes toward it, perhaps indulging in it sometimes, but with reservations manifested especially in the feeling of shame, a sense that it is not an admirable pastime.<sup>2</sup>

On so many issues, people have opinions which are difficult to characterize as deep convictions. Human beings are so often “conventional” in their opinions, adopting half-formed opinions from the environment in which they live, with relatively little sustained thought or reflection on issues. Oftentimes, it seems, others are impelled by powerful passions that lead them to adopt opinions that conform to these passions, again with limited thought and reflection. How many racists adopt their opinions about races on the basis of careful study and reflection? How many 18-year-olds arrive at opinions about premarital sexual activity unaffected by raging hormones or current infatuations? To qualify as “convictions” for Dworkin, do opinions need only to be strongly held, or do they require some reflection? Or does it matter?

2. Public opinion polls notoriously fail to measure intensity much of the time, so that they often fail to capture the ambivalence of many members of the public on various questions.

I think it matters, because one reacts differently to the following propositions: "it is implausible to think that a person can lead a better life against the grain of his most profound ethical convictions" and "it is implausible to think that a person can lead a better life when compelled to live in ways contrary to ambivalent or unreflective opinions, or to powerful passions." The first formulation sounds attractive. The second is more obviously dubious: it seems rather plausible that a person may lead a better life in those cases, especially in the long run. (See the discussion of endorsement below.) Even from the standpoint which recognizes the ideal of people acting freely on their well-thought-out convictions, one can argue that forcing people to live contrary to unreflective opinions or powerful passions may be justifiable.

If many people in society hold opinions that are not deep and settled and reflective, but shallow and ambivalent and unthought-out, then laws that restrict living in accord with these opinions could conceivably help people to live better lives. The unthinking racist may be forced by laws that make him live in a society where he has to deal more often with people of different races to change his opinions and actions, and thereby to live a better life.<sup>3</sup> It is at least plausible to think that a man who feels a certain attraction and repulsion toward pornography at the same time may end up living a better life against the grain of his powerful passions, if laws restrict objects that fuel those passions.

Why a person may be better off if certain passions are restricted becomes more apparent when we see that Dworkin states the goal of conceptual paternalism too narrowly. It is not just a case of removing options from a *conceptual* menu. It is also a question of removing opportunities that have a distorting influence on the will and passions. A significant component of the paternalist antipornography argument, for example, is that pornography is important not primarily because of its influence on the intellect, but because of its influence on the will and passions.

3. Of course, Dworkin might allow for some government attempt to overcome racist thinking on the grounds that racists injure the rights of others. My argument here is the paternalistic one: that it might be desirable, in principle, for government to suppress racist thinking--or perhaps better, racist expressions--because the racists would be better off. (Whether government ought to do this involves other, prudential questions, of course.)

Paternalistic legislation aims not simply at removing some *ideas* from people's *minds*, but at removing *stimuli* to certain *passions and desires*. This protection of people from harmful stimuli--the assistance to them in controlling their passions--is important, among other reasons, because it has an impact on the likelihood that people so controlled will eventually endorse those controls.

#### FUTURE ENDORSEMENTS

Dworkin argues that the defect in paternalism "can be cured by endorsement if the paternalism is sufficiently short-term and limited that it does [not] significantly constrict choices if the endorsement never comes" (TL 78). For example, a child forced "to practice music is very likely later to endorse the coercion by agreeing that it did, in fact, make his life better; if he does not, he has lost little ground in a life that makes no use of his training" (TL 78-79).

But what if the time spent practicing music prevented him from developing a hobby that *would* have brought him either a great deal of satisfaction or improved his capacities to respond to the challenge of living? Why isn't that a very significant loss? And how can one ever say the child will "very likely" endorse the imposition or constraint? Parents are continually frustrated trying to discern *any* "likely" result of their actions. On this analysis, it might be difficult to justify *any* paternalism.

On the other hand, if the endorsement is the thing that cures the problematic character of paternalism, why does it have to be short-lived? And should we not throw in as one factor the magnitude of the benefit derived from the paternalism? Perhaps Dworkin's formula for legitimate endorsed paternalism ought to be:

Paternalistic action is legitimate if it comes to be endorsed. Given our uncertainty about whether it will be endorsed, however, paternalistic action is justified in direct proportion to the importance of the benefit to be gained (as it is ultimately endorsed) and to the likelihood of ultimate endorsement, and inversely as to the length of time before endorsement, the degree of coercion, and magnitude of short-term costs and of opportunities foregone.

