Dworkinian Liberalism, the Right to Pornography, and the Internet

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DWORKINIAN LIBERALISM, THE RIGHT TO PORNOGRAPHY, AND THE INTERNET

By
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A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of the requirements of the Sally McDonnell Barksdale Honors College.

Oxford
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DEDICATION

For Mom and Dad
Abstract

Dworkinian Liberalism, the Right to Pornography, and the Internet

(Under the direction of Dr. Robert Westmoreland)

In a 1981 journal article, “Is There A Right to Pornography?,” Ronald Dworkin argues that we have a right to ethical independence that includes the right to consume pornography. The purpose of this thesis is to inquire as to whether Dworkinian liberalism does entail a right to specifically internet pornography. This research is primarily focused on Ronald Dworkin’s writings in Justice for Hedgehogs, Sovereign Virtue: The Theory and Practice of Equality, and Taking Rights Seriously to describe the principles and character of Dworkinian liberalism and its philosophical relationship to the question of the right to pornography. This thesis considers contemporary pornography consumption and its prevalence as it relates to the effects of internet technology on its availability. Given the nature and the source of pornography’s influence upon the ethical landscape, this thesis argues that contemporary pornography availability undermines the conditions of dignity and that certain types of prohibition do not offend the right to ethical independence.
1. Background

Liberalism cannot meet the demands of equality, democracy, justice, or fairness without a keen eye to the social and political effects of technological development, which are rapidly changing the world. There is seemingly very little that has escaped technology’s vast and transformative reach. As social media democratizes information, government officials are subject to a limitless stream of public scrutiny, intensifying representative accountability while simultaneously transforming the terms of normal political engagement. Philosophical echo chambers abound as partisan disputes intensify. Political groups purify as group membership ceases to be a matter of charitable debate, practical cooperation, and good-faith compromise, and instead becomes finely-grained ideological matchmaking. The capacity of technological forces to change the form and content of human life cannot be overstated. Technological forces continuously affect and change the people and communities that liberalism is charged with governing, raising new issues about our ability to live good lives and personal freedom. Online cultures proliferate continuously, providing anyone with internet access the opportunity to surveil an endless selection of possible lifestyles, worldviews, aesthetics, and even ethics. As Ralph Waldo Emerson once said, “Things are in the saddle, and ride mankind.”

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Yet, liberal philosophers and political theorists have traditionally insisted that these are the sorts of issues with which liberalism ought to be, generally speaking, unconcerned. On this view, liberalism prioritizes questions of the right ahead that of the good. The right concerns our obligations to others, whereas the good concerns what it means to live a worthy life. Liberalism traditionally insists that the latter ought to not be the state’s business, and liberals instead emphasize the importance of personal autonomy. Hence, the sort of liberalism that puts a premium on personal autonomy insists that the individual is the fundamental unit of political analysis, so to speak, and that we must allow others to choose for themselves the lives they will lead, so long as they do not violate the liberal rights of others; this is the essential characteristic of liberal political philosophy. On this account, liberalism might appear to be unconcerned in principle with the good precisely because it is concerned with protecting personal autonomy. Supposing that the good lacks priority under liberalism, it will be left to individuals to define for themselves what counts towards living a good life. On this conception of liberalism, the state must abstain from attending to the good, from interfering in its citizens’ lives to make their lives better. Most importantly, this sort of liberalism must abstain from interfering with technological advances that threaten the possibility of living good life, even when many people agree that a certain technological advance really is a threat to living a good life.

But this sort of abstention is not necessarily desirable. The problem for this kind of liberalism is that the real possibility of living a good life constitutes at least part of what makes personal autonomy substantively important. As such, technology that diminishes the possibility of living a good life must also be seen as threatening to
personal autonomy. In this case, abstention by the state removes the real possibility of choosing a good life, and therefore threatens personal autonomy. But choosing to attend to the challenges to personal autonomy inherent in technological development is not the same as a government forcing a particular way of life on its citizens. If liberalism insists on utter insensitivity towards the good out of respect for the right, does it lose its claim to be an attractive political philosophy? Ronald Dworkin insists that it does, and that if liberal principles are valuable at all it is because they help make it possible for us to live good lives without relieving us of the responsibility either of choosing the lives we live or of respecting the independence of others. Preserving the conditions of living a good life constitutes at least part of the conditions of preserving personal autonomy, so a liberalism that insists on quietism about the good life must not be all that good after all. Therefore, Dworkin thinks that liberals must take the good as seriously as they do the right. Nonetheless, he thinks that people do have a right to view pornography, even if its wide availability diminishes the possibility of an enriching sexual life. How, then, does a Dworkinian liberalism, which claims to attend to the good and the right, justify such a right if pornography use threatens the possibility of living a good life?

2. Aims

This thesis addresses the recently-old (or perhaps prudish) question of the right to pornography, chosen because it is illustrative of a particular aspect of liberalism’s troubling relationship with technology. The value (or disvalue) of pornography is a highly controversial subject that divides people along all manner of ideological lines. The religious conservative condemns pornography as sinful and degrading, while third-wave
feminists disagree with second-wave feminists as to whether pornography can be sexually liberating or is essentially oppressive. Some artists claim that pornography is an expressive medium, as worthy as any other art form to be treated with consideration and respect, while judges and legal philosophers fiercely debate whether pornography even meets the legal standard for protected speech. Yet these are different kinds of claims. The former set of these judgements are judgements about what behaviors are good or bad for us – they are judgements made in response to questions about liberal goods, such as “Does viewing pornography diminish the possibility of an enriching sexual life?”. On the other hand, the latter are judgements are about what sort of obligations we have in how we treat one another, and these judgements answer questions about liberal rights, such as “Does pornography oppress women?”.

Though these judgements differ, both are deeply related to legal questions and, perhaps unsurprisingly, the legal status of pornography is equally controversial. Its consumption is restricted on much the same basis as alcohol and tobacco, and so viewing pornography is, legally speaking, restricted to adults. Most urban, suburban, and rural municipalities enact ordinances and codes restricting the sale, advertisement, and availability of physical pornography, and yet only a few States have chosen to regulate its production. Even the State legislatures that have settled the issue have done so differently, and due to the essentially international scope of the internet, there is no one set of laws or statutes that regulate the use or distribution of pornography across national lines. A single instance of pornography can be produced in a State or country where it is highly regulated and viewed in another State or country where it is unregulated, or
perhaps even highly illegal, and vice versa. Even considered alone, the ambiguous legal status of pornography should be cause for concern for legislators and philosophers alike.

Furthermore, pornography is illustrative of technology’s transformative power, which has fundamentally changed the availability of pornography; what was once available to purchase in featureless brick-and-mortar stores as a physical magazine or video recording by of-age adults is now available online instantaneously in staggering volumes, consisting of hundreds of genres of videos, available to anyone with a web-enabled phone, computer, tablet, or gaming console – all without any effective form of age verification. There are search engine filtering applications and browser monitoring programs that enable parents and employers to block sexually explicit content, but this requires downloading or, in the case of more powerful personal-use or business-use programs, buying the program and effectively using it. For the concerned and technologically-savvy parent, this is perhaps only a small burden to pay to protect one’s children from exposure to adult content. But the point remains that, in most instances, pornography is readily available to anyone with access to the internet, of which a plurality are certainly children and teenagers. Certain internet browsers, like Google Chrome, automatically hide sexually explicit content from search results unless the search query is very precisely worded in order to prevent misspelled searches exposing users to pornographic content, but this cannot prevent teenagers and children from accessing pornographic content if they know what terms to search for, or how to spell a pornographic web address correctly. It is difficult, therefore, to imagine that pornography could be substantively more available than it already is.
Most liberals would find it disturbing if not deeply upsetting if it were discovered that a particular pornographic bookstore, though housed in a nondescript building lacking obtrusive signage or advertisements and well outside municipal limits, was nonetheless routinely allowing middle-schoolers to purchase and rent pornography merely because the children managed to find the store. Undoubtedly, the nature of the internet itself constitutes part of the problem of pornography. The internet was originally conceived as an information superhighway without speed limits, where the motorists all agreed to drive defensively, so to speak. The first users were assumed to be friendly, hence the development of the internet was guided by the principle of ease-of-access. Data security and rigorous identity verification are, in abstract, an unnecessary inconvenience between a closed group of data scientists and vetted government employees. At the risk of generalizing, it needs to be remembered that the internet is, at bottom, fundamentally a physically connected system of wires. When considering the relationship between pornography and the technology that facilitates its propagation, as long as pornography is being produced and made available online, it will always be possible for an experienced user, whether adult or not, to access some sort of pornography, even if it is illegal. Nonetheless, liberals cannot count this fact as a reason to disregard the question of the right to pornography. The necessity of the elimination of child pornography is, one would hope, a settled question among self-avowed liberals, and yet that task is beset by the same structural and conceptual difficulties as the elimination of garden-variety pornography. As such, the question of the right to garden-variety pornography cannot be ignored by appeal to the implicit difficulty of successfully regulating pornography access without
risking moral and ethical hypocrisy. Such a question is a question of how the liberal polity should conduct and govern itself, and such questions are always worth asking.

