Inheritance and Hypothetical Insurance

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This paper examines Ronald Dworkin's treatment of inherited wealth, which is stated only briefly, but represents a sophisticated stance, to which Dworkin remained committed over multiple writings. Dworkin's contentions are that (1) the goal of restricting bequest is to prevent the formation of hierarchies of social class, and (2) this goal can be pursued through a progressive estate tax that models citizens' hypothetical insurance choices concerning protection against class harm. This paper seeks to support Dworkin's commitment to the diagnostic significance of class injustice, but finds problems with his attempt to use the hypothetical insurance approach. After identifying various difficulties around hypothetical insurance, the paper ends on a more positive note: Dworkin's concern to address class hierarchies can be adapted so that an inheritance tax gains support from the various principles that make up the liberty/constraint system in *Sovereign Virtue*, Chapter 3. This may not result in a completely adequate treatment of inherited wealth, but it promises to draw on principles that supplement, rather than rely on, any ideas about hypothetical insurance.

1. Introduction

The question of how to regulate inheritance and bequest clearly lies within the scope of liberal egalitarian theorizing. Nevertheless, egalitarians rarely hold this topic up for sustained attention. Whatever egalitarians have had to say on this matter has tended to occur in the form of tangential discussions or afterthoughts, usually embedded in larger bodies of work in which the main focus is on some

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other topic of egalitarian concern.¹ Ronald Dworkin's writings on distributive justice are something of an exception to this trend. True enough, his discussions of inheritance and bequest are small, and lie somewhat in the background, relative to other more prominent themes in his work. Nevertheless, Dworkin's contribution to egalitarian thought includes an interesting and principled stance on bequest, which has stimulated a small secondary literature. In spite of its brevity, Dworkin's discussion of this issue represents what might be the most philosophically elaborate egalitarian treatment of inheritance to have emerged during the second half of the twentieth century. It would therefore be a loss to any future scholarship on inheritance if Dworkin's thoughts on this topic were overshadowed by the attention rightly given to the more prominent and influential themes in his impressive corpus. At any rate, Dworkin's position on the topic deserves further attention, and this paper is an attempt to provide some of that. My aim in what follows is to both arrive at an evaluation of the characteristically sophisticated position Dworkin holds on the problem of inheritance, and to explore some connections with other theoretical commitments that Dworkin held, but whose potential relevance to inheritance he did not see.

As a guide, here is how the paper is organized. Section 2, "Dworkin's Egalitarianism," provides a brief overview of Dworkin's egalitarianism, and is followed by an account of his stance on inheritance and bequest in section 3, "Hypothetical Insurance." Later sections examine Dworkin's important claim that the injustice of unregulated bequest is related to the problem of class stratification, and his attempt to ground a progressive inheritance tax on claims about hypothetical insurance choices. Section 4, "Class, Prejudice, and Independence," makes two points in response. First, the hypothetical insurance approach faces certain difficulties, due to complex relationships linking class hierarchy, brute luck, and inherited wealth, which Dworkin never properly examined. Second, the approach does not retain the theoretical motivations that it enjoys when applied to topics other than inherited wealth, largely because inheritance is not so closely related to markets as are other forms of brute luck. I then suggest, more positively, how a progressive inheritance tax might have been developed as a more direct requirement of the state's equal concern for its citizens, using theoretical resources that Dworkin developed separately from the hypothetical insurance approach, in particularly his liberty/constraint system that he used to supplement his envy test. Section 6 concludes.

2. Dworkin's Egalitarianism

It goes without saying that Dworkin's views on egalitarian justice are elaborate enough to make brief summary quite difficult. I will assume that the most general ideas are already familiar to most readers: The summary I give aims to highlight

¹I am certainly not claiming that the topic of inheritance has received no recent attention *at all*. Some good recent discussions can be found in Murphy and Nagel (2002: Ch.7), O'Neill (2012), and White (2008). These works do not extend their focus to Dworkin's position.

the details that are most relevant for the subsequent discussion of Dworkin's position on inheritance and bequest.

For Dworkin, justice is fundamentally about how the state, or government, should act toward its citizens. Justice is done insofar as government acts in ways that express equal concern and respect for each of its citizens. Dworkin has been criticized for taking this view, but I will set such matters aside.² Dworkin's fuller conception of justice is developed in his theory of equality of resources. This theory takes much guidance from the idea that distribution should be "ambition sensitive" rather than "endowment sensitive." A society of equals is one in which persons are permitted to develop their own life plans in ways driven by their own tastes, preferences, and convictions, and unhindered, as far as possible, by unchosen personal circumstances.