The problem, for Dworkin, is that this set of principles could plausibly justify a great deal of paternalistic action.



Dworkin says that the important point about future endorsements is that they must be genuine, which is not the case if someone "is hypnotized or brainwashed or frightened into conversion" (TL 79). One minimal requirement for acceptable circumstances of endorsement is that the mechanisms we use to secure the conversion not lessen the person's "ability to consider the critical merits of the change in a reflective way" (LC 486). But "threats of criminal punishment corrupt rather than enhance critical judgment," so even if they secure sincere conversions, they cannot be counted as genuine ones.

Dworkin is right, I think, that a person who is brainwashed or hypnotized has not had his life improved, since his free will seems permanently impaired by such forms of coercion. But it seems an overstatement to assume this about all threats. One is curious, for example, as to how the parents who "force" their children to practice music do so. If it is by threats of punishment, does that mean that subsequent endorsement is not genuine?

If an alcoholic were forcibly "dried out," against his will, by threats of punishment, would a subsequent endorsement be sincere but not genuine on the grounds that his critical judgment had been corrupted rather than enhanced? Dworkin might be able to provide another reason why such coercion was inappropriate (or perhaps he would justify it as a form of volitional paternalism) but it does not seem subject to the complaint that critical judgment is corrupted. It is altogether likely, in fact, that the former alcoholic's critical judgment had been *enhanced* rather than corrupted by the threats of punishment, by the removal of an important obstacle to rationality.

That obstacle is not just drunkenness itself, which is an obvious form of irrationality or at least an attenuation of rationality, but also the more subtle but deep *inclination* to drink that distorts judgment about many other things (for example, an alcoholic's evaluation of the force of his job responsibilities, or his attitudes toward people based on their support or opposition to his habit).

Likewise, a paternalist might argue that homosexual acts are an obstacle to critical judgment, since they involve an orientation of the will that obscures critical judgment with respect to use of the sexual faculty (and whatever supports or opposes a desired use), and that indulgence in pornography is an obstacle to critical judgment, since it involves an orientation of the will that simi-

larly obscures such critical judgment (*e.g.*, about women). Dworkin simply does not consider the relationship between habits and judgment and choice. This is also a problem in his treatment of the next form of paternalism.

#### ETHICAL INTEGRITY

Dworkin's case against what he calls "substitute" paternalism--which is based not on the badness of what is prohibited but on the positive value of the substitute it makes available--turns on the principle of "ethical integrity." According to this principle, a person should be able to "live out of the conviction that his life, in its central features, is an appropriate one for him, that no other life he might live would be a plainly better response to the parameters of his ethical situation rightly judged" (TL 82). This "makes a merger of conviction and life a parameter of ethical success," and a life without ethical integrity cannot be critically better than one with it.

Are there many paternalists who actually argue for paternalistic action on the grounds that a person could be doing something better, even though what he is doing now is not bad in some way? If "substitute paternalism" abstracts from any argument that the life now lived by a person is somehow wrong (even apart from the question of subjective culpability), I think not many people hold such a position. Paternalists usually seek, not to create higher levels of virtue, but to eliminate vice.

Is a life of ethical integrity always better than the alternatives? Dworkin doubts that a person made to live a life other than the one he considers best has a life that is better *for him*.

On one level what Dworkin says seems unobjectionable. Certainly most people, including paternalists, would view it as desirable that people act according to their convictions. Paternalists are simply concerned in a different way about their having *good* convictions and have a different perspective on the formation of convictions. Nonetheless, a paternalist can acknowledge that moral principle demands that one always act on the basis of one's conscience, even an erroneous conscience (one that sincerely believes that something evil is in fact good and choiceworthy). Of course, as Dworkin acknowledges, society may stop someone from acting on his ethical convictions on the grounds that this will lead to harm to others, no matter how sincere he

may be. Paternalists would differ from Dworkin in accepting a much less direct form of harm as a basis for legitimate regulation of a person's activity.

The salience of the requirement of ethical integrity is also affected by short-term and long-term considerations. One can imagine, for example, a case in which forcing a person to live a life opposed to ethical integrity in the short run may conduce to a life (*with* ethical integrity) that is better even *for him* in the long run, that is, the case where the person comes to endorse the higher life he has been forced to live.

A deeper objection to Dworkin's reliance on ethical integrity to undercut arguments for paternalism is his failure to attend more closely to considerations of how convictions are formed, and the role for law that a paternalist might see in that process. Dworkin focuses on the case where the merger of conviction and life is brought about by accommodating life to conviction: with the cessation of paternalistic acts, the person can act on what his convictions are. But where do these convictions come from, and can the law play a role in the formation of convictions?