Given the increasing rapidity with which modern technology generally, and the internet in particular, is transforming and not only the social relations that determine how a society functions, but also the methods and practices of effective governance, the values that color and shape popular culture, and the competing conceptions of ethics that make up the political community, liberalism must take up the challenge of philosophically accommodating and managing the effects technological development. According to Dworkin, if liberalism must ignore the conditions of the possibility of a good life it does not deserve to be taken seriously as a political philosophy. The liberal state can maintain an environment in which people have the ability to choose good lives without prescribing or endorsing a particular kind of life, and that kind of ethical maintenance advances rather than undermines the core liberal value of autonomy. The question of what it means to live an objectively good life, if it is a question with which liberalism ought to be concerned, is a question that must be concerned with actual circumstances in which the modern liberal finds himself: surrounded by technology, with a life to lead in a way that suits him. It is this problem with which this thesis concerns itself. If it means protecting the possibility of living a good life, can attractive conceptions of liberalism countenance prohibiting online pornography?
# TABLE OF CONTENTS

Ethics, Morality, and Value ................................................................. 13

Dignity ................................................................................................... 23

The Right to Ethical Independence, Foundational Issues, and Public Display ........ 38

Pornography, Endorsement, and The Internet ........................................ 45

Bibliography ....................................................................................... 53
ETHICS, MORALITY, AND VALUE

In *Justice for Hedgehogs*, Ronald Dworkin states that an “ethical judgement makes a claim about what people should do to live well; what they should aim to be and achieve in their own lives.”

Ethical questions are questions about the values that someone thinks he ought to pursue, and these values in turn determine the character of his conception of living a good life and how the good life is to be pursued. Ethics, then, is an individual concern of each person. In contrast, *moral* inquiries investigate our fundamental obligations to others. Moral judgements insist that it matters how we treat one another, that we have duties to behave in a certain manner.

But why worry about ethical and moral questions? Why think that there are objectively right answers to questions about what constitutes a good life and what we owe one another? If there are not, then moral and ethical matters are reduced to matters of subjective taste. Indeed, many people deny that there are objective answers to ethical and moral questions because they think that whatever counts as ‘objectively true’ must in principle be provable in terms of non-normative empirical facts. For example, on this view, scientific propositions can be objectively true in virtue of their dependence upon empirical observation, but there isn’t any ‘provable’ law of morality which demonstrates that, for example, lying to your parents is objectively wrong. Related to this view is Hume’s principle, which claims that you cannot derive an ‘ought’ from an ‘is’, that is,

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that normative claims cannot be justified by appeal to a set of empirical claims.

Supposing all the aforementioned, that the ‘world’ is made up exclusively of observable empirical facts, that no set of collected empirical facts can produce a normative claim, and that if something can be objectively true it must be provably objective in virtue of empirical claims, it follows that it ethical and moral claims are not objective.

This is the *subjectivity thesis*, and this particular subjectivist view is popular among different many kinds of people, but is it a convincing position? The subjective view, Dworkin contends, inappropriately assumes that normative claims can only be true if they are reducible to empirical claims or at least empirically provable, and accordingly this position denies the possibility of the autonomy of ethical and moral claims. The autonomy of ethical and moral claims is simply the idea that ethical and moral claims, though not empirically provable, nonetheless are objectively true or false. If the possibility of the autonomy of ethics and morality is left open, however, then one is free to accept Hume’s principle without reducing important questions of value to matters of mere taste.

**Could objectivity be a *bad thing* according to liberalism?** Some liberals, like Richard Rorty, suggest that seeking objectivity in politics risks slipping into the exact sort of autonomy-threatening paternalism that liberalism rejects. These liberals worry that focusing on the purported ‘objectivity’ of normative claims presents a stumbling block to agreement. Liberal governments are necessarily democratic in varying degrees; members of liberal communities hold profoundly different beliefs about sexual freedom,
reproductive rights, economic policy, the penal system, religious liberties, military strategy, and foreign policy, not all of which are obviously reconcilable. As such, the prospect of governing a liberal polity in accordance with purportedly ‘objective’ ethical and moral values seems, at the very least, extremely daunting, and it might be supposed that liberalism must therefore affect a ‘live and let live’ disposition. On this view, liberalism requires a subjective view of moral and ethical values in order to govern effectively and guard against paternalism.

Liberal concerns about objectivity in ethics and morality are distinct, however. Governing in accordance with an objective conception of ethics means endorsing a particular set of values as essential to living well and therefore judging those values as better than others, and liberals worry that merely endorsing some conception of living well risks the government imposing a particular kind of life upon its citizens. Indeed, such an imposition would constitute an offense against personal autonomy, at least facially. If ethical endorsement really risks ethical imposition, as many liberals suppose, infringement against personal autonomy is certainly too high a price to pay for a liberalism that embraces an objective conception of ethics. On this view, acknowledgement of the objectivity of ethics raises the possibility of paternalism.

On the other hand, a liberalism that employs an objective conception of morality in governance takes it to be objectively true that its citizens have certain obligations in how they treat and interact with one another. Certain kinds of treatment are permissible, others are objectively wrong; on one objective conception of liberal morality, it might be morally permissible to protest a campaign rally whose candidate’s platform I vehemently disagree with, even if it greatly offends others, but it might nonetheless be considered
objectively wrong for me to protest someone’s senatorial candidacy by slashing their car tires. The difference between the two kinds of protests might seem obvious in the example given, but liberals genuinely worry that a regime that presupposes an objective conception of morality might fail to fully recognize the scope of some genuine rights, or perhaps fail to recognize certain rights at all. A regime that takes it to be the case that objective morality prohibits intentionally disrespecting national symbols, for example, would nonetheless fail to recognize that the genuine right to free speech might include the right to burn one’s own national flag.

A liberalism that seeks to unilaterally accommodate every possible lifestyle and morality should not be considered as a serious answer to the problem of diverse human association. Liberalism cannot be, as William Galston says, “understood as an arena for the unfettered expression of ‘difference’.” But this critique of the subjectivist position does not prove that ethics and morality aren’t subjective. If they are, the goodness and rightness of liberalism must be subjective as well. In this case, liberal governance becomes an extremely illiberal question of choosing between an arbitrary imposition of political and social order on the one hand, and total anarchy on the other. This is neither an attractive nor particularly liberal conception of governance, but without a conceptual explanation of objectivity of value judgements, liberals will have to settle.