A maximally ambition sensitive distribution is one that passes what Dworkin calls the *envy test*. A resource distribution passes this test if no person prefers any other person's bundle of resources to their own bundle. Importantly, a distribution's being envy free in this sense does not entail that everyone is entirely or equally happy with their particular resource bundle. Persons could each prefer their own bundle to others available while still wishing that there had been more or better resources to exchange in the first place, and hence better bundles. Part of the point of the envy test, though, is that it represents a way of coping with scarcity and conflict in a very broad sense: It specifies a rule about how society ought to divide what it can actually produce, in ways that make each person's pursuit of ambitions sensitive to those being pursued by others.

To give a greater sense of what it means for a distribution to be envy-free, Dworkin offers a hypothetical thought experiment in which resources are auctioned off until a certain distribution of resource bundles is reached. The auction begins from a position of *ex ante* equality, with persons holding exactly equal shares of some otherwise worthless currency used for making bids (such as clamshells). Participants in this auction know what sort of things they want to get out of life, but they do not know the market value of their talents. As such, they are ignorant of how much ability they possess to pursue their ambitions while coping with the sort of luck that life will throw at them. This will affect how the bidding goes. In particular, it will lead participants to bid for certain forms of protection against bad luck, which Dworkin believes can be modeled by various egalitarian policies regarding taxation and the allocation of its revenues.

Whatever egalitarian policies might be derived from it, the resource auction and the envy test are supposed to make Dworkin's egalitarian distinctively liberal as well. Generally speaking, more coveted resources will attract higher bids, and

²Here, I have in mind the worry that Dworkin gives undue prominence to the state as a moral agent, such that any subsequently developed conception of justice will be objectionably administrative as per the criticisms made by Samuel Scheffler (2003). It is possible that the presence of a concern about class hierarchy in Dworkin's treatment of bequest suggests he cared more about oppressive social hierarchies than Scheffler's discussion acknowledges. (See n. 11.)

thus whoever ends up holding them will have had to forego bidding on whatever less coveted resources can be had for fewer clamshells. The role of the auction in realizing the egalitarian requirement of an envy free distribution shows that market exchanges, properly regulated, act as an instrument of justice rather than an impediment to it.³ By making a distribution pass the envy test, what gets ensured is that the costs one must pay to secure any resource bundle vary with the value that others place on that bundle (the more people want something, the more any person will have to bid in the auction to get it). In Dworkin's words, the auction is a device for making "aggregate opportunity costs . . . equal."⁴ Thus, the whole approach is designed to respect human individuality and the diversity of personal ambition.

Importantly, making a distribution satisfy the envy test does not exhaust the requirements of equality of resources. There are two reasons for this. First, many possible resource distributions might pass the test. This is true just because there are many possible ways of identifying and differentiating resources in the first place. A resource such as land plots, for example, could be traded in units of any size and shape, or instead only in units shaped as perfect triangles. An envy-free distribution of land plots could result in either case, but would almost certainly be different in each case. Dworkin uses this point to motivate a requirement that resources be identified "abstractly," that is, made maximally diverse and differentiated. This favors the more intuitive approach of allowing land plots to be sold in all sorts of shapes and sizes. Second, there is the possibility that persons might seek to use their resources in ways that are morally troubling, in ways that are not prevented merely by making a distribution envy-free. This problem motivates what Dworkin calls a liberty/constraint system, which will specify how resources are to be individuated and how they may be used. Several principles end up supplementing the envy test as part of this system, in ways that, for Dworkin, further reveal how liberty and equality are intertwined rather than at war with each other. As I shall explain in section 4, one of these principles may have interesting implications for the regulation of bequest.

Dworkin is at pains to emphasize that the envy test needs to be applied diachronically. It is not a mere "starting gate." He requires that a post-auction distribution be regulated, over time, in ways specified by what sort of outcomes persons would have sought protection (insurance) against. This fixes the degree and type of compensation that might be provided for victims of bad brute luck, for example persons whose talents lack the market value necessary to secure meaningful employment. Persons who are successful or fortunate in life incur larger premiums, so as to fund the policies aimed at helping those less fortunate. These include a welfare state and free (if limited) healthcare. The degree of redistribution is limited by the amount of protection hypothetical purchasers would wish to secure. Because such purchases are included in the hypothetical resource

³For a quotation, see the discussion in Section 3, "Hypothetical Insurance."

