In Defense of "Pure" Legal Moralism

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Most commentators on the Hart-Devlin debate agree that Hart was devastatingly effective in his critique of Devlin's defense of the legal enforcement of a society's positive morality. The claim that social disintegration looms if we fail to enforce social norms forbidding homosexuality is, as Hart noted in his oft quoted jibe, about as plausible as the Emperor Justinian's belief that homosexuality causes earthquakes.[1] But Hart's demolition of Devlin's argument left unscathed the case for a "legal moralism" that ignores positive morality and appeals directly to critical morality. That legal moralism affirms two theses. The first, what R.A. Duff has called "negative" legal moralism,[2] is:

> i) For the criminalization of any type of action to be justified, it is necessary that it be a culpable moral wrong according to true or critical morality.

I believe that i) ought to be rejected, but I won't argue for that point here. My concern will be with the legal moralist's other thesis. If that thesis were that culpable wrongdoing is *sufficient* to justify a criminal law targeting it, then it would be obviously false, since it is evident that many wrongs should not be criminalized.[3] These include personal, harm causing wrongs that should be subject to the civil rather than the criminal legal process—breeches of contract and torts. The plaintiff in such cases is the aggrieved individual rather than "the People" or "the Crown," and we leave it up to her to decide whether to initiate legal proceedings against the party who wronged her.[4] Other immoralities that should not be criminalized are *minor* personal wrongs that cause little or no significant harm (e.g. calling balls "out" that I see have clearly hit the line in a "friendly" tennis match), and even some personal wrongs that may cause greater harm (e.g. a woman's lying to a man about her affection for him so that he will agree to have sex with her; the public advocacy of racist or sexist views). The aggrieved individuals in these latter cases should not have recourse to either civil or criminal remedies because the moral costs of society's trying to provide them outweigh the benefits. Criminalization in particular can carry heavy costs in terms of restrictions on liberty, invasions of privacy, the economic expense of maintaining a criminal justice system with police, courts, and prisons, and the risk

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[1] Hart 1963, p. 50.

[2] Duff 2013.

[3] *Contra* Michael Moore (Moore 1997, p. 645). Moore says that he supports a legal moralism committed to this sufficiency claim, but he seems to assume that a "sufficient" reason is merely a good one, whereas I assume it has to be a conclusive one.

[4] Whether crimes and torts have different "moral essences," so to speak, and if so what they are, is disputed. Marshall and Duff 1998 hold that crimes are "public" while torts are "private" wrongs; Jean Hampton (Hampton 1994) supposes that with crimes a "retribution response by the state" would be appropriate, whereas with torts such a response is inappropriate. Note that if the distinction in question is crime/tort, then misdemeanors and offenses (e.g. littering) as well as felonies count as "crimes" and the criminal sanction may be a small fine rather than any sort of "hard treatment."

that the innocent will be made to suffer. A ban on racist or sexist speech raises legitimate worries about slippery slopes and chilling effects. The criminalization of activities that critical morality condemns but positive morality allows is likely to produce other costs, as evidenced by the example of Prohibition in the U.S. in the 1920's. These may include the creation of black markets, increased opportunities for the corruption of law enforcement, inconsistent enforcement and abuse of prosecutorial discretion, and perhaps most important, a weakening of the public's faith in the criminal justice system. Following Robert George, I'll call the many costs of this type "prudential."[5]

Since immorality clearly is not sufficient for justified criminalization, it is uncharitable to define "legal moralism" as claiming that it is. A better definition commits it instead to:

> ii) There are no act types that we can know *a priori* should not be criminalized. In particular, if critical morality judges some act type to be harmlessly wrong, then it should be criminalized unless the prudential costs of doing so outweigh the moral benefits. In some cases the costs do not outweigh the benefits.

ii) is what Joel Feinberg calls "pure" legal moralism (PLM).[6] His own theory of criminalization is at odds with legal moralism defined in terms of i) and ii) because it rejects both theses. That theory—like Hart's, a variant of the "one, very simple principle of liberty" that J.S. Mill defended in *On Liberty*—holds that criminalization is permissible only to prevent "wrongful harm or offense to others" and insufficiently voluntary acts that risk grave harm to self ("soft" paternalism).

Feinberg's version of the "harm principle" is only one of many, differing from the typical libertarian's in a couple of respects worth noting. First, the libertarian's assumes that legal moralism's first thesis is true and acts must directly, wrongly cause harm (or the excessive risk of it) to others (i.e. be rights violations) to be eligible for criminalization. Feinberg's only requires that the acts be such that preventing them would prevent wrongful harm to others. This is one reason why Feinberg must reject i). Thus, suppose that a ban on all private gun ownership is the most effective means of preventing Columbine-like massacres by lunatics. In that case Feinberg's harm principle permits it while the libertarian's does not. (Of course the fact that his harm principle permits it doesn't mean that it should be enacted; perhaps the ban has other costs that outweigh the good of reduced massacres). Second, the libertarian assumes that all natural or noncontractual rights are negative. Thus, a failure to effect an easy rescue of someone in imminent and grave peril may be immoral but is not a

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[5] George 1995. Prudential costs stand in contrast to rights-based ones, e.g. that the law violates a right to fundamental liberty, "personal sovereignty," a "right to do wrong," or the like.

[6] As he notes (Feinberg 1990, pp. 8-10) there is another "impure" variety of legal moralism that appeals to some version of the harm principle. Devlin's contention that the failure of criminalize flagrant violations of positive morality will lead to social disintegration is an example. ii) is a form of what Duff calls "positive" and "extreme" legal moralism.

rights violation, and thus, is not properly criminalized by the state. Feinberg holds that there is a right to easy rescue against others, so his harm principle (like Mill's) permits Good Samaritan laws. To my mind these differences make Feinberg's version of the principle considerably more attractive than the libertarian's. Both accept the *volenti* maxim ("that to which one consents does one no wrong").