Indeed, many people are initially attracted to liberalism because they are skeptical of the idea that value judgements are objective, and the idea is certainly abroad that a “who’s to say what’s right or wrong” skepticism is an essential characteristic of liberal political philosophies. Is the subjectivity thesis mistaken? If what is in fact the ethical

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way for me to live my life is merely the life I happen to want, then the putative
distinction between the subjective and objective in ethics vanishes. Ethical (and moral)
assertions are not claims of the sort that ‘correspond’ to some other feature of reality in
the way that we often think answers to questions of biology ‘correspond’ to the physical
world. Dworkin refers to such typically scientific inquiries as *criterial* and, situating
questions of value in contrast to criterial questions, classifies ethical and moral
judgements as *interpretive*, which most simply means the following: answers to questions
of ethics and morality are not given by criterial evaluations, evaluations which ask
whether our answers to certain kinds of questions correspond in a ‘one-to-one’ manner to
some feature of reality in a ‘verifiable’ and determinate way. Rather, interpretative
evaluations require that we investigate how our answers to, say, one particular subset of
ethical claims coheres with our other judgements about morality and what it means to live
well. Interpretive concepts in a sense ‘justify’ one another.

Hence, living a good life “cannot mean simply having whatever one in fact
wants”[^4] – that would be to reduce a normative ethical question to a merely empirical
question of one’s desires, a violation of Hume’s principle according to Dworkin. Ethics
cannot be a matter of my volitional interests, those things that I merely happen to desire
irrespective of the things I ought to desire. Instead, leading a good life must be defined by
one’s *critical interests*, “the interests we should have.”[^5] Normative inquiries that hope to
discover answers grounded in non-normative or physical entities begin in error.

According to Dworkin, the realm of value is so fundamentally different from the physical
world that ethical and moral inquiry must begin in *interpretation rather than criterial*

[^5]: Ibid.
In order to understand what Dworkin means by ‘interpretation,’” one need only look to the principle claim of Dworkin’s *Justice for Hedgehogs*, that the realm of value is unified. As Dworkin says:

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The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest. I try to illustrate the unity of at least ethical and moral values: I describe a theory of what living well is like and what, if we want to live well, we must do for, and not do to, other people.⁶

Morality and ethics fix each other in such a manner that our answers in one realm should support our answers in another, and it is in this sense that character of normative inquiry ought to be understood as interpretive.

Furthermore, the answers we seek in the realm of value cannot be treated other than *as if they are objective*. For Dworkin, the reply that value must be subjective because it ultimately proceeds from an autonomous human will, or because “only naturalistic explanations are competent to explain why people hold the convictions they do,”⁷ or because of any kind of skepticism which *a priori* denies the existence or objectivity of any and all values, is categorically insufficient because “it does not redeem the phenomenology that inspires it.”⁸ On Dworkin’s account, we are bound by a responsibility to live in accordance with our ethical obligations because the explanation of the existence of such a responsibility is *phenomenologically irresistible*. A special human aspiration exists to live a life that is critically good, and this normative ambition demands interpretive explanation. As Dworkin says:

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We are self-conscious animals who have drives, instincts, tastes, and preferences. There is no mystery why we should want to satisfy those drives and serve those
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⁶ Ibid., 1.
⁷ Ibid., 214.
⁸ Ibid.
tastes. But it can seem mysterious why we should want a life that is good in a
more critical sense: a life we can take pride in having lived when the drives are
slaked or even if they are not. We can explain this ambition only when we
recognize that we have a responsibility to live well and believe that living well
means creating a life that is not simply pleasurable but good in that critical way.⁹

This is not to say that questions of ethics and morality have clear or obvious
answers, nor to suggest that Dworkin thinks that ethical and moral judgements are
subjective at the individual, or even the group level. He firmly asserts that all normative
claims are objectively true or false; value judgements are value judgements all the way
down, so to speak. To search for an empirical foundation for an ethical or moral inquiry
is to mistakenly suppose from the outset that ethical and moral concepts are criterial
rather than interpretive, and Dworkin is not a value skeptic or relativist. In Justice for
Hedgehogs, he says:

That there are truths about value is an obvious, inescapable fact. When people
have decisions to make, the question of what decision they should make is
inescapable, and it can be answered only by noticing reasons for acting one way
or another. No doubt the best answer on some occasions is that nothing is any
better to do than anything else. Some unfortunate people find a more dramatic
answer unavoidable: they think nothing is ever the best or right thing to do. But
these are as much substantive, first-order, value judgements about what to do as
are more positive answers. They draw on the same kinds of arguments, and they
claim truth in just the same way.¹⁰

More particularly, as he lays out later in Justice For Hedgehogs, Dworkin contends that
external moral skepticism is flatly self-contradictory and insufficient to explain the way
we experience value. External moral skepticism denies the possibility of any objective
answer to questions of value. Internal moral skepticism, on the other hand, might deny
objectivity of certain normative judgements or that a certain objective judgement is
correct, but does not deny the objectivity of value writ large. The view that values must

⁹ Ibid., 196.
¹⁰ Ibid., 24 (emphasis added).
be subjective because there are no metaphysical objects which correspond to those values fails because, on Dworkin’s view, “We cannot escape, in how we think, an assumption that value exists independent of our will or fiat.”11 It is not necessary to lay out that argument in its fullness here. For now, what is important about that argument is that Dworkin’s conception of liberalism is categorically realist about ethical and moral values, particularly liberal ones, and that Dworkin believes that any attractive conception of liberalism will be categorically realist about value. Furthermore, Dworkin insists that ‘external’ conceptions of value, i.e. claims about the metaphysical or empirical foundation of normative value, add nothing to the objective character of morality and ethics, and so the absence of any such foundation does not detract from the objectivity of value. He insists that people really ought to honor their moral and ethical obligations, even when they do not in fact do so, or when they deny having such obligations. The objective character of morality and ethics is not a ‘special’ or second-rate kind of objectivity; the objectivity of value is just as robust as any other kind of objectivity, whether scientific or otherwise. Dworkin claims that any liberalism that does not assume the objectivity of value is inherently self-defeating, since liberalism itself is a grand thesis about what is in fact right.

And so, when a liberal government makes it illegal to drive at seventy-five miles an hour through a school zone, the law is not an expression of brute preference. Speed limits and traffic laws implicitly claim to create objectively justifiable obligations. Liberal justice, then, is not enforcing the majority’s merely subjective preference for certain rules; liberal morality must be objective. In the same way, ethical matters cannot

11 Ibid., 214.
be equated to questions of whether one prefers rocky road ice cream to vanilla swirl, for we “cannot explain the importance of a good life except by noticing how creating a good life contributes to living well.” If liberalism takes morality to be objective, then ethical matters must be considered as objective as well. In the same way that liberalism cannot emphasize the value of personal autonomy as distinct from the possibility it creates for living well, liberalism cannot dispense with objective conceptions of morality or ethics.

Dworkinian liberalism is a \textit{fully} comprehensive liberalism beyond a merely \textit{political} comprehensive liberalism, to apply the Rawlsian distinction. His liberalism is not skeptical towards the fundamental answers to questions of ethics and morality which ordinary people inquire of themselves in their everyday lives. If Dworkinian liberalism were not fully comprehensive, the question of whether or it would be justifiable and rightly enforceable to ban pornography would, by all plausible accounts, be clearly beyond the pale. But Dworkin’s liberalism is comprehensive, and he thinks that there are objective ethical truths, \textit{one of which might be that pornography is bad}. Yet, many liberal philosophers, Dworkin included, assert that unless it can be shown that pornography consumption causes rape, domestic violence, or some plainly \textit{morally} abhorrent consequence, banning pornography constitutes a tyrannical, paternalistic, and damnable moral offense against the members of the liberal community. Furthermore, they also deny that such a relationship between pornography and the aforementioned offenses can be shown; if such a causal relationship could be demonstrated, banning pornography would be within the bounds of non-Dworkinian, less-comprehensive liberalisms. As of now such a relationship has not been demonstrated. However, Dworkin is adamant in asserting

\footnote{Ibid., 196.}
that the answers we seek in ethics can be objectively correct and that objectivity in ethics does not threaten liberal rights. Liberalism, he thinks, cannot make sense of the right without a theory of the good that explains the importance of personal autonomy. As such, the question of the right to pornography is perfectly within the bounds of consideration under a fully Dworkinian liberalism.
DIGNITY

Seeking to find an integrated “conception of morality that can guide our interpretation of living well,” Dworkin separates general ethical inquiries into two kinds of questions: what it means to live well, and what constitutes a good life. Living well is a matter of rising to a challenge, a charge given “by the bare fact of our existence as self-conscious creatures with lives to lead.” For Dworkin, living well has value independent of its consequences. Having a good life, on the other hand, depends upon one’s particular historical, financial, and social circumstance, as well as what philosophers call ‘moral’ and ‘ethical luck’ A political leader who achieves worldwide recognition and admiration, who lives a life full of diverse and elevated experiences, but who gained his status through lying, deceit, and treachery would have lived a good life but not a life lived well. Dworkin thinks that part of living well is striving for a good life, but that a life may be lived well even if lived through unfortunate circumstances and bad luck: a bad life lived well. Furthermore, he asserts that “living well is not the same as maximizing the chance of producing the best possible life.” Dworkin contends that it is living well, rather than having a good life, which gives our lives ethical meaning.