⁴Dworkin (2000: 149).

auction, they count as part of the process that makes the eventual resource distribution envy-free. The fact that insurance purchases have implications for the subsequent regulation of the resource distribution means that their inclusion gives the envy test its diachronic extension. Dworkin's view is that hypothetical insurance choices would err towards substantial but limited redistributive compensation for those who turn out to be less fortunate. It is plausible, Dworkin says, that protection would be sought against physiological handicap and unemployment. But it is unlikely that protection would be sought up to a level that would provide compensation for missing out on the most lucrative careers, or funding for cosmetic surgery. More generally, the prospect of such extensive schemes can be ruled out by the need for some set of better off individuals to pay the taxes that fund them—no insurance scheme makes any sense unless it specifies some set of favorable conditions under which one pays a premium rather than receive a payout. This sort of moderate regulation of distribution is supposed to represent the insurance choices of the people “on average, acting prudently,”⁵ while knowledgeable of their ambitions and tastes in life but ignorant of other aspects of their circumstances. Overall, then, hypothetical insurance choices provide a counterfactual guide for designing redistributive taxation, including the calculation of rates and the selection of which policies should be funded by the revenues.⁶

3. Hypothetical Insurance

Dworkin's application of *equality of resources* to inheritance appears within a short but dense discussion in *Sovereign Virtue*, Chapter 9. The position defended here is reaffirmed in some later replies to critics.⁷ Dworkin formulates the problem of inheritance in an intuitive and familiar way, namely, as an apparent dilemma between freedom and equality: The act of bequest seems to make a distribution ambition both sensitive in one respect and endowment-sensitive in another. Many parents want to give something to their children in the form of gifts and bequests. Typically, this counts as an important life goal rather than the sort of arbitrary preference that might be held while not really valued. If ambition sensitivity is to be promoted, it therefore seems problematic to impose special restrictions on bequest. On the other hand, however, unregulated bequest makes it almost certain that some members of subsequent generations will be handicapped by their parents' failure to provide for them, while others will profit from much more generous parental support. This sounds like a way in which distribution becomes increasingly endowment-sensitive. This diagnosis can be extended in a certain way: Importantly, and unlike many other contemporary egalitarian writers,

⁵Dworkin (2002: 111).

⁶Dworkin (2000: 77-78).

⁷Dworkin's references to inheritance and bequest can be found in the following bodies of text Dworkin (2000: 346-349, 2002: 125, 2004a: 352-353, 2006: 117-118).

Dworkin recognizes that the long run tendency of unregulated, large bequests is to give rise to economic stratification so that social relations take on the “familiar character of a class system.”⁸

Unfortunately, Dworkin fails to expand on the meaning of class system in this context. Evidently, he accepts that class hierarchies involve inequalities of status and power that are caused by the intergenerational replication of inequalities in resources.⁹ But, so long as nothing is said about the sort of power and status involved, such claims remain more formal than substantive. I think there are two normatively interesting, broad accounts of class hierarchy that are compatible with Dworkin’s position so far as it is stated. The first is that class hierarchy is simply the lack of mobility between income levels, such that resource inequalities have a tendency to replicate themselves with each generation. Somewhat wider accounts of class hierarchy leave room for mobility but stress the normative importance of further factors that are hard to describe in strictly distributive terms. These include a variety of distinctly oppressive aspects or consequences of hierarchies, such as patterns of stereotyping, stigma, and segregation.¹⁰ My own view is that it makes the most normative sense to construe class hierarchies in accordance with the second, wider, conception. I suspect that Dworkin, if forced to choose, would err towards a mobility-based conception. This may be only because the coherence of ambition-sensitivity might be complicated by much work connecting oppression with things like adaptive preference. I will proceed on the assumption that an oppression-based conception is the more plausible, although I think it is possible to reconstruct at least many of my criticisms of Dworkin on a mobility-based conception. I will eventually argue, also, that an oppression-based conception would in fact provide Dworkin with certain theoretical resources, to the extent that he may have been better off explicitly endorsing a conception of this kind.¹¹

Whatever class hierarchy might be, Dworkin’s proposal for restricting bequest resembles the intuitive compromise that many find attractive when it comes to regulating the flow of inherited wealth: Citizens should have a limited right to bequeath, so as to respect parents’ decisions about how to live their lives. But this right needs to be limited, so as to protect against the injustice of class stratification. Societies that fail to regulate the acts of gift and bequest *at all* will

⁸ Here there is a parallel between Dworkin’s thinking and recent work that seeks to expand on the Rawlsian reasons for regarding a property-owning democracy as superior to welfare state capitalism—see O’Neill (2012). The taxing of inheritance features prominently here.

⁹ Dworkin (2000: 348).

¹⁰ For a useful discussion of the relation between sociological work on mobility and philosophical ideas about equality, see Swift (2000). Thinking of class hierarchy in terms inclusive of things like stereotype and stigma would be to extend important recent work on status hierarchies of other sorts, particularly race. (See note 26, below.)