Feinberg claims not only that his theory of criminalization is correct but that it is an essential part of the liberalism that he supposes is the true political morality; PLM and hard paternalism have implications that no liberal can accept. Elsewhere I've defended some hard paternalism as acceptable to liberals.[7] In this paper I argue that Feinberg was wrong to suppose that liberals must oppose any criminalization of "harmless immorality." The problem with a theory that permits criminalization only on the basis of the harm and offense principles is that it is *underinclusive*, ruling out laws that most liberals believe are justified. One objection (Arthur Ripstein's) is that Feinberg's theory is unable to account for the criminalization of harmless personal grievances. Another (Larry Alexander's and Robert George's) is that it cannot account for public decency laws. I shall reject both of these underinclusiveness objections in favor of one that focuses on the "free floating evil" of corpse desecration. Liberals need PLM to explain their support for a criminal ban on mistreatment of the dead. I shall also argue that while deterrence is plausibly regarded as the primary rationale for criminalizing and punishing wrongs like murder or rape, it is not plausibly regarded as any part of the rationale for criminalizing free floating evils. The point of punishing corpse desecrators has to be either retribution or the promotion of virtue/discouraging of vice. In the final sections of this paper I turn to Feinberg's reason for rejecting all PLM, namely, that competent adults have a right to personal sovereignty or autonomy, and the state's duty to respect that right trumps the desirability of punishing or reducing the vice associated with harmless immorality. I argue that Feinberg's argument here fails because it exaggerates the right's strength and scope.

Types of harmless immorality; free floating wrongs and evils

Feinberg distinguishes three kinds of harmless immorality: i) acts that wrong another individual despite the fact that they do not harm him (set back his interests, reduce his well-being)—"harmless grievances"; ii) "impersonal" or non-grievance wrongs that are connected to welfare; and iii) impersonal wrongs not connected to welfare, or "free floating evils."[8]

An example of a harmless grievance is a benevolent lie. Kant held that the liar wrongly disrespects the person lied to despite the latter's benefit and the former's altruistic intention. On the question whether harmless grievances are possible, Feinberg agrees with Kant. He holds that hard paternalistic interference with another competent adult's fully voluntary choices wrongs him even if it benefits him in the long run, because it violates his right to personal

[7] See Scoccia 2013.

[8] See Feinberg 1990, p. 19 for a helpful chart.

sovereignty or autonomy.[9] Assuming that the *volenti* principle is true, this kind of harmless immorality is possible only where the person wronged does not consent to the action.

The second kind of harmless immorality—"welfare connected non-grievance evils"—is of two types. The first is any act that increases the total amount of harm in the world but there is no individual who would have been better off had the act not been performed. Feinberg offers Derek Parfit's example of conceiving a child that one knows will be severely disabled but just barely better off existing than not, instead of waiting and conceiving a different but "normal" child. Feinberg agrees that conceiving in these circumstances is an impersonal wrong, and he even concedes that wrongs like it are properly criminalized—making them an exception (the sole one, he thinks) to his theory.[10] The second evil of this type involves harms to others with their consent. Victim consent precludes personal grievance, but the harm suffered is still an evil to be regretted. A possible example is the sale of meth by a drug dealer to a user desperate for a fix.

The third kind of harmless immorality, non-grievance evils not connected to anyone's welfare, is a motley bunch. Some of Feinberg's own examples are: having an evil intention that one doesn't act upon because the opportunity never presents itself; some false belief (e.g. that a famous historical figure was evil when in fact he was highly virtuous); the "wanton, capricious squashing of a bug in the wild"; and the extinction of a species.[11] Feinberg also counts some exploitation as a free-floating evil. Most exploitation is coercive or deceptive and involves wrongful harm to the person exploited, but in some cases these features are missing and what "offends the moral sense" is simply the exploiter's benefitting in the manner or circumstance he does. The profit by the meth dealer is a gain of this sort. Some moral conservatives regard homosexuality, the enjoyment of pornography, fornication, and public indecency, as well as all

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[9] The right for Feinberg protects only acts that are "sufficiently" voluntary given the risks of harm to self they create. If we thwart someone's choice to drink coffee to which he has just added strychnine in the mistaken belief that it was sugar, or to chop off his own hand with an axe while in a state of drug induced temporary insanity, we are not overriding his autonomy for the sake of his welfare; the right to autonomy simply does not protect substantially involuntary choices like these. Thus, interference with such choices for the person's own good is "soft" paternalism. "Hard" paternalism imposes on a competent adult ("for his own good") values or preferences that he would disavow when factually well informed and thinking clearly. An example is forcing a Jehovah's Witness to submit to a life-saving blood transfusion.

[10] See Feinberg 1990, pp. 26-33 and 325-8. "No other non-grievance evil has as much weight as this one, derived from unavoidable nonconsensual suffering. Liberalism must bend to permit an exception in this special kind of case. I think that it can bend without breaking." (p. 33)

[11] Feinberg 1990, pp. 23-5.

suicide and suicide assistance, as free floating wrongs.[12] Of course utilitarians and defenders of other welfarist moral theories deny that any free-floating evils exist. According to them all putative examples of it either are not evils at all or are evils only because they reduce welfare in some non-conspicuous way.

In rejecting PLM Feinberg is denying that criminalization is ever justified to punish and/or prevent any of the three types of harmless immorality. If liberalism is the true political morality but Feinberg's theory of criminalization is false, it must be false either because it permits laws that most liberals condemn (making it overinclusive), or it forbids laws that most liberals support (making it is underinclusive). I believe that Feinberg's theory is false for the latter reason. Before presenting the version of the objection that I think demonstrates this, I want to review two versions of it that fail.

Harmless trespasses and rapes

A possible underinclusiveness objection to Feinberg's theory is that some harmless immoralities are personal wrongs despite the fact that the "victim" has consented, and some of them are properly criminalized. This objection assumes that the *volenti* principle is false. In some cases the wrongdoing may set back important interests of the victim, in which case the rationale for restricting liberty can just as easily be "indirect" (or what Gerald Dworkin called "impure") paternalism as the prevention of harmless immorality. A law forbidding meth dealing is a possible example. In other cases the consented to personal wrongs might involve indignity rather than prudential harm, such as "dwarf tossing" or (in the view of some) prostitution. In all of these cases the "victim" might also be subject to blame for ignoring a *duty to self*. I want to set aside this version of the objection. It may have some merit, but I won't consider it any further.

An underinclusiveness objection that I want to consider and reject is consistent with the *volenti* principle. It focuses on personal grievances that are unconsented to but supposedly involve no prudential harm to the victim. Arthur Ripstein has argued that trespass can be a wrong of this type. His example:

> I let myself into your home, using burglary tools that do no damage to your locks, and take a nap in your bed. I make sure everything is clean. I bring hypoallergenic and lint-free pajamas and a hairnet. I put my own sheets and pillowcase down over yours. I do not weigh very much, so the wear and tear on your mattress is nonexistent.