Dworkin locates the particular aspect of living well that achieves an interpretive integration between ethics and morality in two principles, the principles of self-respect.

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13 Ibid., 193.
14 Ibid., 196.
15 Ibid., 199.
and authenticity. The principle of self-respect states that “each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity.” Self-respect requires that I recognize that my life matters and that it matters objectively with general, rather than special, importance. That is to say, self-respect requires that you recognize that none of the special features of your life, whether career success, marital fulfillment, profound artistic achievement, or otherwise, can produce, affect, or even diminish the value and importance of your life. The principle of self-respect requires that we recognize that our lives matter objectively even if we end up living bad lives. On the other hand, the principle of authenticity states that “each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses.” There is, therefore, an aspect of Dworkinian ethics that is deontological, for it objectively matters that each person take his own life seriously and make a sincere attempt to live it well irrespective of whether or not someone thinks that it matters that they do so.

These two principles state the fundamental requirements of living well and are joined in Dworkin’s interpretive concept of dignity. A life lived well is a life lived with dignity; the two are equivalent. Furthermore, the objective character of the two principles of dignity stipulate that each person recognize that it objectively matters that others live with dignity as well, that we have an obligation to others to not inhibit them from being able to define their own lives as they see fit. Self-respect requires that I recognize the general importance of my life, and the objective character of this recognition implies

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16 Ibid., 203.
17 Ibid., 204.
everyone else’s lives are equally as generally important as mine. Authenticity requires that I take personal responsibility for living well, and the objective character of this responsibility implies that others have such a responsibility as well. Dignity, then, grounds the interpretive unity between ethics and morality. Because it objectively matters that each person lives a life of dignity, it objectively matters that others live a life of dignity as well. In dignity, the good meets the right at the political level as well, as the objective importance of living well means that the members of a political community have objective obligations not to hinder other people’s capacity to live well in certain ways.

A word must be said about the particular requirements of authenticity, as it will be relevant to our consideration of the pornography question later. Self-respect requires taking oneself seriously, and so living authentically “means expressing yourself in your life, seeking to live in a way that grips you as right for you and your circumstance,”18 and those expressions are no less authentic because they are “so severely constrained that only limited choices are available.”19 Living well, then, is sensitive to limitations imposed by historical and social circumstance. Hence authenticity is a kind of independence, a recognition that what makes a life valuable is not living a life defined by opposition to or conformity with any particular social or political worldview, but that living well requires living in response to “your situation and the values you find appropriate.”20

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18 Ibid., 209.
19 Ibid., 210.
20 Ibid.
The most important aspect of our consideration of banning pornography lies what Dworkin calls *ethical independence*, the aspect of authenticity which stipulates “what dignity demands we try to establish in our relations with other people.”\(^{21}\) Dworkin says:

> We all live in an ethical culture that provides, at any time, the palette of recognizable ethical values from which possibilities can be drawn. We rearrange conventional priorities among those values – we can become people of brute honesty instead of tact – and we can cleave to personal values that others disdain, like sexual abstinence.\(^{22}\)

Happenstance limitations imposed on the range of ethical lifestyles available to us by culture or society, then, cannot constitute an offense against authenticity, and therefore they do not constitute an offense against dignity. The widespread technological dependence may make living as a devoted Luddite extremely difficult, perhaps even impossible. Nonetheless, a person suffers no offense against his dignity when he cannot travel the highways by horse and buggy.

So Dworkin says, “We cannot escape influence, but we must resist domination.”\(^{23}\)

When a person’s ability to live authentically - to live in a state of ethical independence - is not limited by cultural circumstances but rather is *actively forbidden* by a person or party, that constitutes a fundamental offense against his dignity because “he is made to accept someone else’s judgement in place of his own about the values or goals his life should display.”\(^{24}\) Because living well requires that we see our ability to define our own lives as a matter of objective importance and therefore that it also matters that others be permitted to do so as well, forcing someone to adopt a set of ethical values with which he

\(^{21}\) Ibid., 211.
\(^{22}\) Ibid.
\(^{23}\) Ibid., 212.
\(^{24}\) Ibid.
does not identify is not merely to treat him immorally, it violates a fundamental right.

Dworkin continues:

On the other hand he does not live authentically, no matter how great the range of options he is offered, if others forbid him some options otherwise available because they deem those options unworthy. The indignity lies in usurpation, not limitation. Authenticity demands that, so far as decisions are to be made about the best use to which a person’s life should be put, these must be made by the person whose life it is.25

The decision as to what ethical values we ascribe to our own lives must emerge from a conviction derived from self-respect authentically, irrespective of social pressures or political coercion. Because Dworkin grounds the fundamental value of a life in living with dignity, and because dignity serves as the interpretive conjunction of our distinct ethical and moral concepts, dignity serves as the foundation of both Dworkin’s conceptions of political legitimacy and of rights. What, then, is the functional difference between domination and mere limitation? Under Dworkinian liberalism, is it necessarily the case that prohibiting pornography counts as an illegitimate act of domination if it cannot be shown that viewing pornography causes rape or sexual violence? On the other hand, is it only ‘mere limitation’ if cultural forces conspire in such a way as to make viewing pornography both pervasive and irresistible to many people? If pornography were prohibited by reason of the latter case, would it necessarily constitute domination, or is a liberal political community sometimes justified in prohibiting what it earnestly understands as a threat to the very possibility of having an enriching sexual life?

25 Ibid.
EQUAL CONCERN, DWORKIN’S THEORY OF RIGHTS, AND JUSTIFICATION

As it relates to the question of pornography, Dworkinian liberalism is comprehensive in two closely-related senses. Firstly, it is comprehensive because it asserts that liberal goods are good because they are good *in themselves objectively* speaking. Liberty, democracy, equality, and autonomy are not conceptually useful means to some ‘more pragmatic’ social end, they are objective values to be recognized as such. Secondly, Dworkinian liberalism is comprehensive in theoretical scope, seeking an interpretive integration between our most fundamental ethical and moral commitments on the one hand and liberal political values on the other. Insofar as consideration of the question of a moral right to pornography is a question of value, it must be answered interpretively. The best answer will cohere with Dworkinian liberalism’s other value judgements. Particularly, it must endorse Dworkin’s normative conception of dignity and a robust conception of living well.

Do liberal rights and the principle of political legitimacy rule out prohibiting pornography? What constitutes true political legitimacy? What standard of justification must be met such that a certain policy or law is properly said to be legitimate within a fully-Dworkinian liberalism? As Dworkin explains in *Sovereign Virtue*, *equal concern* is the “precondition of political legitimacy”\(^26\) that justifies the claim of the democratic

majority of the right to enforce its laws against the minority. The principle of equal concern is a moral principle, for it makes a normative claim about how a liberal government must treat its citizens, and this principle occupies a particularly powerful position in Dworkin’s liberal schema. From the perspective of governance, the principle of equal concern separates issues that are permissibly on the political agenda from those that are excluded as a matter of principle; it determines what laws officials must not even consider. If prohibiting pornography categorically fails to show equal concern, it is morally unjustifiable for a Dworkinian liberal community to enforce against its members.

