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## DEVLIN WAS RIGHT: LAW AND THE ENFORCEMENT OF MORALITY

GERALD DWORKIN\*

[The police power is] vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws . . . either with penalties or without . . . as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise.<sup>1</sup>

Chief Justice Shaw

It is now thirty-five years since H.L.A. Hart published *Law, Liberty and Morality*,<sup>2</sup> which marked the beginning of the Hart-Devlin debate concerning the enforcement of morality by the criminal law. It is 125 years since James Fitzjames Stephen published *Liberty, Equality, Fraternity*, which initiated a similar debate with John Stuart Mill.<sup>3</sup> Both of these debates concerned the legitimate role of the use of criminal sanctions to punish immoral conduct. As Hart framed the issue, the question can be formulated as: Ought immorality as such be a crime? It is claimed that Mill and Hart say that the answer is "No"; it is said that Fitzjames Stephen and Devlin say "Yes." Contemporary liberal theorists such as Joel Feinberg, Thomas Nagel, and Ronald Dworkin are united in agreement with Mill and Hart

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1. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851).

2. H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

3. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (R.J. White ed., Cambridge Univ. Press 1967) (1873).

that it is not a legitimate function of the state to punish conduct simply on the grounds that it is immoral.<sup>4</sup>

Contemporary legal opinion also divides as to the constitutionality of various statutes that forbid conduct based on the alleged right of the state to enforce moral views. Whether the issue is consensual homosexual conduct between adults,<sup>5</sup> nude dancing in bars,<sup>6</sup> or the ritual sacrifice of animals,<sup>7</sup> judges disagree about whether the state should regulate conduct based on its moral status.

In this Essay, I want to distinguish two issues. The first is the substantive question of whether the state actually should regulate particular conduct, e.g., homosexual sex, on the grounds that it considers the conduct immoral. The second is the question of whether it is illegitimate "in principle" for the state to do so. On most issues concerning specific laws, I side with Hart, against Devlin, in believing that the conduct in question should not be criminalized. I side with Devlin, however, in believing that there is no principled line following the contours of the distinction between immoral and harmful conduct such that only grounds referring to the latter may be invoked to justify criminalization.<sup>8</sup>

## I.

My first task is to attempt to clarify what divides Devlin and his opponents. We know that this division concerns whether a principled line can be drawn between the kinds of reasons that the state gives to justify coercive restrictions on behavior. What

4. See 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 173-75 (1988); THOMAS NAGEL, *EQUALITY AND PARTIALITY* 166 (1991); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 240-58 (1977).

5. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

6. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

7. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

8. It is important to note that almost all of the Hart-Devlin debate concerned the enforcement of "positive" morality, i.e., the currently accepted moral views of the society. See HART, *supra* note 2, at 20. I am exclusively concerned with the enforcement of "critical" morality, i.e., the set of moral principles that one believes are the correct (best justified, true) views concerning moral matters for the society in question. See *id.* I am grateful to Leslie Francis for emphasizing this point.

does it mean, though, for there to be a principled line? I shall begin by looking at the line that liberals—my term for those who oppose Devlin—claim to be the right one, and I will then look at what they mean by that line being the correct one.

The historical context for the Hart-Devlin debate was the release of the *Report of the Committee on Homosexual Offenses and Prostitution*—popularly referred to as the *Wolfenden Report*, after its chairman. The Committee defended a particular conception of the function of the criminal law:<sup>9</sup>

[I]ts function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.<sup>10</sup>

Having said what the law allows by way of reasons for coercion, the report made clear at least one ground that is not allowed: "It is not the duty of the law to concern itself with immorality as such."<sup>11</sup>

The usual rubric under which one discusses these issues is that of the enforcement of morality by the criminal law. The specific formulation attributed to the above claims is that the law ought not to be in the business of enforcing morality. The obvious rejoinder, however, is: Why then does the law protect citizens against, among others, injury, harm, offense, and indecency?

9. In fact, the Committee displayed typical English caution by adding the qualifier "so far as it concerns the subjects of this enquiry." PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 2 (1965) (quoting REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION ¶ 13 (1957) [hereinafter WOLFENDEN REPORT]). Devlin himself noted, however, that the conclusions of the Committee "are made in general terms and there seems to be no reason why, if they are valid, they should not be applied to the criminal law in general." *Id.* at 3.

10. *Id.* at 2 (quoting WOLFENDEN REPORT, *supra* note 9, ¶ 13).