¹¹ Dworkin’s appeal to social class apparently injects a certain degree of concern for social or intergroup relations into his egalitarianism, something which criticisms of Dworkin might have overlooked when categorizing Dworkin alongside other “luck egalitarians.” Readers of Dworkin (2003) will already be aware of his frustration at this. In recording this observation, I leave it open whether Dworkin is right to wholly dismiss the way in which such critics have understood him.

almost certainly fall afoul of Dworkin's observation that egalitarian requirements must work diachronically. Dworkin's solution is to call on the hypothetical insurance approach that he uses at greater length in *Sovereign Virtue* to justify other broadly redistributive policies. Hypothetical insurance represents a desire to secure protection against bad genetic luck or bad talent luck. For example, citizens would want to secure some protection against ending up with a set of talents that the market fails to reward. At the same time, they would want to retain some freedom to use talents that turn out to be lucrative, while paying tax as a premium. Dworkin believes that much the same can be said about inheritance luck: Insurance purchasers would seek protection against being unlucky enough to get little or no inheritance, while retaining the option of being able to provide benefits for their own offspring. Dworkin's conclusion is that this sort of insurance preference could be modeled by a steeply progressive tax on estates.¹²

Now that it has been summarized, it is possible to raise some doubts about the hypothetical insurance approach. First, we might wonder whether hypothetical insurance choices work well as a counterfactual guide for inheritance taxation, even granting that they can guide other sorts of egalitarian tax policies in the way that Dworkin maintains. This is partly because we can distinguish inheritance luck, i.e., concerning how one fares when it comes to receiving any inheritance, and class luck, i.e. concerning what position in a class hierarchy one happens to occupy. Dworkin only speaks explicitly about inheritance luck, when speaking of insurance choices, but he still refers to class when speaking of the harm that such choices are supposed to protect against. It is worth quoting some of Dworkin's remarks here at length:

We should begin by asking why people would want [inheritance] insurance and what considerations would affect how much they would be willing to pay for it. The harm such insurance protects against is, we might say, relative rather than absolute... Inheritance insurance would make sense, therefore, to guarantee not a higher standard of living in absolute terms, but against the different and distinct harm of occupying a lower tier in a class system – against that is, life in a community where others have much more money, and consequently more status and power, than they do and their children will.¹³

In effect, these remarks treat inheritance luck and class luck as identical. But Dworkin's own remarks offer some signs that they should be kept distinct: The passage reproduced above is drawn from a larger piece of text in which multiple

¹²Dworkin apparently modifies this claim, later, in *Is Democracy Possible Here?* Here, he remarks that "it does seem unprincipled to tax an estate at the same rate without regard to the number or wealth of its beneficiaries... it would be much fairer... to treat substantial gifts of any form, including bequests, as income subject to ordinary taxes" Dworkin (2006: 117-118). Dworkin's suggestion here is to move from a traditional estate tax to a receipts tax. There are indeed strong egalitarian reasons for taxing receipts rather than estates. On this, see White (2008).

¹³Dworkin (2000: 348).

references are made to the prospect simply having ungenerous, imprudent, or stingy parents. Such possibilities represent bad inheritance luck but not really bad *class* luck: It goes without saying that parental generosity need not vary straightforwardly with class position. Indeed, it is perfectly possible for members of the upper classes to suffer a decline in economic position because of the poor financial choices of their parents or simple parental refusal to provide support. Indeed, some of Dworkin's readers have formulated the problem of insuring against inheritance simply as a trade-off between being seeking to benefit one's own children while seeking protection against one's own parents lacking the ambition or ability to bequeath.¹⁴ The plausibility of such claims does not rely on any sort of claim about class harm.

Generally speaking, the class position of any individual is usually determined prior to their inheriting any wealth. Inheritance is in fact coming increasingly late in life, given increasing longevity among wealthy demographics.¹⁵ This suggests that seeking protection against bad inheritance luck may be neither necessary nor sufficient for seeking protection against class luck. This is certainly not to say that class position and inheritance are unconnected, only that it is far from easy to work out the relation between them. It remains plausible that inheritance does much to drive a class hierarchy. Although class position does not depend on an individual's own inheritance, it may still depend on the prior inheritance flow further back in their family line. Plausibly, then, much of inheritance's significance can be traced to its special role in overcoming the temporal lag between concentrations of wealth and membership of a social class. This lag, which runs in both directions, is evidenced by the way in which sudden increases in wealth lead people to be labeled as *nouveau riche* while persons with low incomes can still be said to come from good stock. There is actually much to be said for approaches to inheritance and bequest that target the sorts of inherited fortunes that cascade down successive generations.¹⁶ Sensitivity to this sort of iterated inheritance is not part of standardly progressive inheritance taxes, which merely tie liability to

¹⁴This appears to be the reading offered in a recent discussion by Matthew Clayton, who writes: "Individuals will come to the choice they face with different views concerning the importance for them of giving to particular individuals who are close to them and of ensuring that they or their children receive monetary resources, and it is their view of the relative importance of these ambitions that will guide their insurance decisions" Dworkin (2012: 109). Clayton recognizes Dworkin's preoccupation with class harm later in his discussion—my point here is merely to highlight the way in which protection against bad inheritance luck comes apart from protection against class harm.