On Dworkin’s account, the principle of equal concern entails that members of a liberal community have a claim to a certain kind of treatment. The character of the treatment to which they are entitled is defined by liberalism’s commitment to the ideal of ethical individualism, which is “fundamental to any comprehensive liberal political theory.”27 There are two principles which constitute ethical individualism: the principle of equal importance and the principle of special responsibility. The principle of equal importance claims that “It is important, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from an objective point of view, for each human life.”28 This first principle is a reflection of Dworkin’s concept of self-respect, which takes it to be a matter of general, rather than special, importance that each person value his life as objectively valuable. The principle of equal importance, as differentiated from self-respect, requires that liberal lawmaking and governance regard the success of human life as a matter of objective importance. A law that distinguishes between persons on the principle that some kind of people matter less than others, or

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27 Ibid., 5.
28 Ibid.
because the majority despises their way of life, by reason of plainly violating of the principle of equal importance, is politically illegitimate. The second principle of ethical individualism is the principle of special responsibility. This principle claims that to whatever degree cultural forces permit, if someone has an ethical choice to make about the life he thinks he should lead, it is that person’s sole responsibility to make that choice rather than someone else’s. A law that arbitrarily forbids public membership in a certain religious denomination fails to show equal concern, and is therefore illegitimate, because it implicitly denies the special responsibility of religious practitioners to inhabit a belief system that strikes them as correct. In this way, the principle of special responsibility mirrors Dworkin’s conception of authenticity in the same way that self-respect mirrors the principle of equal importance. Authenticity requires that each person identify what counts as success or failure in his own life, and the principle of special responsibility requires that a liberal government’s laws and policies recognize that each person does have such a responsibility to authenticity.

These two principles establish that liberal governments must take up the task of making its laws and policies insensitive, as far as possible, to who people are, for “morality must be treated as prior to ethics in politics.” A liberal community cannot, for example, forbid someone from pursuing the life of a professional minigolfer simply because they judge that miniature versions of regular sports are intrinsically worthless, but in the same way, professional minigolfers are not owed additional government income simply because mini-golf happens to be less lucrative profession than its regular-sized counterpart. Dworkinian laws are sensitive to people's’ choices in virtue of the fact

29 Dworkin, Justice for Hedgehogs, 371.
that they stipulate how must people treat one another rather than the kind of lives they should lead. The principle of equal concern permits liberal communities to generally regulate behavior that morally threatens other people’s ability to live well, but it strictly forbids liberal communities from enforcing individual conceptions of ethics through law.

But, Dworkinian liberalism is not silent on all ethical matters, for it completely endorses the objective goodness of liberal values against illiberal values, and these values are inseparable from the importance of striving to live a good life. Dignity has objective ethical value and recognizing that fact contributes to living a good life; one depends upon the other. If someone fails to recognize the objective importance of living well, it should be considered a highly lamentable ethical failure; yet this fact alone cannot justify a liberal government taking corrective measures to ensure that the demands of ethical individualism are met in each of its citizens’ lives. As a general rule, liberal governments rightly regulate behavior that morally offends against dignity in virtue of treating certain people as if they matter less than others. But, insofar as lifestyles that do not violate the liberal rights of others are concerned, Dworkinian liberals must refrain from prioritizing or endorsing certain ethical conceptions as being better or more desirable than others. It is in this sense that laws which endorse a certain conception of ethics are wrongly “sensitive to who people are.” A law that provides that only Protestant churches will be considered tax-exempt because “Catholicism is wrong” would be a law that is wrongly sensitive in this manner, for it prefers one kind of religion to another as an ethical judgement.

Because Dworkin’s conception of liberalism is thoroughly comprehensive, the principles that constitute this ideal of ethical individualism must necessarily be “located in a more general account of the humane values of ethics and morality, of the status and
integrity of value, and of the possibility of objective truth.”

Ethical individualism must be liberalism’s answer to the “challenge of equal concern,” and it must interpretively cohere with our other ethical and moral commitments in such a way that they reinforce one another. The two principles of ethical individualism mirror the two principles that define Dworkin’s concept of dignity, authenticity and self-respect. The principles of equal importance and special responsibility establish a moral threshold that differentiates between policies that fail to show equal concern and those that do not. In this sense, showing equal concern and respecting dignity are two sides of the same coin. As individuals, we are obliged to respect the dignity of others, to not interfere with someone else’s meeting the demands of authenticity and self-respect, of recognizing both the importance and the value of having a life to lead. As citizens, we are permitted to severely criticize the kinds of lives and values we find unworthy, but the obligations of equal concern stand even if we are objectively correct in claiming that a certain kind life is a terribly undesirable one. As a lawmaking liberal political community, we are obliged to legislate in accordance with the demands of equal concern. With respect to the question of whether or not a certain law fails to show equal concern, all that needs to be asked is whether the law constitutes an offense against the dignity of those whom it claims authority to govern. Under Dworkinian liberalism, the final test of political legitimacy is found in dignity, for to show equal concern is simply to respect human dignity in governance.

Dworkinian-liberal governments must show equal concern in governance, which essentially entails respecting dignity. But Dworkinian liberalism is also robustly

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31 Ibid., 6.
democratic; a liberal government can permissibly pursue many goals other than
protecting a political environment in which people can live well. The obligation to show
equal concern in governance is an obligation upon the democratic majority to respect the
dignity of those it is tasked with governing, and when dignity is not threatened, the goals
of the majority can rightly prevail. Hence liberal governments can pursue many different
kinds of goals even when the democratic minority objects. As Dworkin says in Taking
Rights Seriously:

The bulk of the law – that part which defines and implements social, economic,
and foreign policy – cannot be neutral. It must state, in its greatest part, the
majority’s view of the common good. The institution of rights is therefore crucial,
because it represents the majority’s promise to the minorities that their dignity and
equality will be respected. When the divisions among the groups are most violent,
then this gesture, if law is to work, must be most sincere.32

It might be highly controversial that a majority of townsfolk support installing paid
parking meters around their parking-space-starved town square to fund the construction
of a large parking garage, but no one’s rights are violated when they are required to pay
just as much as anyone else to park on the square, because no one is made to accept
someone else’s conception of living well because he has pay for a parking spot. It is only
when the majority has failed to show equal concern in governance that someone has a
moral claim against the majority of being treated without respect to their dignity. Equal
concern is not met, and so the justification of the majority’s preferences in law and
policy-making is insufficient, and it is in this sense that someone is said to possess a
‘right’ against his Dworkinian-liberal government.

Dworkinian rights, then, are rights to a particular kind of treatment. This is precisely the function of rights, for “Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.” Dworkin distinguishes two kinds of rights. There are background rights, which are fundamental rights “held in an abstract way against decisions taken by the community or the society as a whole” that intrinsically demand equal concern, and institutional rights, which are “rights that hold against a decision made by a specific institution.” Institutional rights necessarily must not violate background rights, and in many cases institutional rights will exist independently of any more fundamental background right. The character of background rights makes them lexically prior to institutional rights, though certain rights may be instances of both kinds, where particular institutional iteration of the right is also an expression of a more general moral principle that describes how the political community must treat its members. I have a constitutional right to a trial by a jury of my peers, a legal right to a certain kind of treatment from the justice system as an institution, but that right is also an expression of the liberal principle of self-governance, which derives from the principle of dignity as a background right that asserts that people should have a say in how they are governed. Under Dworkinian liberalism, if it can be said that someone possesses a background right to something in the aforementioned sense, then failure to fulfill this obligation constitutes an offense against his dignity that entails the law or policy in question is morally illegitimate.