What about the reverse case of ethical integrity, one might ask: where paternalism forces a person to engage in good acts, or more typically to refrain from engaging in bad acts, in order to facilitate his developing different and better convictions about what acts are good and bad? We are back to the question, touched upon above, of the sources of convictions and the role the law can play in shaping them.

The argument for paternalism is not that people should be forced to refrain from bad acts so that they will be good. It is that they should be forced to refrain from bad acts so that it will be easier or more likely that they will be good. Law does not create virtue, but it can remove obstacles. How? First, by prohibiting bad acts that create habits or dispositions that are serious impediments to the formation of good convictions. And second, by contributing to the formation of good convictions themselves.<sup>4</sup>

For example, laws that prohibit the sale of certain drugs create obstacles to drug use and abuse, and some people—espe-

4. A fine discussion of the utility of law for establishing the conditions of a decent life is Harry Clor's *Obscenity and Public Morality* (Chicago: University of Chicago Press, 1969), chap. 5.

cially those not deeply committed to drug use--will not use drugs because of the punishments that might result from it. Those who refrain from it simply because of the punishments are not virtuous--their will is still disposed toward performing the act. But if they are not permitted to engage in those acts over a long period of time, they will not form the habits or dispositions that would make it much more difficult to arrive at the conviction that such acts are wrong.

Dworkin does not seem to consider that the way people live may affect their convictions, that there is a reciprocal influence between our ideas and our acts: not only do our ideas help to shape our acts, but our acts also may affect our ideas. Paternalistic laws aim not only at preventing acts, but also at nourishing convictions.

The success laws achieve in forming convictions in particular cases varies. The paternalist hopes that his laws will foster ethical integrity, by providing conditions that support decent convictions. To the extent that the laws sometimes only prevent acts, without successfully fostering in them the corresponding convictions, the paternalist can still hope for endorsement at some time in the future, and can view the absence of ethical integrity as an unfortunate condition, occasioned by the failure of these individuals to embrace proper convictions, and justified by the requirements of the common good. That is, even if the individuals are not "better off" themselves, a paternalist might believe that the restrictions are justified by society's desire to avoid the indirect harms the prohibited acts would entail, among which are the encouragement and support they would give to others to act in that way.

#### INFLUENCING THE CONCEPTUAL MENU

Dworkin considers also "critical paternalism," which is defended in terms of its effects not on the present generation, but on future ones. For example, laws prohibiting homosexual acts, he says in "Liberal Community" (487 n.13), could be said to aim at eliminating homosexuality as part of "the conceptual menu" so that future generations will not even be able to imagine such a life. Dworkin puts it somewhat more moderately (and accurately, I think) when he characterizes this form of paternalism in the Tanner Lectures: "people should be protected from choosing

wasteful or bad lives not by flat prohibitions of the criminal law but by educational decisions and devices that remove bad options from people's view and imagination" (TL 83). (Of course, the use of the criminal law and educational devices are not incompatible.)

Critical paternalism can place certain ways of living so at the margins of what is a conceivably good life that few people would give them any serious consideration. Until recently, for example, the vast majority of Americans would not have considered an active homosexual life as an imaginable way of life for them or any decent person.

Moreover, there is no reason, in principle, why a policy of critical paternalism cannot also seek to educate citizens, to give them sound reasons *why* certain lives ought to be so disfavored, in accordance with their intellectual abilities. For example, it might allow adults and college students to study arguments in favor of a disfavored life, while making such study off-limits at lower educational levels, and while maintaining legal prohibitions. (Of course, the given mores of a community will place limits on what form of critical paternalism citizens can agree upon.)

Dworkin argues that a life is less well lived if it is based on simple acceptance of conformity to social conventions, rather than on serious reflection. Obviously, we would prefer a society in which people refrained from, say, torture for well thought-out reasons. But given a choice between a society in which people rather unreflectively opposed torture and another in which people embraced it with considerable ethical integrity, it would be at least reasonable to choose the former. The reasonableness of such a choice would be based not merely on the rights of the tortured, but on what would be good for the torturers themselves. Moreover, the superiority of unreflective nontorturing to reflective torturing would exist even if there were a certain *subjective* superiority of the "ethically integrated" torturers, arising from their dedicated pursuit of what they think is good according to their invincibly deformed consciences.