¹⁵On this point, which may also undermine some traditional moral defences of the right to bequeath wealth, see Ackerman and Alstott (2000: 36).

¹⁶Most significant here are the writings on iterated bequest, and how to design ways of restricting it, that were discussed in the early twentieth century. See especially Rignano (1925) and Wedgwood (1929: esp. ch. 11). These works appeared during a sort of heyday in philosophical discussions of inheritance and social justice, but have now been largely forgotten about in philosophical circles. I am currently engaged in writing a book manuscript, which devotes some attention to these views. A philosophically sophisticated summary of the historical context around these works can be found in Erreygers and Di Bartolomeo (2007).

the economic value of a bequest or receipt. Similarly, the fact that inheritance can have a cumulative rather than immediate impact is almost never appreciated in recent political philosophy.

Dworkin's failure to properly separate inheritance luck from class luck remains a weakness in his short discussion. That said, the idea of inheritance luck might be broadened so as to include the presence or absence of inheritance further up one's family tree. This would, at least, be a way of redefining inheritance luck so as to make it correlate more closely with class luck. There is nothing incoherent about insuring against complicated aspects of one's family history alongside more immediate parental poverty or stinginess. And there is nothing theoretically problematic about hypothetical insurance choices being modeled by an inheritance tax that ties the liability of a bequest to facts about earlier inheritance in the family line, rather than just to its sheer size. Dworkin's commitment to the significance of class might require him, ultimately, to favor a tax scheme more complex than a traditionally progressive estate tax. But this may be an interesting, rather than a damaging, result. It remains hard to see how it can be established that an inheritance tax, ultimately aimed at removing class luck (by removing a class hierarchy altogether), is a model of hypothetical insurance choices that aim at individuals' protection against bad inheritance luck.

A second doubt emerges once it is asked whether, when applied to inheritance and bequest, the hypothetical insurance approach retains all the motivations behind its application to other contexts in which bad brute luck operates, such as in the labor market. I will begin by drawing attention to the difference between the idea of preventing class hierarchy from occurring, and the fact that insurance (hypothetical or otherwise) is basically a nonpreventative device, used to instead mitigate or compensate for the effects of some event that the insurer is unable or unwilling to take steps to prevent.¹⁷ What this means is that though there is nothing wrong with regarding inheritance tax as a device for removing or preventing class hierarchy, there is something strange about treating inheritance tax as a model of insurance purchases. Dworkin apparently acknowledges, at the beginning of his discussion,¹⁸ that an inheritance tax must aim at *preventing* class hierarchies from forming in the first place. This preventative character remains evident in his brief recommendations about how to spend inheritance tax revenues, which aim broadly at promoting equality of opportunity across

¹⁷The idea that the hypothetical insurance approach mitigates rather than removes or neutralizes the effects of brute luck features in some other general interpretations of Dworkin's position. See, for example, Mason (2004: 150-152). My points in this paragraph also resemble a criticism that Colin MacLeod has made about Dworkin's position on disability. As I read him, MacLeod's point is (roughly) that many of the injustices suffered by persons with disabilities are features of their social environment rather than the resource distribution, including patterns of stereotyping and stigma. MacLeod uses this point to suggest that the hypothetical insurance approach misconstrues certain types of disadvantage, partly because of the way it seeks to mitigate or compensate disadvantage rather than directly address underlying factors.

¹⁸"I must now say something about why equality of resources *would not generate* class distinctions" Dworkin (2000: 346, emphasis added).

demographic groups. But to insist that a preventative use of tax revenues models a hypothetical choice whose function is to compensate or mitigate is to stretch what it means for the proposed actual tax to model what is (merely) a curative rather than preventative strategy.¹⁹

This point can be strengthened by connecting it with Dworkin's original motivations for the hypothetical insurance approach. These draw on his views about the role of the market in the pursuit of liberal equality. The case for invoking hypothetical insurance relies partly on the claim that markets have some valuable features but also some disturbing ones that call for regulation. For example, some brute luck disadvantage is unavoidable given that some persons lack the sort of talents that can command any sort of job security, let alone decent incomes, in the labor market. One view is to regard the market as a source of injustice. As I have said, a pillar of Dworkin's liberal egalitarianism is his unwillingness to accept anything like this. Dworkin famously tells us that "the idea of an economic market, as a device for setting prices for a vast variety of goods and services, must be at the center of any attractive development of equality of resources."²⁰ Among other things, markets promote a form of fairness by requiring people to spend more of their resources if they want to acquire something that other people want as well—recall the earlier remark about aggregate opportunity costs. The fact that some people lose out as a result of an unplanned market economy is part of the price we pay for the advantages (moral as well as economic) of some form of market allocation. This allows the welfare state to be defended as, perhaps among other things, a device for mitigating disadvantage wrought by luck in the labor market, without denying the claim that markets are in some way essential for the pursuit of liberal egalitarian justice.