33 Ibid., xi.
34 Ibid., xii.
35 Ibid.
There are many philosophical implications of this conception of rights, the most pertinent to the question of pornography being that rights are possessed by *individuals*, not groups or collective entities. An argument against the existence of a right to pornography which claims that the community has a right to have its ethical standards enforced fails from the start, for Dworkin rejects the argument that a community can possess rights in the same way as an individual. Such arguments rely incorrectly on a kind of conceptual anthropomorphism that “supposes that a communal life is the life of an outsize person, that it has the same shape, encounters the same moral and ethical watersheds and dilemmas, and is subject to the same standards of success and failure as the several lives of the citizens who make it up.”36 I will return to this particular aspect of Dworkin’s theory of rights later, but it is worth emphasizing the following: when considering the question of whether the majority’s political goals fail to show equal concern, a lot turns on that goal’s justification.

Dworkin’s theory of rights acknowledges two kinds of rights: background and institutional. The right to pornography, if it exists under Dworkinian liberalism, is an instance of the former kind of right. Such a right might also become an institutional right if, for example, that right is expressed formally in a legislative act, but for the purposes of this thesis, the question of the existence of a right to pornography must be a question of whether prohibiting pornography would constitute failure to show equal concern. If prohibiting pornography necessarily fails to show equal concern, it follows individuals possess a right to consume it, even if it goes against the majority’s conception of sexual ethics, for “a right against the government must be a right to do something even when the

majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done”\textsuperscript{37} even \textit{objectively speaking}. Hence, background rights are rights in the strongest sense: they are moral rights held in virtue of the demands of dignity, such that someone possesses a background right whenever the justification for the majority’s political goals is insufficient because it fails to show equal concern.

Still, it might be said that political majorities nonetheless have a stronger claim to having their preferences fulfilled, that all other things being equal, it is objectively better when more rather than fewer people have their moral and ethical preferences reflected in the laws that govern their communities. This felicific argument appeals to the positive ethical value of succeeding in living in accordance with your own ethical ideals. If it is better, objectively speaking, when more people succeed in living well than when they fail, it follows that in cases that require arbitrating between apparently conflicting background rights, a political majority does well to support the critical interests of the greatest number of people. This utilitarian argument parallels the earlier mentioned ‘collective will’ argument, but it fails for a different reason. Whether or not an individual succeeds in living well, it is of \textit{no additional ethical value} that his value preferences happened to be shared by a political majority. Political majorities are not individual persons with a responsibility to live well, and so they cannot ‘succeed’ or ‘fail’ to live well. When different conceptions of background rights conflict with the majority’s goals, we must recognize as competing rights only the rights of other members of society as individuals. We must distinguish the ‘rights’ of the majority as such, which cannot count as a justification for overruling individual rights, and the personal rights of the members of the majority, which might well count.\textsuperscript{38}

\textsuperscript{37} Ibid., 194.
\textsuperscript{38} Ibid., 194.
The concept of background rights captures the difference between moral and institutional obligations, and the interpretive character of Dworkin’s conception of background rights implies that there might be one or more plausible answers to the question of the right to pornography, all things interpretively considered. As will be seen in the next section, whether equal concern entails that people have a background right to pornography depends significantly on how a political majority justifies its preference for prohibition, and whether a political majority’s preferences can permissibly be enforced is a question about what kinds of justification fail to show equal concern. There might be multiple reasons for prohibiting online pornography that do not violate the requirement of equal concern. In this respect, the scope and aims of this thesis make it necessary to make a choice about the conceptual justification of a right to pornography within Dworkin’s broader scheme of rights, if only to select the strongest argument in favor of the right to pornography. In this regard, this thesis follows Dworkin’s interpretive project.
THE RIGHT TO ETHICAL INDEPENDENCE, FOUNDATIONAL ISSUES, AND PUBLIC DISPLAY

In a 1981 article “Is There A Moral Right to Pornography,’ Dworkin suggests that the right to view pornography might be found in a more general right to ‘moral independence,’ which “is to be justified as a trump over an unrestricted utilitarian defense of prohibitory laws against pornography, in a community of those who find offense just in the idea that their neighbors are reading dirty books.”39 At that time, Dworkin had not yet adopted the conceptual ethics/morality distinction that appears in his later works. In this instance, the word ‘moral’ should not be taken to mean the same thing as ‘moral’ in his later works, which concerns what dignity stipulates we owe other people in our interactions with them. Here, the ‘independence’ in the right to ‘moral independence’ should be understood as a right to an ethical independence. The right to ethical independence is founded by the second principle of dignity, authenticity, which stipulates “what dignity demands we try to establish in our relations with other people,”40 namely independence. Someone suffers an indignity whenever he is “made to accept someone else’s judgement in place of his own about the values or goals his life should display,”41 which certainly includes judgements enforced through the law.

40 Dworkin, Justice for Hedgehogs, 211.
41 Ibid., 212.
An earlier argument this thesis considered, that a political majority deserves to have its preferences fulfilled *in virtue* of its being a majority, offends against the right to ethical independence in this manner. Banning pornography on the justification that a majority of people find it offensive ignores the special individual demands of ethics, that ethical value of a life is a matter of rising to a challenge as *an individual*. Ethical independence means that the individual right to live in accordance with one’s own conception of the good trumps the individual ethical preferences of the majority. On the other hand, this right also implies that a political community *may* prohibit certain activities and behaviors which it believes directly threatens ethical independence, which is not the same as prohibiting something *simply because the majority dislikes it*. Although equal concern forbids a political majority from enforcing its ethical preferences through law, Dworkin claims that a liberal community may regulate the ethical impact of certain types of behaviors as their “numbers and tastes justify,” and that restrictions on the public display of “potentially offensive acts to special or private places” are consistent with liberal justice.

Under Dworkinian liberalism, there are two instances in which someone has a right to ethical independence against the government. The first instance in which someone possesses a right to ethical independence *does not* depend on how the majority justifies its relevant political goals. In this case, someone has a right to ethical independence when political goals threaten an essential condition of authenticity, regardless of the given justification. Dworkin refers to such cases as being matters of *foundational importance*, and laws that offend ethical independence in a *foundational* way “deny people the power

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43 Ibid.
to make their own decisions about matters of ethical foundation – about the basis and character of the objective importance of human life that the first principle of dignity declares.”44 On this view, governments that refuse to allow gay people to get married violate the right to ethical independence because choosing whom to marry is a foundationally important decision. In such matters, utilitarian justifications for political goals are categorically insufficient, and so matters of foundational importance necessarily imply a right to ethical independence against the government, which “may not constrain foundational independence for any reason except when this is necessary to protect the life, security, or liberty of others.”45

The second instance, as has been hinted, occurs whenever the most plausible justification for the majority’s preferences depends on an ethical, rather than moral, judgement. Political decisions of this sort offend authenticity “in virtue, not of the foundational character of the decisions they inhibit, but rather of government’s motives in enacting those laws.”46 In the second case, the right to ethical independence can be interpreted to protect a wide range of different behaviors and actions, and whether or not a certain law or policy depends upon an ethical judgement that fails to show equal concern is not always obvious. Assuming that the decision to purchase an AK-47 is not foundationally important, a law prohibiting citizens from purchasing AK-47’s and similar automatic rifles might depend upon a judgement that those who own them wrongly glorify violence, but there are other plausible justifications for prohibiting assault rifles that do not depend upon an ethical judgement. Instead, the political community might

44 Ibid., 368.
46 Ibid., 369 (emphasis added).
claim that banning assault rifles decreases the overall rate of violent gun crime, refraining from passing ethical judgement on would-be assault rifle owners. In the latter case, the majority’s justification assumes no ethical judgement, therefore the right to ethical independence is not implied when a liberal community decides to ban ownership of assault rifles. In the former case, however, the explicit justification depends upon an ethical judgement that offends authenticity, and in such a case a member of the political minority possesses a right to ethical independence against the policy or law, even if the ability to own an assault rifle is objectively not foundationally important.