Ripstein claims that the "harm principle cannot provide an adequate account of either the wrong I commit against you or the grounds for criminalizing it,"

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[12] Suicide and suicide assistance as supposed to violate the "sanctity of human life" (SHL). I take the SHL doctrine to be that it is always wrong intentionally to kill or facilitate the death of any innocent human being, whether or not the person consents and whether or not she is better off dead. While some violations of SHL are forbidden by the harm principle, others (e.g. assisting the suicide of a terminally ill person who autonomously requests the assistance) if wrong have to be free floating evils.

because there is no harm to you "on any plausible conception of harm."[13] Another example that may be used to press the same objection is the "pure rape" described by John Gardner and Stephen Shute: a woman is raped while unconscious; the rapist wore a condom; she never knows that she was raped; etc.[14]

The claim that the "pure rape" is harmless seems to presuppose a hedonistic account of harm, interests, or prudential value. On a want-based or preferentist account according to which something is bad for you if and only if it frustrates some of your informed, self-regarding preferences, the rape is harmful because it thwarts such preferences. One's preferences can be thwarted without one's ever knowing it. Feinberg in particular defends a want-based account of interests that allows for this reply to the objection.[15]

Ripstein's trespass is more puzzling than the "pure rape" because he is not assuming a hedonistic account of harm. He can't, because he supposes that the bed's owner is not harmed even if he learns of the trespass and is upset by it. He argues that if the trespass itself is not harmful, then fear that it will happen or anger that it already has cannot bootstrap it into one.[16] But Ripstein's claim that the trespass is harmless "on any plausible conception of harm" is simply false: the trespass can be plausibly thought to harm the bed's owner in the same way that "pure rape" harms the unconscious woman, namely, by thwarting self-regarding preferences.

There is another problem with Ripstein's objection. Suppose that the owner of the bed is indifferent to unauthorized use of his personal property (toothbrush, underwear, etc.) so long as it is not damaged. Suppose that some woman is indifferent to being raped as long as it doesn't damage her health and she never finds out about it. Even assuming that such cases are not *merely* conceivable and there are a few actual instances of them, it does not follow that Feinberg's theory is unable to justify a criminalization that extends to them. If *most* tokens of X involve significant wrongful harm (or risk of it) to others and the only feasible way for the criminal law to reduce their number is to forbid all X including the few harmless tokens of it, then Feinberg's harm principle permits a ban on X.

To see why the harm principle (at least Feinberg's version of it) has to be construed in this way, consider the example of setting the speed limit on a stretch of road at 55 mph because the average driver in the average car poses an excessive risk of harm to others when he exceeds it. Suppose that a small minority of drivers, including Mario, is exceptionally skilled, with quick reflexes and in cars with superior tires and braking systems. When they drive on this road at 60 mph they pose less of a danger to others than the majority of drivers

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[13] Ripstein 2006.

[14] Gardner and Shute, 2000. Though they present "pure rape" as an example of harmless grievance, they do not think its criminalization poses a problem for defenders of the harm principle.

[15] See Feinberg 1984, chapter one.

[16] Ripstein 2006, p. 220.

traveling at 50 mph on it. Surely Feinberg's harm principle permits the speed limit and its enforcement against Mario.[17] Of course the law could forbid "driving at an unsafe speed" rather than "driving in excess of the posted speed limit." But such a law would not draw a bright enough line between what is and is not legally permitted (thus running afoul of the principle of legality), and for this reason is likely to lead to more accidents (and fear of accidents) than a law that sets a clear, unambiguous speed limit.[18] Surely a similar point is telling against a law that forbids only harm causing rape rather than all rape: it would lead to more harmful rape and more fear of rape among women.[19]

Public indecency, moral conservatism, and free floating evil

Consider next laws forbidding public indecency (nudity, copulation, urination, etc.). Though some of the acts that these laws target may in some circumstances raise the "harm" concerns of public health and hygiene, the acts are forbidden even when such concerns are not implicated.[20] Because Feinberg supports such laws (as do other liberals, including Mill), cannot plausibly defend them *via* the harm principle, but is unwilling to countenance any PLM, he amends Mill's theory so that it permits criminalization to prevent wrongful offense as well as wrongful harm to others. Of course an unqualified offense principle would have many patently illiberal consequences, so Feinberg qualifies it in several ways. In order for acts that offend others to be personal wrongs and properly subject to criminalization, they must cause offense that is intense, would be felt by the "average" or "reasonable" person in the circumstances, is due to actually witnessing the offensive act, and is not easily avoidable.

In claiming that public decency laws can be justified *via* this offense principle, Feinberg is claiming that the publicly indecent person is more like the

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[17] The case of Mario shows that the first, "negative" half of legal moralism has to be construed in a similar way, that is, as permitting criminalization of a type even when some tokens of it are not culpable wrongs. Duff supposes otherwise; he would say that Mario is guilty of the *mala in se* of "civic arrogance," that is, of supposing that *he knows* that he is among the minority whose speedy driving is not excessively risky. Douglas Husak ably criticizes Duff's view (Husak 2008, pp. 103-119). Husak's own view (as well as the libertarian's version of the harm principle) seems to imply (absurdly, I would have thought) that enforcement of the law against Mario is wrong.

[18] The "principle of legality" permits punishment only with "due process," that is, a fair trial with a finding of "guilty" for having violated a prior, public, and sufficiently unambiguous law.

[19] This is why Gardner and Shute think that the harm principle permits the criminalization of "pure rape." For reasons he does not explain, John Stanton-Ife (Stanton-Ife 2010) finds this defense of the harm principle feeble.

[20] Consider Feinberg's example of the man on a bus who publicly defecates into clear plastic bags that he then seals and properly disposes of. He is no more a danger to public health than the man who walks his dog in the park and cleans up after it.

public nuisance who disturbs others with his reeking odors or obnoxious noises than, say, an interracial couple holding hands publicly in the plain view of racial bigots. For the bigot offended by the sight of this couple is no less offended by the bare knowledge that such couples exist, and his being offended depends on his belief that their intimacy is wrong or "unnatural." The offense caused by the person who is a nuisance requires some sort of direct experience of his behavior, and it does not presuppose any belief that the behavior is immoral regardless of whether others have direct contact with it. Feinberg's claim is that the cases covered by public decency laws—e.g. a husband and wife stripping naked in a crowded public park—are like the nuisance cases because we think that there is nothing wrong with the couple's nudity in private. It is wrong only because it occurs in circumstances where it is likely to disturb (embarrass, disgust, distract, cause unwilling voyeurism in) others, interfering with their own use of the park. Its offensiveness is what makes it wrong rather than its believed wrongness making it offensive.