11. *Id.* (quoting WOLFENDEN REPORT, *supra* note 9, ¶ 257). Another claim that I shall ignore for the most part, as it seems to me to have led the discussion into less fruitful paths, is the view that "there must remain a realm of private morality and immorality which is . . . not the law's business." *Id.* at 3 (quoting WOLFENDEN REPORT, *supra* note 9, ¶ 61). The introduction of the private/public distinction addresses *where* behavior takes place rather than its status as moral or immoral.

Surely, it is because for someone to inflict these on another without adequate justification and excuse is to act wrongly, i.e., immorally. Indeed, if one begins to examine some of the more specific categories, the most prominent of which is "harm," one reaches the conclusion that the term itself is a normative one. Not every setback to a person's interests counts as harmful for the purposes of justifying coercion. Only those that are "wrongs" count.<sup>12</sup>

One answer that is sometimes given—that although rape is both harmful and immoral, the reason the law prohibits it is only that it is harmful—is not available to liberals who wish to reject some thesis about the enforcement of morality. The thesis has to be formulated in terms of different parts of morality. Some parts may be enforced by the law; some parts may not.

Where the line is drawn may differ from liberal to liberal, but they all agree that various rights may be enforced in order to protect individuals against attacks on interest. Indeed, on some views this is part of the notion of a right itself. Other notions that are invoked include the protection of autonomy and respect for persons. What are the parts of morality that may not be enforced? Here, matters are less clear, but they seem to include various ideals, such as ideals of virtue and character, certain ideals of fairness or fittingness, and ideals of sexual conduct.

With respect to certain issues, liberals may divide. Consider Good Samaritan laws—laws requiring so-called "easy rescue." Some liberals, such as Feinberg, approve of such laws because they think that people are harmed by not being rescued.<sup>13</sup> Others who think of harm as being lowered from some status quo believe that failure to rescue is not a harm. They believe that people do not have a right to be rescued, but that it is "indecent" to fail to come to someone's aid in such circumstances.<sup>14</sup> If they wish to require such rescue, they are willing to enforce some ideals, but not others. To defend their thesis, then, liberals have

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12. For the most sophisticated discussion of this and similar issues, see 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1985).

13. See *id.* at xii.

14. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47, 62-65 (1971).

to be able to specify some division of morality into parts and argue that only some of the parts may be protected legitimately and promoted by coercion.

For our purposes, we shall draw the line more or less as Feinberg does—the protection of autonomy and equal respect for persons.<sup>15</sup> This line is not one that is more vague or fuzzy than others we use, yet it does seem to separate the activities that many liberals believe may be regulated from those that may not be. We now need to see what kinds of arguments are available to justify such a line, and whether they are adequate.

## II.

Devlin's views differ from those of liberals in at least two respects. There are substantive differences and differences of theory. Devlin often looks like a consequentialist who has a different view about the consequences. His famous equation of immorality with treason and his advocacy of the right of any state to defend against either make a claim about the harm that would occur if the actual moral code of a society were allowed to be attacked and weakened.<sup>16</sup> Hart has said all that needs to be said about the various forms the thesis "an established morality is as necessary as good government to the welfare of society"<sup>17</sup> may take, and the evidence (or lack of it) for various claims to protect the shared moral views of society. The trouble with many of Devlin's claims is the same as that faced by the strategic theorist who, when asked about his various "calculated risks," admitted that he had never done the calculations.

Even when Devlin comes to the view, based on consequentialist considerations, that some form of conduct may be regulated, he often agrees with the liberals that it should not be. He does so because he believes that

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15. See generally 4 FEINBERG, *supra* note 4, at 81-123 (arguing that "one can preserve one's allegiance to personal autonomy in the way that liberalism requires while fully acknowledging the central and indispensable importance of community in human lives").

16. See DEVLIN, *supra* note 9, at 13.

17. *Id.*

[t]he arm of the law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one. Since it is an instrument, it is wise before deciding to use it to have regard to the tools with which it can be fitted and to the machinery which operates it.<sup>18</sup>

In addition to these practical matters, however, Devlin refers to "general statements of principle which it may be thought the legislature should bear in mind when it is considering the enactment of laws enforcing morals."<sup>19</sup> These include: "toleration of the maximum individual freedom that is consistent with the integrity of society . . . that in any new matter of morals the law should be slow to act . . . [and] more tentatively . . . that as far as possible privacy should be respected."<sup>20</sup>

In spite of the fact that Devlin refers to these as "principles," it is quite clear from the context that these are considerations of value that he thinks ought to be used in deciding when matters that are legitimately within the province of the law actually should be enforced. He distinguishes among three questions:

1. Has society the right to pass judgement at all on matters of morals?
2. If a society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it?
3. If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?<sup>21</sup>

Devlin offers an answer to the last question:

[M]y third interrogatory should be answered—not by the formulation of hard and fast rules, but by a judgement in each case taking into account the sort of factors I have been mentioning. The line that divides the criminal law from the moral is not determinable by the application of any clear-cut principle. . . . There is no logic to be found in this. The boundary

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18. *Id.* at 20.