Are there good reasons, then, to think that viewing porn is a foundational issue, that prohibiting it necessarily denies “people the power to make their own decisions about matters of ethical foundation – about the basis and character of the objective importance of human life that the first principle of dignity declares”?47 And, if it turns out to be implausible that dignity is foundationally threatened when pornography access is curtailed, does a plausible justification exist for prohibiting pornography that does not depend on an illegitimate ethical judgement? If viewing pornography is foundationally important, and therefore included in the right to ethical individualism, it can only be overcome by another foundationally important issue, i.e. if it is “necessary to protect the life, security, or liberty of others.”48 On the other hand, if viewing pornography is not foundational, then it is politically possible for a liberal government to ban pornography, so long as the apparent justification does not depend upon an ethical judgement. That is, certain prohibitions against pornography does not fail to show equal concern when the “matter is not foundational, and government’s constraint assumes no ethical

47 Ibid., 368.
48 Ibid., 369.
justification.”\textsuperscript{49} Does Ronald Dworkin consistently adhere to the view that legal restriction of pornography must not depend upon an ethical judgement?

In any case, the question of whether a Dworkinian liberal government is justified in prohibiting pornography should not begin and end by considering whether, in the abstract, the right to consume pornography is foundationally important. Beyond what is “necessary to protect the life, security, or liberty of others,”\textsuperscript{50} Dworkin thinks that “Which other decisions are also foundational, if any, is open to dispute.”\textsuperscript{51} Surveying Dworkin’s comments on pornography, it is clear that at the very least Dworkin finds it implausible to conceive of the ability to view pornography as foundationally important. Dworkin asserts that the most plausible justification for prohibition nonetheless depends upon an ethical judgement that “some peoples' conception of what sexual experience should be like, and of what part fantasy should play in that experience, and of what the character of that fantasy should be, are inherently degrading or unwholesome.”\textsuperscript{52}

What, then, according to Dworkin, justifies a liberal community limiting the right to view pornography \textit{by degree}? Dworkin rejects the claim that a “community or any individual is better off with more pornography rather than less,”\textsuperscript{53} and therefore asserts “No one is denied an equal voice in the political process, however broadly conceived, when he is forbidden to circulate photographs of genitals to the public at large.”\textsuperscript{54} On this account, certain restrictions on access to pornographic material are at least politically possible. From Dworkin’s perspective, then, certain kinds of restriction on pornography

\textsuperscript{49} Dworkin, \textit{Justice for Hedgehogs}, 369.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid., 205.
\textsuperscript{53} Ibid., 193.
\textsuperscript{54} Dworkin, “Is There A Moral Right to Pornography?”, 177.
access do not offend the dignity of those who consume pornography, nor of those who would prefer it to be publicly displayed. Is this a contradiction? The former claim is certainly an ethical judgment about whether viewing pornography contributes to living well, and it is the judgement that it doesn’t. But Dworkin firmly asserts that insofar as the political majority’s motivations for prohibiting pornography are “preferences about how others should behave,”\(^55\) the right to ethical independence “is to be justified as a trump over…prohibitory laws against pornography.”\(^56\)

But this apparent contradiction arises when we inappropriately assume that ethical judgements necessarily express “preferences about how others should behave” in a way that threatens ethical independence. On the contrary, insofar as a political majority’s preferences “emphasize not how others should lead their lives, but rather the character of the sexual experience people want for themselves,”\(^57\) Dworkin asserts that the right to ethical independence actually recommends a compromise that “allows restrictions on public display.”\(^58\) If the right to ethical independence entails a “prophylactic refusal to count any motive whenever we cannot be sure that that motive is unmixed with moralism,”\(^59\) the preconditions of political legitimacy under Dworkinian liberalism become “unnecessarily inhospitable to the special and important ambitions of those who then lose control of a crucial aspect of their own self-development.”\(^60\) The importance of the right to ethical independence in sexual matters cannot be understood without

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\(^{55}\) Ibid., (emphasis added).
\(^{56}\) Ibid.
\(^{57}\) Ibid., 205.
\(^{58}\) Ibid., 206.
\(^{59}\) Ibid., 205.
\(^{60}\) Ibid.
recognizing how substantive ethical independence in sexual matters contributes to living well.

The principles of Dworkinian liberalism therefore recognize the essential difference between proscribing a specific conception of sexual ethics through law and restricting what a liberal community believes diminishes their ability to respond to a judgement of ethical value in sexual matters. From a political perspective, prohibition and restriction are *not morally equivalent*. Prohibition almost certainly depends on an ethical judgement that clearly offends our right to ethical independence. Restriction, on the other hand, depends upon an ethical judgement, but not an ethical judgement that expresses “preferences about how others should behave.” In this respect Dworkin asserts that *this* justification for restriction, though an ethical judgement, does not inherently offend the right to ethical independence. Hence, if viewing pornography is not foundationally important, it is politically possible for a Dworkinian liberal community to restrict access to pornography by prohibiting public display. Dworkinian liberalism is therefore open to pornography restrictions based on these particular kinds of ethical judgments, and it stands to reason that it is open to similarly justified restrictions on pornography access as well.
PORNOGRAPHY, ENDORSEMENT, AND THE INTERNET

Since Dworkin wrote “Is There A Moral Right to Pornography?” in 1981, the manner in which people view pornography has changed dramatically. With the advent of the internet, pornographic magazine subscriptions and adult video stores have been replaced as the primary suppliers of pornographic material. Nowadays, pornography is primarily obtained through online streaming services, which are accessible from nearly every phone, laptop, desktop, gaming console, tablet, and TV with an internet connection and a web browser. As such, it stands to reason that Dworkinian arguments favoring prohibition on public display of pornography might support prohibiting online pornography in light of a fundamental technological shift in the way people view pornography. The internet did not exist when Dworkin originally addressed the question of the right to view pornography, and comments on the subject in his later works give no indication that Dworkin thought much about how the powers of the internet affect the accessibility and visibility of pornography. Perhaps he simply never reconsidered the question after 1981. In any case, the question demands being reconsidered if one finds Dworkin’s liberal principles compelling. Even if prohibiting online pornography is, from a practical perspective, logistically impossible, the question of the right to pornography is important because (hopefully) it demonstrates that technological development in general, and the internet in particular, is a sharp and double-edged sword. If the internet can amplify the ethical impact of certain behaviors to such a level that it threatens peoples’
real ability to pursue a good life, a laissez-faire attitude is unacceptable. Does Dworkinian liberalism, then, address the effect internet technology has on pornography consumption?

The right to ethical independence, Dworkin thinks, entails that some kinds of restrictions on the public displays of pornography succeed in showing equal concern, at or least do not violate it, and so it makes sense to wonder whether the same applies to digital pornography. What, exactly, is pornography? There seems to be a clear difference between the nudity present in Michelangelo’s *David* and Kim Kardashian’s sex tape, but an analytic definition of pornography proves elusive. However, as Ludwig Wittgenstein noted, “the question of a word’s meaning so often obscures its use,” and so this thesis follows the recommendation of Justice Potter Stewart’s opinion in *Jacobellis vs. Ohio*:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…

The question at hand is not “What is pornography,” and the question of whether a liberal government may legitimately ban pornography *does not depend* on the existence of a perfect definition of ‘pornography’. Indeed, many laws that govern liberal communities employ concepts with fuzzy borders. Liberal communities rightly penalize those that drive under the influence and consequently injure other motorists in spite of the fact that the precise meaning of “gross negligence” is unclear. For the purposes of this thesis, the most helpful definition of pornography stipulates merely that pornography appeals primarily to prurient interests, as opposed to artistic or otherwise, and whether not some

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61 *Jacobellis vs. Ohio*, 378 U.S. 184 (1964)
film or picture counts as ‘pornography’ will have to be determined on a case-by-case basis accordingly.