So, Dworkin has well-worked-out, liberal motivations for regarding the market, when properly constrained, as an essential instrument of distributive justice. And this view of the market is compatible with the egalitarian approach he wants to take to other forms of bad brute luck in the world. But this view remains attractive largely because the brute luck in question is of a sort that we have reason to *merely* mitigate, given that it represents an avoidable downside of some otherwise indispensable process. In other words, the hypothetical insurance approach draws much of its appeal from the very idea that the cures for some ills emerge from a source that it would be wrong to wholly remove. Anybody who rejected Dworkin's view that markets are essential tools of justice would, therefore, be able to reject one of Dworkin's main reasons for proposing the hypothetical insurance approach at all.²¹ The problem with applying the hypothetical

¹⁹ Dworkin repeatedly mentions that redistributive taxation schemes act as models for hypothetical insurance choices. At no point does he offer a theory or theoretical characterization of what a model ultimately is. Given this, I do not take my line of argument here to be uncharitable.

²⁰ Dworkin (2000: 66). See also (2011: 356-358).

²¹ Hypothetical insurance has other theoretical advantages, not least the avoidance of having to find a purely metaphysical way of separating brute luck from option luck. There may also be ways of responding to this metaphysical problem without invoking hypothetical insurance—see Tan (2012: 93-94).

insurance to the problem of inheritance is that class hierarchy is not like the market. Inheritance is a system of asymmetric or gratuitous transfers, rather than a system of exchanges. As such, it is not really a market phenomenon.²² Class stratification is not some special tool of promoting justice due to special features warranting its preservation under some set of constraints. Instead, the right response to class hierarchy is just to do what we can to get rid of it.²³ Because of this, it becomes less obvious why the defense of a substantial tax on inheritance needs to appeal to hypothetical insurance choices, even granting that whether persons gain any inheritance is largely a matter of brute luck.

None of the concerns raised in this section demonstrate that hypothetical insurance choices *can not* be used as a counterfactual guide for designing the sort of inheritance tax that would protect society against class hierarchy. But they do not enjoy the same sort of support that Dworkin was able to provide for its application in other contexts. There are two good reasons, each compatible with Dworkin's more fundamental commitments, for keeping the treatment of inheritance away from hypothetical insurance. First, it is just difficult, theoretically speaking, to work out a view on which inheritance tax models hypothetical desires to protect against bad inheritance luck, in ways that neatly coincide with the sort of design that would prevent class hierarchies from emerging. Second, a number of the theoretical reasons for adopting the approach at all seem to be absent, or weaker, with respect to inheritance than with respect to the more straightforward problems of market regulation. It may be that invoking the hypothetical insurance approach remains tempting just because inherited wealth is one of those practices that result in some people having better or worse brute luck than others. But the presence of differential brute luck was never supposed to be a fundamental theoretical motivation for employing the hypothetical insurance approach. Readers of Dworkin will already be aware of the vehemence with which he has made this point in response to certain critics.²⁴ All things considered, there

²²This observation has been more fully developed against Dworkin by Michael Otsuka (2002, 2004), who observes that gifts and bequest have a tendency to introduce envy into the resource distribution in ways that market exchanges need not. Otsuka's point raises a very important question about a way in which gratuitous (non-market) transfers of resources are problematic for Dworkin. Transfers of this sort are insensitive to the opportunity costs of third parties, who do not have the opportunity to bid for the transferred themselves. Dworkin remained unmoved by Otsuka's criticism; see Dworkin (2004: 352-353), but did not, to my mind, give an entirely satisfactory explanation of how to solve this problem. Some more discussion of the disagreement between Dworkin in Otsuka can be found in Williams (2004). Lazenby (2010) shows that the general problem of gift-giving (construed in ways inclusive of bequests) is likely to dog any sort of egalitarianism in which Dworkin's distinction between brute and option luck has direct implications for whether a distribution is just.

²³I admit that this claim may be easier to accept with the view that class injustice involves oppression as well as low mobility, but I think it is correct for either view.

²⁴Dworkin (2004b) stresses that ideas about equal concern, the envy test, and hypothetical insurance do the fundamental theoretical work in *equality of resources*. He denies the "much more extreme" claim that egalitarian justice aims at eliminating inequalities deriving from differential brute luck. At most, he concedes that "the distinction between people's choices and their circumstances is of central importance to justice."

is no really strong case for extending the idea of hypothetical insurance to the problem of inherited wealth apart from the fact that it is merely one convenient way of refining the idea that something needs to be done about differential levels of brute luck. Apart from the fact that this is not obviously what is unjust about the failure to restrict inheritance in the first place, the difficulties with invoking the hypothetical insurance at least motivate the search for some other source of theoretical guidance when seeking to design a way of regulating bequest.