Nor could one prefer the society of reflective torturers on the grounds that they could more easily be brought to see the objective evil of what they are doing than unreflective nontorturers could be brought to have convictions (rather than mere beliefs)

about not torturing people (*i.e.*, more easily brought to live ethically integrated lives). A habit of reflection might make the reflective torturers more open to change, but a habit of torturing might make them less sensitive to the desirability of change. And there are ways short of tolerating evil acts to induce people who unreflectively reject evil to be more reflective about that rejection--classical education along the lines of the Platonic dialogues or scholastic disputations, or even traditional catechisms, are examples. Ethical integrity hardly requires an unrestricted conceptual menu.

Moreover, all conceptual menus are limited, since there are infinitely varied ways of life and no one could reflect on them all. (The limits of what can be studied are especially obvious at the lower educational levels.) Does it not seem strange to say that not considering *some* possible way of life means that a person's life is worse off?

Nor does it seem enough to assert in response that the conceptual menu ought to include at least those ways of life that are considered or have been thought in the past to be good ways of life. That response concedes that a restricted conceptual menu is not *per se* bad. If our choice, then, is between restricted menus why should mere convention dictate which restricted menu is best, as opposed to a judgment regarding which menu emphasizes and gives greatest support to the objectively best way of life?

Dworkin considers it "odd to think that a person's *own* life could be made a better life to have lived, in the critical sense, by constricting his imagination" (LC 487 n. 13). But one can easily imagine useless or dangerous uses of the imagination, and ask why constriction of these would be bad.

"A challenge cannot be more interesting, or in any other way a more valuable challenge to face, when it has been narrowed, simplified, and bowdlerized by others in advance, and that is as much true when we are ignorant of what they have done as when we are all too aware of it," says Dworkin (TL 84). But would skiing be a greater challenge, and skiers' lives better lived, if some ski resorts contained ski runs so difficult and dangerous as to be life-threatening, and skiers had to find out which ones were and how so? Does cutting unsafe ski resorts out of the menu for skiers make life less interesting and valuable, whether or not

skiers know that this restriction has been imposed?<sup>5</sup> The assertion that restricted menus are necessarily inferior ones does not hold up, unless one operates with a skeptical assumption about our capacity to distinguish what is desirable or undesirable to have on the menu.

#### TRANSCENDENT STANDARDS

Dworkin ultimately has recourse to the proposition that ethics is not based on a transcendent standard.<sup>6</sup> The real error of the conceptual or critical paternalist, Dworkin thinks, is that he “assumes that we have some standard of what a good life is that *transcends* the question of what circumstances are appropriate for people deciding how to live, and so can be used in answering that question, by stipulating that the best circumstances are those most likely to produce the really correct answer” (TL 84). But the skillful performance demanded by the challenge model includes not only producing a product, but also defining the very meaning of what the good life means. Just as there is no one absolutely greatest way to make art, but artistic value must be judged in relation to the historical circumstances in which it was produced, so there is no one best way to live, and living well must be judged in relation to the full particularity of a person’s circumstances.

But can Dworkin himself avoid employing a transcendent standard? He says that the paternalist errs in imagining that we

5. Perhaps Dworkin would respond: since life is threatened, we can call this prohibition of unsafe ski-runs volitional paternalism, since we can assume skiers have a preference for enjoying skiing, and not ending life this way. But that simply returns us to the ambiguity of volitional paternalism. We could also say that those who are searching for the best way of life have a preference for a good way of life, and so they do not need to consider immoral ways of life.

6. It might be objected that, if Dworkin takes a rejection of a transcendent standard as a starting point, much of what I have said in response to his criticisms of paternalism so far is irrelevant, since it assumes the possibility of such a standard. But I do not think that Dworkin’s rejection of a transcendent standard is his starting point. He does not begin by saying “we have no transcendent standard” and then show that “therefore we should not be paternalists.” The order of my argument here more or less follows Dworkin’s own order, in which he starts out by describing different forms of paternalism and then subjects them to critical analysis. The rejection of a transcendent standard, then, is not an assumption from the start, but a factor that arises within his subsequent analysis and critique, especially the later treatment of *conceptual* paternalism.

have a standard of a good life "that transcends the question of what circumstances are appropriate for people deciding how to live." But why does Dworkin assume that people *ask* the "question of what circumstances are appropriate for people deciding how to live?" Why do we bother to try "deciding how to live?" Dworkin's assumptions here indicate that he too has a transcendent standard that somehow tells him that human beings are "choosing beings." Moreover, his emphasis on "the central, constitutive role the model of challenge assigns to reflective or intuitive *judgment*" (TL 86) also seems to commit him to the notion that human beings are "reasoning beings." A transcendent standard is implicit in his characterization of the challenge model. His transcendent standard--a certain form of rationality--is admittedly at an extraordinarily high level of generality, but that does not exempt him from his own criticism.