Robert George and Larry Alexander argue that this is a mistake. The only reason why public nudity (copulation, urination, etc.) offends is that it is thought to violate a moral norm. The norm in question forbids the acts only when done in public, but it forbids them whether or not they produce offense in nearby spectators. Thus, Alexander claims, "eliminate the norms and you eliminate the offense."[21] George says, "moral conservatives consider public nudity immoral even on designated nude beaches where, presumably, no one present is in danger of being offended. The reason they consider public nudity immoral—regardless of whether it gives offense—is that it is in its essential nature immodest. And immodesty is, in their view, immoral."[22]

"Immodesty" as George describes it would be free floating evil, making the moral conservative's support for a ban on public nudity an instance of PLM. Note that it misrepresents this conservative's objection to say that she favors the ban to protect herself or other like-minded persons from being offended at the bare thought of public nudity. To put the matter that way improperly "subjectivizes" it. Libertarian leaning economists make this mistake when they treat morals laws as though they were nothing more than an attempt to satisfy the "moral preferences" of their supporters.

George and Alexander suppose that the offense occasioned by public nudity is in some people parasitic on their belief that conservative sexual norms are true. I grant this and concede that Feinberg's offense principle fails to capture the reasons why *these* individuals support public decency laws. But the important question is whether their reasons are good ones. Should we think that public nudity *really is* a free floating evil? It seems to me that we should not. No doubt the distraction, embarrassment, etc. that many experience on seeing nudity in public is due in large part to socialization and is not an innate, hard-wired response. And perhaps a widespread acceptance of moral conservatism in the past explains why I and others got socialized so that we respond to it in

[21] Alexander 2008, p. 139.
[22] George 1999, p. 307.

this way. But that we respond in this way is not enough to make *us* moral conservatives or make the moral conservative view about why public nudity is wrong correct. I (and many others) reject it. We judge public nudity to be immoral only insofar as the nudists are indifferent to whether they pose distractions to and cause embarrassment in others. The bare thought of nudists on secluded public beaches with posted warnings does not offend us in the least.

What if the "we" just referred to is only a minority, and the majority supports a ban on public nudity on the basis of moral conservatism and PLM? Then it follows that Feinberg's theory of criminalization fails to capture the reasons why the majority supports the ban. But that is hardly an objection to his theory. To avoid the underinclusiveness objection that George and Alexander lodge, Feinberg needs to show that his theory supports the ban, not that it agrees with the reasons why the majority supports it. Even if the "average" person in society were a moral conservative, it would remain the case that a ban on public nudity satisfies the offense principle's requirements. After all, conservatives too will suffer what the offense principle counts as personal wrong when they have unconsented to and not easily avoided direct experience of public nudity and then are deeply offended. According to Feinberg it is to protect them from that personal wrong, not prevent acts that they judge impersonally immoral, that the criminalization of public indecency is justified.

Feinberg needn't *deny* that public nudity is the free floating evil that moral conservatives allege. He only has to deny that moral conservatism and PLM are *needed* to justify a ban on it. Indeed, Feinberg's primary objection to all PLM is consistent with the possibility that moral conservatives are correct in holding that not just public nudity, but fornication, "homosexual sodomy," and any suicide or suicide assistance, are heinous free floating evils. I'll come to that objection and what I think is wrong with it shortly. Here I simply want to register my own belief that criticizing moral conservatism is the best, most direct way for liberals to oppose traditional morals laws that target sex and suicide. We should reject conservative legal moralism not because of its legal moralism but because of its conservatism. Insofar as traditional Judeo-Christian morality and Thomistic natural law theory imply that fornication, homosexual relationships, or assisted suicide for the terminally ill are free floating evils, they are simply mistaken.[23] "Justificatory liberals" who hold that liberal opposition to any morals laws ought to rest on "neutral" (or "public") reasons cannot endorse this objection to conservative legal moralism, since the claim that Thomistic natural law theory is false is no more neutral than the claim that it is true. But those liberal theorists who deny that "neutrality" here is possible and/or desirable can endorse it.[24] This objection does not rule out the permissibility of all PLM and leaves open the possibility of a "liberal legal moralism." Indeed—and this is the most important point—it is not really an objection to PLM. After all, PLM is *not* the claim that

[23] As Michael Moore has noted, "it trivializes morality to think that it obligates us about what organ we insert into what orifice of what gender of what species." (Moore 1997, p. 756).

[24] See the conclusion of Dworkin G. 1999.

some acts *mistakenly believed* to be harmlessly wrong are properly criminalized. It's the claim that some acts that *really are* harmlessly wrong should be criminalized.

The desecration of corpses and duty to respect humanity

To defend PLM and its consistency with liberal political morality, one needs to find an example of an act type that liberals agree should be criminalized but whose criminalization cannot be justified by appeal to Feinberg's harm or offense principles. We rejected harmless rapes and trespasses, as well as public indecencies, as viable candidates. Michael Moore offers three others: cruelty to animals, causing species extinctions, and mistreatment of the dead.[25]

Cruelty to animals is not a counterexample because it is possible to formulate the harm principle so that it permits its criminalization. Feinberg supposes that the acts forbidden by animal cruelty laws (e.g. blood sports) gives its animal victims a harm-based grievance (even if they are unable to *articulate* it), while the myriad other ways in which humans exploit animals, such as using them in lethal biomedical experiments, gives them no grievance. Animals have "an interest in freedom from cruelly or wantonly inflicted pain" and the law should "count as 'harm' all and only invasions of *that* interest."[26] Perhaps the "speciesism" of this view makes it problematic. But if there is a problem here, it exists for anyone who wishes to defend animal cruelty laws but allow the other forms of animal exploitation. It is not a reason to think that a defense of animal cruelty laws based on PLM is superior to one based on a harm principle rigged in the way Feinberg proposes.

I pass over Moore's second example in order to devote more space to his third—the mistreatment of the dead. Feinberg's explanation of how his theory can support a criminal ban on it is utterly unconvincing. The harm principle can support a ban on the mistreatment of those who, when alive, had a preference that their corpse be cremated or buried rather than chopped up and fed to animals.[27] It may also support a ban that extends to those with close relatives who would be deeply upset by mistreatment of their beloved's corpse. But the ban that liberals support is not limited to just them. It applies to all corpses, including those who when alive were completely indifferent to their posthumous treatment (as well as infants and others incapable of having any wishes about the matter) and those whose death is unmourned by anyone. The offense principle might support a ban on the public desecration of their corpses but not one that extends to their private desecration. Feinberg suggests that the harm principle supports a ban on the mistreatment of anyone's corpse because

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[25] Moore 1997, p. 646.

[26] Feinberg 1973, p. 41.