4. Class, Prejudice, and Independence

Sovereign Virtue, Chapter 3, addresses a variety of principles that are designed to supplement equality of resources, so as to provide the right sort of bridge between equality of resources and the more fundamental requirement of equal concern. Dworkin derives various liberties and constraints on the use of personal resources, which help resolve the indeterminacy of the envy test. This responds to the fact, noted earlier, that the envy test does not select a unique resource distribution, and does not rule out certain uses of resources that Dworkin plausibly identifies as being the sort of thing that a state should prohibit if it is to show equal concern for all its citizens. There is insufficient space for me to work through each of these principles or comment fully on the general objectives of the chapter. But one principle that deserves special mention is Dworkin's principle of independence. This principle is motivated by the need to prevent people from using their resources in ways connected with prejudice.

Dworkin motivates the independence principle partly by noting one important limit of the hypothetical insurance approach:

Compensation schemes based on hypothetical insurance markets, useful though they may be in ameliorating other forms of handicap, are plainly inappropriate in combating the effects of prejudice. We must find some other way, compatible with the other goals and constraints of equality of resources, to place victims in a position as close as possible to that which they would occupy if prejudice did not exist.²⁵

An example accompanying this quoted passage portrays a coordinated group of racists who attempt to buy housing land for the purposes of excluding black residents. Since this use of resources is motivated by prejudice, it ought to be prevented by the state, who can pass laws that combat it. Dworkin's point here, which seems absolutely correct, is that compensation (when understood as grounded in hypothetical insurance purchases) is simply the wrong way of trying to help victims of prejudice. This is not to deny that *some* sort of compensation might be appropriate in these cases—for example, requiring wrongdoers to pay

²⁵ Dworkin (2000: 162).

their victims as part of being punished. The inappropriateness lies with treating things like racism as a “fixed and given threats,” in the manner that we treat bad genetic luck. Instead, racism is just something that ought to be stamped out as part of the pursuit of equal concern.

Dworkin’s discussion of racism indicates his awareness of the limits of the envy test and, therefore, the hypothetical insurance approach. Now, it is not obvious why the impact of racism on the resource distribution should differ from the impact of social class. This is especially true if social class, like racism, involves prejudice of a sort that impacts resource distribution. Very likely it does, particularly if class hierarchy involves oppression as well as low mobility. One plausible way of further filling out an account of class injustice is to appeal to the antagonistic relationships that form between segregated demographic groups. The relevant sense of segregation here is a broad one: In addition to strict or legally enforced geographic segregation, it covers the more subtle segregation that occurs when members of different groups are educated in different schools, occupy different professional roles, and socialize apart from each other. Any combination of these varieties of segregation can help maintain, and sometimes constitute, oppressive hierarchies of social class. One of the simpler causal mechanisms operates if segregation leads members of different social classes to become ignorant of the basic features of each other’s lives. This leads members of groups to stereotype each other as the lack of understanding necessitates a greater reliance on heuristics. Since the stereotyping of disadvantaged groups tends to be negative, it can lead to demonization that expresses profound disrespect for members of lower class group, and compounds the disadvantage that gave rise to it in the first place (often perpetuating a cycle of yet more stereotyping).²⁶

What this means is that the injustice of class hierarchies is, in part, constituted or unavoidably correlated with the operation of prejudice. This is evident in a host of examples. Certain politicians and parts of the media demonize the poor (which we may treat roughly as a class group) as being lazy welfare cheats who prefer to live off the state than to find work. A plausible sociological explanation is that such demonization succeeds only because the poor *appear* to be lazy *from the perspective* of the better off. This is because better off members of society are ignorant about the incompetency of the institutions tasked with implementing welfare policy. Someone who has never been unemployed, or formed friendships with unemployed persons, will likely fail to appreciate why it can be rational to turn down an offer of short-term paid work, on grounds that the benefits system is so fallible that it is a safer option to stay on it, rather than risk a long delay in getting benefits reinstated after the short period of paid work is over.²⁷

²⁶This paragraph has been guided by Anderson’s (2010) discussion of the mechanisms behind oppressive social hierarchies. Anderson’s work focuses on racial segregation in the United States, but much of the conceptual framework does not exclude other sorts of hierarchy.

²⁷Some similar concerns to these are raised in Wolff’s (1998) discussion of why conditional welfare benefits require the badly off to undergo scrutiny and shameful revelations about their private affairs.