What is the apparent danger of pornography? As Robert George notes, “It is often supposed – particularly by judges who would invalidate anti-pornography laws – that the ‘harm’ of pornography is offense to the sensibilities of those – like themselves, the judges are quick to add – who find it distasteful.”62 On the contrary, the threat of pornography lies in its “tendency to corrupt and deprave.”63 As Dworkin notes,

For the offense in question is not simply offense to the majority's aesthetic tastes, like the offense people might find in a pink house in Belgravia. The offense is freighted with moral convictions, particularly with convictions about what kinds of sights are indecent rather than simply regrettable in the public space.64

The sexual appeal inherent in visual nature of pornography makes viewing it extremely attractive. Humans are naturally sexually attracted to one another, and pornography appeals to that prurient interest, often perhaps against the consciously-held sexual ideals of its viewers. From this perspective, viewing pornography is merely a means to the end of sexual pleasure, one that is seductively exempt from the messiness of normal human interaction. Irrespective of the ethical value someone assigns to pornography, it is the sheer convenience of viewing pornography which tends to ‘corrupt.’ Pornography is inherently appealing; it stimulates sexual desire in the viewer and simultaneously exists as a means to fulfilling that desire, and it this combination which many people find irresistible. In this respect, Dworkin asserts that it is possible that availability of pornography will limit both “the ability of individuals consciously and

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63 Ibid.
64 Dworkin, “Is There a Right to Pornography?”, 188.
reflectively to influence the conditions of their own and their children’s development”\textsuperscript{65} and “their ability to bring about the culture structure…in which sexual experience has dignity and beauty, without which their own and their families’ sexual experience are likely to have these qualities in less degree.”\textsuperscript{66} Where pornography is more highly available, therefore, it might become increasingly difficult to choose the kinds of sex lives we want.

In this respect, pornography diminishes one’s capacity to respond to judgements of ethical value in sexual matters, to live well through one’s sexual preferences and choices of behavior, whether or not they think that pornography is inherently bad for them. On this view, the danger of pornography lies in the \textit{moral - not ethical - threat} it presents to second aspect of dignity, authenticity. Authenticity is threatened whenever someone or something diminishes the “ability to consider the critical merits”\textsuperscript{67} of the certain choice “in a reflective way,”\textsuperscript{68} the choice in question here being the choice to critically incorporate viewing pornography into one’s conception of living well. Accordingly, authenticity is threatened whenever the possibility of genuine endorsement of one’s own life is threatened, and the widespread availability of pornography can only be understood as increasing this threat. This is not to suggest that viewing pornography \textit{never} contributes to someone’s having lived well, for critically considering the merits of viewing pornography is certainly possible. Rather, it is to say that for many people pornography inherently frustrates their responsibility to live authentically, and they live less well because of it; it can become something \textit{like} an addiction as pornography

\textsuperscript{65} Ibid., 190.
\textsuperscript{66} Ibid.
\textsuperscript{67} Dworkin, \textit{Sovereign Virtue}, 218.
\textsuperscript{68} Ibid.
continually frustrates their capacity to live well by all the while appealing to their prurient interests against their critical interests. On this account, they lead sex lives they would not have chosen. As Dworkin says, if someone “never endorses the life he leads as superior to the life he would otherwise have led,” he has failed to meet the responsibility to live in response to his own ethical judgements and therefore does not live well on this account.

How large is the audience for internet pornography? How much pornographic material is online, and how often is it viewed? According to statistics published by Pornhub, the world’s largest pornography website, pornhub.com alone received an average of 92 million daily visits. Just in 2018, approximately 115 years’ worth of new pornographic videos were uploaded to Pornhub; at 12,700,800 GB per day, more data is transferred between Pornhub’s servers and viewers than the entire internet consumed in 2002. According to Pornhub’s “2018 Year in Review,” every minute

63,992 new visitors arrive at Pornhub, 207,405 videos are watched, and 57,750 searches are performed... 12 new videos and 2 hours of content are uploaded to Pornhub every minute while 7708 Gigabytes of data are transferred worldwide. Pornhub’s users view 13,962 profiles, follow 593 other users, accept 167 friend requests and send 122 messages. 271 videos are rated, 528 are added to playlists and 22 new comments are left.69

It shouldn’t be a surprise, then, that interviews given by officials at major search engine companies estimate that between 10-15% of all internet searches are pornography-related70. No conceivably possible increase in the number of brick-and-mortar pornography shops or lifting of restrictions on public display could make pornography

more accessible than it is in virtue of power of internet technology. Whether or not overall porn consumption has risen between “Is There A Moral Right to Pornography?” and now, the advent of the internet has almost certainly made pornography more accessible than ever before. The magnitude of the moral danger of pornography is directly related to its availability, as Dworkin acknowledges, and so it remains to consider whether it is plausible to think that arguments endorsing restrictions on public display might also apply to the internet in a manner consistent with liberal principles.

For a great many people in liberal communities, internet use dominates their daily activities and endeavors. Through the internet we engage in political discourse, run businesses, order groceries and even pharmaceuticals; social media is one of the primary avenues for social engagement and the main outlet for news sources. The internet is so thoroughly integrated into nearly every quintessentially human activity that living a life without dependence on internet technology is, all things considered, more difficult than not. The amount of relative inconveniences and disadvantages someone incurs at refusing to use the internet is not insignificant, and as technology progresses, it is reasonable to think that internet use will be further integrated into more and more fundamental human activities as the opportunity cost of staying disconnected increases. In these circumstances, it makes sense to suppose that the internet is a kind of public space subject to certain kinds of restrictions.

The reply that people who dislike pornography in this way should just “not look for pornography online” is to misunderstand Dworkin’s original argument and understate the degree to which most people depend upon constant internet access in their essential day-to-day activities. The right to ethical independence protects against political action
that implicitly judges some kinds of lives as better than others or treats certain kinds of people as if they matter less than others, but in the case of pornography, Dworkin claims it also recommends restrictions on public display of pornography as a “compromise.”

Banning something simply because it is wrong and banning something because it tends to diminish the real capacity to live well are not the same, and prohibiting online pornography is not the same as prohibiting pornography entirely. Dworkin asserts that insofar as the justification for restriction of pornography access is of the latter sort, those members of the political community deserve to have their preferences counted. That the primary means of viewing pornography has merely shifted from physical stores to the internet gives no reason to think that the right to ethical independence recommends any less of compromise, especially where the perceived threat of pornography to living well is greatly increased by internet technology.

If anything, a political majority that considers the availability of pornography a threat to living well likely has a stronger claim today than they did when Dworkin first considered a possible right to pornography. In this sense, the right to ethical independence makes limited recommendations. Firstly, it is implausible to think that the right to ethical independence justifies a total prohibition of all forms of pornography. The corrupting moral danger of public displays and online pornography is not present when someone reads *Playboy* in private, for instance, and so the right to ethical independence cannot serve as grounds to justify total prohibition in this case. However, neither is the right to ethical independence threatened nor the responsibility to show equal concern abdicated when a political majority that considers the online availability of pornography

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as a serious threat to living well and moves to prohibit it on this account. Such a justification does not depend on an illegitimate ethical judgement about either would-be pornography viewers or the kinds of sexual behaviors depicted in pornographic works. Hence, a Dworkinian liberal community can be justified in prohibiting online pornography in the same manner as public displays. Though they may make an implicit ethical judgement in doing so, the right to ethical independence is not threatened when the preference for online prohibition is justified by ethical self-protection, rather than ethical disapproval. This is not to say, however, that from Dworkinian principles it follows that liberal communities should prohibit online pornography, rather that it is politically possible for a Dworkinian liberal community to do so. Where objectively attractive liberalisms must be sensitive to the right and the good together, it should be no surprise a technology as powerful and far-reaching as the internet might demand regulation in accordance with liberal values. Liberal justice concerns morality, what we owe other people as members of a political community. Therefore, a contemporary liberal community seeking to protect the value of living well, personal autonomy, and dignity might do well to begin addressing the challenges to pursuing a good life implicit in internet technology by prohibiting online pornography.
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