[27] Feinberg supposes that they are harmed when alive inasmuch as their preferences about their posthumous treatment are frustrated (though of course they don't know it); see Feinberg 1984, pp. 92-3. This is another case (in addition to Ripstein's trespass and the "pure rape") where hedonism cannot while preferentism can account for the existence of harm.

mistreating corpses tends to corrupt one's character, rendering one more likely to violate the rights of the living.[28] It is surprising that he would suggest this defense, since he is usually skeptical of the very general and speculative psychological claims on which slippery slope arguments like this depend. (For example, he is skeptical of the claim is that if we legalize any physician assisted suicide or voluntary euthanasia, we will become so desensitized to the evil of killing that eventually we'll come to support involuntary euthanasia for the elderly and disabled.) In any case such a defense is unpersuasive.

Another possible defense of the ban employs a strategy that might also be used to defend a ban Irving Kristol's imagined gladiatorial fights to the death before cheering throngs in Yankee Stadium, or a ban on misogynistic pornography. It defends them on the grounds that they satisfy the "associational" preferences had by many: "I don't want to live amongst others who enjoy gruesome blood sports, or men with violent sexual fantasies about women, or people who mistreat the dead; I simply don't want them as my neighbors."[29] Corpse desecration causes a diffuse harm to many people by thwarting their preferences to inhabit a community in which others share their attitudes about how the dead should be treated.

I doubt that this attempt to defend the ban is successful. One reason to doubt it is that it seems improperly to "subjectivize" our objection to corpse desecration. The presence of others in our community willing to mistreat the dead to make a buck may well thwart some of our associational preferences. But the only reason why it thwarts them is that we judge such people to be depraved, and we don't want depraved neighbors. Not all associative preferences have this moralized basis, but these seem to. They *presuppose* the judgment that mistreatment of the dead is an impersonal wrong, the disrespecting of humanity. Another reason to doubt the strategy's success is that it is unclear whether associational preferences are sufficiently personal or self-regarding that their frustration should count as harm. Does the racist suffer harm when his desire not to live in a *world* in which there are interracial couples is thwarted? Surely that preference is too "external." How geographically near must others be to count as one's "neighbors" so that one's preferences about them are sufficiently "self-regarding"?

I conclude that the moral judgment needed to justify a ban on corpse desecration is one that deems it an impersonal, non-welfare related wrong—disrespect for humanity/human life. The claim that this is a free-floating evil assumes a "non-teleological" rather than "teleological" conception of intrinsic value.[30] On that conception it is concrete individuals rather than lives, worlds, or states of affairs are the bearers of value. Non-teleological value (or what bears it) is to be *respected* rather than *increased* or maximized. Thus, the claim is not

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[28] Feinberg 1992, p. 53.

[29] Richard J. Arneson endorsed this strategy as the best way to defend the ban on gladiatorial entertainments. See Arneson 1990.

[30] These are T.M. Scanlon's terms in Scanlon 2000, chapter two. Ben Bradley (in Bradley 2006) calls the two conceptions "Moorean" and "Kantian."

that human life has intrinsic prudential value (a kind of teleological value); that would absurdly imply that one is better off alive in a permanent vegetative coma than dead. Nor is it the claim that *the world* is a better place, other things being equal, with *more* human beings in it. Rather, it's the claim that *existing* humans including those who are not "persons" in Kant's sense (e.g. embryos, corpses, those in a permanent vegetative coma) ought to be treated in certain ways.[31] Indeed, since there is a separate duty to respect persons (those with capacities for moral agency and personal autonomy), the implications of a duty to respect human life or humanity are most clearly seen in connection with humans who are not persons.

The duty to treat what has intrinsic value—humanity, the Grand Canyon, the ruins at Stonehenge, etc.—"with respect" usually rules out treating it as a mere commodity with a market price. While many support bans on organ sales and parents selling their newborns due to paternalistic worries about the vulnerability of the poor to exploitation, many also support them because they see markets in human kidneys and infants as promoting disrespect for human life. Also, treating what has intrinsic value with respect typically precludes damaging or destroying it, but not always. Bonnie Steinbock has argued that using spare human embryos in stem cell research aimed at finding treatments for diseases does not disrespect them, whereas using them in place of frogs in high school biology classes or (more grotesquely) to make jewelry does.[32] It matters whether they're being destroyed for trivial or objectively weighty reasons.[33]

On the assumption that the duty to respect human life or humanity is *prima facie* rather than absolute, it does not entail SHL. A *prima facie* duty unlike SHL leaves room for the permissibility of some suicide, much abortion, and

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[31] Ronald Dworkin (who labels the two conceptions the "incrementally" valuable and the "sacred" or "inviolable") says, "the hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because—and therefore only once—it exists." (Dworkin 1993, pp. 73-4).

Note that the distinction between the two kinds of intrinsic value does not coincide with the distinction between agent relative and agent neutral value. It is possible to hold that some teleological values are agent relative while some non-teleological ones are agent neutral. On an agent neutral view of the value of respecting human life, one ought to desecrate a corpse if it is the only way to prevent many more acts of corpse desecration by others. Admittedly this sort of view is unusual. It is more common to regard the duty to respect what has non-teleological value as an agent relative value, as Kant did.

[32] See Steinbock 2007.

[33] An example of "triviality" is provided by the woman who says, "maybe I should be on the pill, but it's so much trouble! I'd rather just take my chances and if I get pregnant use abortion as my last resort method of birth control." Pro-lifers believe that the immorality of such an attitude stems from its indifference to wronging the fetus, which they suppose has a right to life. A duty to respect human life explains why liberal pro-choicers who deny any fetal right to life can find the attitude impersonally immoral.

embryonic stem cell research. It may even permit an organ market if the economic efficiencies make it possible to save the lives of many more people in need of transplants.

Retributivism and the reason for criminalizing corpse desecration

I now want to argue that liberals who support criminal sanctions on corpse desecration because it is the free-floating wrong of disrespecting humanity are committed *via* their PLM to either retributivism or a "moral education" theory of why it should be criminalized and punished. While the primary reason to criminalize and punish serious rights violations like murder and rape is to reduce their future incidence via coercion, that cannot be the rationale for criminalizing a free-floating wrong.

By "retributivism" I mean what much of the secondary literature refers to as "strong" (or "positive") retributivism. The "weak" (or "negative") thesis is about the distribution of punishment: only those guilty of culpable wrongdoing should be punished, and their punishment should be proportionate to the gravity of their wrong.[34] The "strong" thesis conjoins to the weak one a claim about the justification of the practice as a whole: the primary reason to punish is to give wrongdoers their "just deserts." Michael Moore accepts the strong retributivist thesis, and he defends legal moralism on the grounds that the thesis implies it.