Class hierarchy is not, of course, wholly like racial hierarchy.²⁸ Often, people do not realize that they are participating in the relevant form of stereotyping: Government elites who think the poor must be given incentives to take paid work are often benevolent but simply very ignorant, with often disastrous effects. Dworkin's example of the racist landowners suggests that he has in mind prejudice as a very conscious phenomenon. But to insist on prejudice being conscious lacks motivation, and is not in any case suggested by anything Dworkin says. Plenty of racial prejudice is unconscious, to the extent that persons exercising it are distressed and mortified when it is revealed to them. More important, it is hard to believe that by letting a prejudice be exercised, the state succeeds in treating its citizens with equal concern, just because this prejudice is unconscious. After all, prejudice does not need to be conscious in order to "destroy some people's lives." This sort of outcome is a very real possibility in cases in which class prejudice leads people to use resources in ways that are very bad for others. To treat such profound consequences as detached from the resource distribution is implausible and under motivated, and certainly not ever insisted on by Dworkin. If such detachment could succeed, it would probably only show that there is something wrong with conceiving of requirements of justice as things that regulate the resource distribution in the first place.

I have been critical of Dworkin's attempt to address the problem of inheritance within the scope of his hypothetical insurance approach. But my criticisms help lead to the suggestion that Dworkin may have done better to locate the treatment of gift and bequest in the same place that he located the racially prejudiced use of resources. Dworkin's response to the racism example is to propose what he calls the independence principle. As Dworkin formulates this principle, it imposes on the use of resources a set of "constraints necessary to protect people who are the objects of systematic prejudice from suffering any serious or pervasive disadvantage from that prejudice."²⁹ Given the very general formulation that Dworkin

²⁸In earlier work, Dworkin drew a distinction between external and personal preferences (1977: 234-238). Roughly speaking, *external preferences* concern the resources or opportunities assigned to others whereas *personal preferences* concern only those held by oneself. Dworkin makes it explicit that, if external preferences have racist content, their accommodation by the state will be incompatible with equal concern for citizens. This view remains present in *Sovereign Virtue* (298: n.12). It is not entirely clear that *all* external preferences are incompatible with equal concern, although some of Dworkin's formulations imply the weaker claim that it is always unfair for external preferences to influence the resource distribution. A preference to bequeath meets the broad, formal definition of an external preference since it concerns the assignment of goods and opportunities to another person. But it is also a preference about how to use one's own resources, e.g., not to spend them down prior to one's death. What's more, preferences to bequeath lack the overtly contemptuous content of a racist preference to avoid having black neighbors. My reasoning in the above paragraph is guided by the view that accommodating external preferences violates equal concern so long as such accommodations are causally related to the emergence of prejudice or similarly objectionable elements of oppressive hierarchy. This allows that such preferences do not aim at oppression so far as their content is concerned. It also allows that some other external preferences do not violate equal concern at all.

²⁹Dworkin (2000: 161).

uses here, it remains plausible that bequest could be fitted into its scope, particularly if the reason to restrict bequest is derived in some way by requirements to combat class hierarchy, *and* class hierarchy is understood as a phenomenon involving oppression, and not just lack of mobility between income levels.

This relocating of gifts and bequest retains the spirit of Dworkin's liberal egalitarianism, which seeks a compromise between restricting the tendency of bequest to make distribution sensitive to brute luck, while allowing parents the freedom to devote their lives to supporting their children's future. There is every reason to believe that *some* amount of bequeathing wealth is compatible with reining in the growth of class hierarchy and the prejudices to which it gives rise (construed as involving stereotyping, demonization, and so on). Given this, there is reason to believe that the case for a substantial inheritance tax could be just as strong under the independence principle as Dworkin took it to be under the hypothetical insurance approach.

5. Conclusion

Dworkin's position on inheritance rests on an important diagnostic insight, but he is led to his preferred solution due to a certain amount of naïveté about what the diagnosis really contains, and perhaps a failure to have seen the further advantages of other aspects of his theory of justice. But Dworkin's work on inheritance is driven by precisely the right sort of concern, which is that unregulated bequest leads to a socially stratified society, in which class distinctions corrode social life and make people's fortunes all the more dictated by arbitrary facts about their ancestry. Further progress in the search for a compelling egalitarian treatment of bequest needs to proceed by way of an intensified focus on exactly how the practice of inheritance perpetuates social hierarchies of class. Dworkin's own reflections on inheritance take some important steps in this direction, perhaps more so than any other egalitarian philosopher of his generation. Although it is not the most substantial or perhaps successful piece of his enormous contribution to legal and political theory, it would be a genuine loss to scholarship on inherited wealth and social justice if it were entirely overshadowed by the more major themes in his rightly celebrated contributions to legal and political philosophy.

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