Dworkin is right to have that transcendent standard: I think that human beings do inevitably--if not always articulately--ask what the best life they can live is, and do answer that question by employing their intellects and wills. But he thereby assumes that there is some criterion for distinguishing between right and wrong answers, that human beings have some capacity for knowing the truth about how to live, and that they ought to respond to this challenge of defining what the best life is.

The error here is not the paternalist's, but Dworkin's. He seems to assume that he has some Archimedean point from which he can criticize the paternalist for assuming that there is a transcendent standard *prior* to our engaging in the challenge of living. He is *asserting* that the only way to live well is to define for yourself what it means to live well. But from what vantage point can he make that assertion, unless he has smuggled in a transcendent standard of his own?

#### THE IMPACT AND CHALLENGE MODELS

While most of the arguments above deal with Dworkin's more particularized contentions, I should briefly raise questions about his dubious dichotomy between the impact and challenge models. It is hard to resist the inclination to think that the impact model is a straw man. Certainly there are those who believe that the quality of a person's life is affected by extrinsic products of that life, for example, great art or social works. But who believes



that a life could be considered good *simply because of* certain products? Does anyone believe that someone leads a good life simply because he does things that are good for some people, even if he has no desire to be good, or in fact desires to be bad to people? Does anyone believe that a criminal forced to make good things for people in prison leads a good life? (It may be *less bad* than a life of crime itself, of course, in the very limited sense that accomplishing an evil adds to the evil of desiring it.)

When Dworkin suggests that the impact model supports ethical paternalism, he gives the following as an example of that thinking: "people's lives would go better if they were forced to pray, because in that case they might please God more and so have a better impact, even though they were atheists" (TL 78). It is hard to believe that Dworkin would use such an example, as if the "prayer" (compelled utterances) of an atheist would of itself be pleasing to God, according to any contemporary ethical model.

People in general instinctively understand that virtue or goodness lies not *simply* in certain results of action, but in an orientation of the will toward certain human acts.

The real opposition lies between two forms of the challenge model, which emphasizes "skillful performance": one that stresses objective, substantive criteria for skillfulness (there are acts that are good and those that are bad, by virtue of their objects) and another that denies that there are such objective, substantive criteria, focusing purely on "procedural" qualities of skillfulness (*e.g.*, whether someone has really reflected on a problem seriously, grappling with its difficulties, etc.). In both cases, it is true that virtue does, in some sense, lie in skillful performance in the meeting of some challenge, but Dworkin has a very reductionistic and formalistic view of the criteria for skillfulness.

### Conclusion

What I hope to have shown in the course of this article is merely that Dworkin's critique of paternalism is not a persuasive one, except with respect to relatively crude forms of it, which imagine that coercion is able to accomplish more than it can. I do not contend that I have made a case for paternalistic government policies, which would take a more substantial showing and an effort to deal with many more objections.

I do think that such a project would be a valuable and necessary one. Paternalism, from one point of view, is simply unavoidable. It would be an illusion to believe that the form and content of the law--all law, in liberal regimes as well as others--do not have a powerful influence on the lives of many human beings, subtly shaping their attitudes about what a good human life is. Only a relatively artificial and abstract view of human beings, divorced from an adequate sociology of knowledge and ethical life, would fail to see the connections. Unfortunately, that artificial and abstract view of human beings tends to have considerable influence among liberal intellectuals, from Mill on down. If government and law inevitably shape human beings, then it makes sense to be aware of the tendencies of any given regime and to foster what is good and resist what is bad in it.

This general defense of paternalism does not justify any particular paternalistic policy, and it may be that there are large areas of human endeavor that it is prudent to leave free, or relatively free, of government control. It is also true that paternalism always poses dangers of various kinds. Paternalism can obviously go askew when it is put at the service of bad ideals or employs bad means to a good end. It also has to overcome a certain kind of negative presumption: other things being equal, it is more desirable for a person freely to choose good and reject evil than to be constrained to do so. Moreover, when government acts to achieve a paternalistic objective, it ought to do so in accord with the principle of subsidiarity (*i.e.*, the principle that a given function ought to be exercised by the lowest level of community that can perform that function adequately).

Much remains to be done to articulate the grounds and conditions of intelligent paternalistic policies in modern, pluralistic liberal democracies. But that complicated task can only be undertaken when the fallacies of principled arguments against paternalism, such as Dworkin's, are properly understood.