Both Hart and Feinberg maintain that retributive punishment makes sense only where there is a victim with a grievance against the wrongdoer; the wrongdoer incurs a debt to the person whom he has wronged, and his punishment is required fully to cancel it. Where there is no aggrieved individual, as is the case with impersonal wrongs, the notion of retribution is out of place.[35]

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[34] *Another* version of the weaker, distributive thesis is that punishment should be proportionate to not just the gravity of the wrong but the depravity of the offender. According to it the unrepentant thief who stole $100 from personal greed deserves a harsher punishment than the repentant thief who stole the same amount of money in order to aid the needy. If the wrongful harm in the two cases is the same yet this distributive thesis is correct and the judge should go a little easier on the second thief in sentencing, then it may seem to follow that criminalization and punishment ought not aim solely at the enforcement of "grievance morality." Devlin defended this inference in his debate with Hart (Devlin 1965, p. 130), and Hart responded that it confuses the question of what should be criminalized with the separate question of how severely any criminal act should be punished (Hart 1963, pp. 36-7). Feinberg defended Hart's reply (Feinberg 1987, esp. 253-5), while Jeffrie G. Murphy argued that the Hart-Feinberg reply is unsuccessful (Murphy 1995, esp. p. 92). In my view while this distributive thesis may entail a sort of "legal moralism," it is irrelevant to the dispute between defenders of the harm principle and "legal moralism" defined in terms of i) and ii) at the beginning of this paper, because it implies nothing about which culpable wrongs are properly criminalized in the first place. Hart's objection to Devlin's inference was correct.

[35] See Hart 1963, pp. 57-9, and Feinberg 1987, p. 267.

This view seems to me mistaken. The retributivist who follows in the footsteps of G.E. Moore (rather than Kant or Hegel) holds that while suffering by itself is an intrinsic bad, an "organic unity" effect kicks in when it is preceded by and proportionate to earlier culpable wrongdoing, and the suffering-*cum*-wrongdoing becomes an intrinsic good.[36] For example (and note that this example does not involve punishment as an intentional act meted out by a punisher), it is better that an evil, cold-blooded murderer, after committing his crime and in his haste to make his escape, slip on the icy street, break his back, and spend the rest of his life in a wheelchair, than that he profit from his crime. It is better that he suffers this fate even if it will not reduce the future incidence of murder by himself or others. Nothing prevents the retributivist who accepts this Moorean axiology from supposing that the organic unity effect holds even when the wrongdoing that preceded the punishment was impersonal.

Perhaps we should admit (*contra* purely welfarist moral theories) that giving any culpable wrongdoer his just deserts has *some* intrinsic value. Criminalizing the wrongdoing first makes it possible to realize the value without violating the principle of legality. But while realizing that value might give us *a* good reason to criminalize serious rights violations, it certainly is not the "primary" one. Its weightiness as a reason pales in comparison to the fact that criminalizing them will reduce their future incidence *via* the deterrent effect of the state's threat of punishment. As Jeffrie Murphy has noted, the consensus view of the liberal contractarian tradition is that the consequentialist rationale is the primary one: Lockean contractors create the state and its criminal justice apparatus because they believe that their lives, liberty, and property will be safer under a limited sovereign than in the state of nature.[37] Why should we accept that consensus view? As noted earlier, it is undeniable that culpable wrongdoing is insufficient for justified criminalization. The main reason not to criminalize lying to another about one's affection for him so that one may obtain sexual favors is that any serious attempt to enforce the law would require massive invasions of privacy. The lying Don Juan (male or female) may well *deserve* punishment, but as Michael Moore notes, "only a monomaniacal retributivist would urge that we must achieve retributive justice, no matter what the cost."[38] Once we admit that non-retributive values outweigh retributive ones in cases like the lying Don Juan, it becomes hard to deny that the deterrence of future murder is a much more important reason to criminalize murder than giving murderers their just deserts. The strong retributivist thesis is false.

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[36] Moore, G.E. 1962, p. 214.

[37] Murphy 1985. Of course not even Locke accepts a purely consequentialist rationale for criminalization and punishment. One of the "inconveniences" of the state of nature is that each has the authority to punish others who violate his natural rights, and "men being partial to themselves, passion and revenge is apt to carry them too far" (P. 125, *Second Treatise*). Weak retributivism is the rationale for setting up "a known and indifferent judge" to remedy this inconvenience.

[38] Moore 2009 p. 43.

Can the defender of PLM make a similar claim about why we should criminalize and punish free-floating wrongs, namely, that the primary reason is to reduce *via* deterrence their future incidence? Reflection on the precise *locus* of free-floating evils leads me to think that such a claim would be quite implausible. Consider again corpse desecration. Does the evil of it reside in the *act* of corpse mistreatment, in the bad intentions, motives, and values of the desecrator, or in a combination of the two? It seems to me that it has to consist in the combination, with the lion's share of the disvalue deriving from the depraved character that the act usually manifests. Consider these three cases:

> a) After his wife dies of natural causes, Joe grinds up her body and feeds it to the voracious family dog. He knows that corpse desecration is a criminal offense, but because of his justified confidence in non-discovery, the law's threat of sanctions fails to deter him.
>
> b) Jack is in precisely similar circumstances. But because he is timid and overestimates his chances of being found out, he chooses to bury his wife rather than feed her to the family dog. If he were confidant of non-discovery, he would proceed exactly as Joe did, from the same motives and values.
>
> c) Mary feeds her dog ground up animal organs, delivered to her on a regular basis through UPS. UPS is also shipping some ground up organs from her recently deceased husband to a medical school to which he donated his body for scientific research. Due to a mix-up at the shipping office, her husband's remains are delivered to Mary, and she unknowingly feeds them to her dog.

My sense is that the state of affairs in a) is only slightly morally worse than the one in b), while b) is much worse than c). Of course Mary in c) is not guilty of the crime of desecrating her husband's corpse, since she does not perform the act knowingly and thus lacks the *mens rea* that is an element of the crime. (Why think that her innocent act is an evil at all, though one for which she is blameless? Answer: to explain the *appropriateness* of her reaction of horror should she ever discover the mistake.) It is only when the act is accompanied by a *mens rea* like Joe's that it becomes a very large harmless immorality. With most actions that are or might be thought to be free-floating evils (e.g. Feinberg's "gratuitously squashing a bug in the wild," the moral conservative's "immodesty"), most of the evil lies (or is supposed to) in morally defective character rather than the act itself.[39]

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[39] Those who believe that causing the extinction of some insect or plant species is a free-floating wrong because biodiversity is an important intrinsic value must reject this claim. According to them most of the evil lies in the act's consequences (the species extinctions) rather than in the anthropocentric *hubris* of the humans responsible for the extinctions. To suppose that the evil resides primarily in the failure of the humans to appreciate the value of other species is, on their view, just another form of such *hubris*.

To suppose otherwise—to think that the state of affairs in b) is much better than a), and c) nearly as bad as a)—is to confuse morality with taboo. H.L.A. Hart is urging the same point in his debate with Devlin when he observes:

> Where there is no harm to be prevented and no potential victim to be protected …. it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom that it involves. The attribution of value to mere conforming behavior, in abstraction from both motive and consequences, belongs not to morality but to taboo…. What is valuable… is voluntary restraint, not submission to coercion, which seems quite empty of moral value.[40]

Note that Hart's observation applies to free-floating evils only, not harm-causing personal grievances. The world is a better place with fewer murders in it even if it contains just as much murderous will, because it contains less death, which is usually a great harm. This is why the deterrence justification for the criminalization of murder is the primary one. Deterrence fails as the justification for criminalizing corpse desecration, because the only slightly greater value of b) as compared to a) may well be insufficient to outweigh the prudential costs of criminalization, and more importantly, because only actions or choices can be deterred and one's possessing or lacking the virtue of respect for human life is not an action.

Perhaps because of the "expressive" function of the criminal law, criminalizing corpse desecration and punishing those guilty of it is a means of imparting or reinforcing this virtue in all members of the community. This seems to be Robert George's (and other classical perfectionists, including Aquinas's) hope with respect to traditional morals laws—that they will "make men moral" in a gradual, "indirect" sort of way.[41] If this theory has merit, then it provides a different rationale for criminalizing free-floating wrongs from the retributivist's. Whether it is a superior rationale is too large a question to pursue here.[42]

<u>The right to personal sovereignty</u>

Liberals who wish to defend society's ban on corpse desecration cannot avoid PLM. So why would liberal political theorists believe that a categorical rejection of all PLM is an essential tenet of liberal political morality? According to the "justificatory liberal," liberalism rests on a principle of political legitimacy according to which state coercion is permissible only when it can be justified to all citizens subject to the coercion. Further, coercion premised on the claim that some act is harmlessly wrong, especially the claim that it is a free floating wrong, is not justifiable to all reasonable persons. A state that respects the liberal

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[40] Hart 1963, p. 57.

[41] George 1995, p. 44.

[42] The literature comparing the two is extensive. See Hampton 1984 and Nozick 1981, pp. 363-97. One possible advantage of a moral education theory is its ability to explain why criminal trials and their verdicts ought to be public (namely, so that they can promote virtue in the general public).

principle of political legitimacy can take a stand on questions about "the right" but must remain neutral on questions about "the good."[43] All PLM is objectionable because it is not properly "neutral."

We noted earlier that Gerald Dworkin is one liberal theorist who denies that state neutrality on "the good" is possible or desirable. Perfectionist liberals like Joseph Raz and George Sher do so as well. I believe that their objections to justificatory liberalism are decisive, but that is the topic of another paper. I want to set aside justificatory liberalism to consider another view of liberal political morality that makes it inconsistent with any PLM. This one alleges that at the heart of that morality lies a commitment to a right of all competent adults to personal sovereignty or autonomy. Consider again a ban on any physician assisted suicide, even for the terminally ill. Ronald Dworkin seems to me correct in his contention that slippery slope arguments cannot justify it and its defense presupposes SHL.[44] Many liberals (Dworkin included) object to such a ban in part because of its inhumanity but primarily because it violates the right to personal autonomy of those terminally ill people who wish to end their lives with a (willing) physician's help and who reject SHL in favor of other views about the dignity and worth of human life (Stoicism, many Eastern religions, etc.). For Feinberg in particular, the fact that these persons reject SHL and voluntarily choose to end their own lives is enough to make the ban wrong. It would be wrong even if SHL were true and suicide always was a heinous though harmless immorality.[45] Feinberg supposes that the ban would be wrong even in that circumstance because the duty to respect the right *trumps* the duty to prevent and/or punish any harmless immorality; that is, the right is *absolute* vis-à-vis the prevention or punishment of such immorality. A right to autonomy with this feature is the moral core of Feinberg's theory of criminalization, the reason why it categorically rejects all PLM.

I want to amend Feinberg's account of the right's content in a way that I think strengthens it. The right to personal sovereignty that PLM violates is the same right that hard paternalism violates. It protects only choices that are "self-regarding" in the sense of not threatening any wrongful harm to others. The amendment is that is it irrelevant whether or to what degree those choices are *voluntary*. Instead, what's important is whether the person whose choices are being interfered with would consent to the interference given his current preferences and values, full and accurate empirical knowledge about the

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[43] The term "the right" as it occurs in this formula has to be understood as encompassing personal grievances only, with questions about free-floating wrongs getting pushed into the domain of "the good." Thus, whether SHL is true and suicide is wrong even if benefits oneself and doesn't wrong others is a question about "the good."

[44] See Dworkin R. 1997.

[45] I take it that the justificatory liberal disagrees with this claim. To say that a defense of liberal policies requires a "bracketing" of questions about the good (as the justificatory liberal does), is different from saying that liberal policies are defensible no matter which account of the good is true (Feinberg's claim).

circumstances in which he is choosing, and full means/ends rationality. Thus, the reason why forcing the blood transfusion on the adult Jehovah's Witness infringes his right to autonomy is not so much that he doesn't consent to it as that he wouldn't under these hypothetical conditions. (His actual non-consent is not irrelevant; it is strong evidence that forcibly transfusing him will not satisfy the hypothetical consent requirement). Similarly, the ban on physician-assisted suicide violates the right to autonomy of terminally ill persons who want the help of a willing physician to commit suicide, because they would not consent to this interference with their self-regarding choice given their beliefs about the dignity and value of their lives. This gives us the content of the right to autonomy. It is a separate question how strong the right is. Feinberg's view is that it is *absolute* vis-à-vis state criminalization aimed at promoting one's prudential good *or* preventing/punishing one's harmless immorality. Insisting that the right is absolute in these two respects does *not* commit Feinberg to holding that it is absolute vis-à-vis restrictions aimed at increasing the welfare or autonomy *of others*. Libertarians may hold that the right is absolute in these further respects, but Feinberg does not.[46]

There is one very puzzling feature of Feinberg's account of the right that should be noted. It is his assumption that of the many possible forms of state coercion and regulation, criminalization alone can violate it. Thus, as regards state paternalism he claims that a ban on smoking backed by the sanction of fine would violate the personal autonomy of smokers, whereas a "sin tax" on cigarettes would not.[47] Feinberg supposes that fines and other criminal sanctions are different from taxes and regulatory fees inasmuch as they are meant to be stigmatizing; imposing a small fine on littering is a relatively mild means of publicly condemning it. But even he is right about this, it is hard to see why it should follow that criminalization alone can violate the right to autonomy. Surely for the smoker of limited means who's indifferent to the state's condemnatory judgment about the foolishness of smoking, a steep sales tax on cigarettes limits his autonomy more than a small fine for smoking would.

<u>Against an absolute right to personal autonomy vis-à-vis harmless immorality</u>

It is important not to confuse the claim that all PLM is wrong because it infringes an absolute right to personal sovereignty with the different claim that all PLM is wrong because its prudential costs always outweigh the good of preventing or punishing harmless immorality. If PLM is wrong for the first reason, then it is wrong even if the prudential costs of criminalization are negligible.

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[46] Feinberg deems it acceptable soft paternalism to require as a condition of licensing that all motorcyclists attend seminars informing them of the dangers of riding helmetless. The requirement restricts the liberty of those motorcyclists who are already well informed about the risks, do not want to wear a helmet, and do not want to attend the seminar. Feinberg must say that the restriction does not violate their right to autonomy because it is for the increased welfare and autonomy of others (the many uninformed motorcyclists).

[47] Feinberg 1984, pp. 23-4.

Conversely, PLM need not ever be wrong for the first reason for much of it to be wrong because its prudential costs are excessive. The latter is the reason why the moral conservative Robert George opposes some traditional morals laws, such as an anti-fornication law, despite the fact that they target what he thinks are genuine immoralities.[48] The defender of the "right to personal sovereignty" objection to PLM must hold that the right protects an important positive value that is distinct from the negative value had by the prudential costs of criminalization.

Why does Feinberg think that the right needs to be *absolute* in the respects he claims? The only answer I can come up imagines him arguing as follows: "SHL is in fact false, the right to life not 'inalienable,' and suicide by the terminally ill not immoral at all.[49] But what if SHL *were* true? In that case assisted suicide would be a very serious harmless immorality. But liberals insist that a ban on (all of) it is wrong even if SHL is true, and even if the prudential costs of enforcing the ban are relatively small. The only way that it could be wrong under those conditions is if there is a right to personal autonomy that's absolute vis-à-vis punishing or preventing harmless immorality. Thus, liberals are committed to upholding such a right."

What should we make of this answer? Not much, in my opinion. The claim that liberals must oppose the ban even in the counterfactual circumstance described makes liberalism a kind of fanaticism. Consider the similar claim: "even if the state could know with absolute certainty that X is the true religion; that sincere belief in X is necessary for one's eternal salvation; and that relatively small punitive and coercive measures aimed at the followers of false faiths will gradually and over a long period of time greatly increase the number of sincere converts to X—even in that case that liberals would have to oppose the measures and demand that the state remain neutral on the question of what is the true religion." The insistence that state intolerance towards false faiths would remain wrong even if it saved the souls of legions reflects a sort of fanaticism or fetishism about the value of religious freedom to which liberalism is not committed. Sensible liberals don't defend liberal policies in all possible worlds, only in our and closely related ones. And in those worlds no state can reasonably claim to know that religious intolerance will save souls or that all assisted suicide is a very heinous, harmless immorality.

Feinberg holds that the right to personal autonomy protects all self-regarding choices equally: sovereignty is all or nothing, and a trivial interference with it is no more possible than a "minor invasion of virginity."[50] It seems to me that he is guilty of exaggerating the right's scope as well as its strength. While no infringement of autonomy may be trivial, surely some infringements are more serious than others. Suppose that you consider imbibing alcohol to be sinful, and

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[48] George denies that there is any right to personal autonomy; a morals law that targets a genuine immorality is objectionable *only* if its prudential costs are too high. See George 1995, chapter four. George criticizes Jeremy Waldon's defense of a "right to do wrong" for confusing the two objections.

[49] See Feinberg's "animadversions on Kant" in Feinberg 1986*,* pp. 94-97.

[50] Feinberg 1986, p. 94.

abstinence is important to the kind of person you aspire to be. I on the other hand regard alcohol consumption in moderation as morally innocent and partake on occasion as a means of relaxation. Forcing you to drink alcohol (either for your own good or for moralistic reasons) seems a more serious infringement of your right to personal autonomy than preventing me from doing so for similar reasons. Your choice not to drink is "self-constituting," while my choice to drink isn't. Viewpoint-based restrictions on freedom of expression are especially likely to interfere with significant, self-constituting choices. The line between choices that are/are not self-constituting, while fuzzy, seems morally significant.[51] Self-constitution is perhaps the most important "positive" value that a right to personal autonomy protects.

Liberal political morality seems to me committed to a less tidy theory of criminalization than the one that Feinberg so ably and eloquently defended. That less tidy theory: i) recognizes the existence of harmless immorality, including free floating wrongs; ii) rejects moral conservatism; iii) counts the punishment of harmless immorality as a positive value for reasons of retribution, moral education, or both; iv) denies that any harmless immorality is so heinous that it could deserve punishment as severe as what we reserve for serious rights violators; v) recognizes that the criminalization of harmless immorality sometimes has steep prudential costs that by themselves outweigh the positive value referred to in iii); and vi) sees the infringement of a right to autonomy—a right, however, that is not absolute, and that protects choices essential to one's self-constitution more strongly than other choices—as a significant non-prudential cost of some morals laws. The good of giving corpse desecrators their just deserts, publicly affirming society's commitment to the value of respect for human life, and perhaps promoting such respect as a moral virtue, outweigh the prudential and non-prudential costs of a ban to make the criminalization of corpse desecration justified. The criminalization of the hunting for sport of endangered animals seems justifiable on similar grounds. Perhaps there are other examples of PLM besides these that are consistent with i)-vi). But if so, it seems likely that are very few in number.

[51] Michael Moore (Moore 1997) wishes to limit the "basic right to liberty" to self-defining choices, and Jeremy Waldron has argued (Waldron 1981) that the liberties that liberals think are deserving of the greatest protection are ones especially important for self-constitution.

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