19. *Id.* at 16.

20. *Id.* at 18.

21. *Id.* at 7-8.

between the criminal law and the moral law is fixed by balancing in the case of each particular crime the pros and cons of legal enforcement in accordance with the sort of considerations I have been outlining.<sup>22</sup>

This passage is a bit of a mess. The problem is that Devlin is giving an answer to his third interrogatory, but frames it in terms appropriate for the second. He states that the line dividing the criminal law from the moral should not be determined by clear-cut principle. What he should be saying, though, if he is answering the third question, is that the line between what the state has a right to regulate and what it actually ought to regulate is not a matter of principle. This, however, is a matter on which any sensible liberal would agree. Given that it clearly is immoral for men to lie to women about their affections in order to secure sexual favors, and given that any woman so lied to has a personal grievance, it is something we might debate about criminalizing. Considerations of prudence, of efficient use of scarce resources, or of the value of privacy may lead us not to use the criminal law in this case. Both liberals and "Devlinites" can agree about this.

The issue that divides Devlin and the liberals is the second interrogatory. I take it that Devlin believes the answer to his second interrogatory is "yes" and for liberals it is "no." The debate concerns whether one can draw a principled line designating which matters the state has a "right" to regulate by means of the criminal law. What exactly is a principled line, and are there other conditions that liberals impose on whatever principle(s) they put forward?

### III.

What is being contrasted with "a principled line" when these issues are at stake? The contrast is not with no line at all, but with a line justified in some different fashion. Of course, it is not being claimed that the alternatives are unprincipled—merely nonprincipled. To tighten up the question, it is useful to consider Mill's views about principled line-drawing. Mill calls his harm

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22. *Id.* at 21-22.



principle "one very simple principle,"<sup>23</sup> and he is clear that the principle is supposed to settle the issue of the state's jurisdiction, not the question of when the state *should* exercise its power:

If anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law or, where legal penalties are not safely applicable, by general disapprobation. . . . There are often good reasons for not holding him to the responsibility; but these reasons must arise from the special expedencies of the case: either because it is a kind of case in which he is on the whole likely to act better when left to his own discretion than when controlled in any way in which society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent.<sup>24</sup>

The reference to "cases" is not determinative of what to do about specific offenders but about types of acts and deciding whether they are the right types to be the subject of legal coercion. Based on this explanation, one might think that we have a principled line with exceptions based on "special expedencies." The problem here is that Mill says his principled line is also based on expedencies, i.e., what will promote utility: "I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions."<sup>25</sup>

So when Devlin writes,

I think, therefore, that it is not possible to set theoretical limits to the power of the State to legislate against immorality. It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstance to be allowed to enter,<sup>26</sup>

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23. JOHN STUART MILL, ON LIBERTY 13 (Currin V. Shields ed., Liberty Arts Press 1956) (1859).

24. *Id.* at 14-15.

25. *Id.* at 14.

26. DEVLIN, *supra* note 9, at 12-13. There is a certain complication here that is connected with the idea of "areas of morality" into which the law is not to enter. My own view is that there are areas of conduct that are immoral and with which the state ought not interfere. See *infra* p. 945 (discussing free speech). The category of free speech, however, is not an area of morality. In similar fashion, I believe that

Devlin certainly disagrees substantively with Mill, yet both appeal to "expediencies" and consequences.

Basically, their dispute is between direct and indirect consequentialism. As we have seen, Devlin thinks that for each proposed type of immorality one must balance the pros and cons of enforcement. Mill thinks that there is an argument from the long-range consequences "grounded on the permanent interests of man as a progressive being" for setting up general categories (e.g., harm to self) and claims that we can draw a line determining the illegitimacy of enforcement against acts falling into that category in advance.<sup>27</sup> Correspondingly, there are general categories (e.g., harm to others) that bring the conduct within the scope of state action, although determining whether a given range of acts in such a category ought actually to be criminalized is left to more particular calculation. One might raise some questions about whether any line drawn in advance on the basis of the balance of benefits over harms is a "principled" one. Unless one is going to beg the question against consequentialists, though, it seems reasonable to adopt a broad definition of "principled."<sup>28</sup>

The last preliminary question that needs to be addressed is whether a liberal, principled view should include some restrictions on the nature of the principles to which we appeal. By this I mean some qualification on the appeal of the principle in question. Liberals address their arguments to people, such as Devlin, who disagree with them about many things. They have factual disagreements, and they have disagreements about the rational status of religion; they have different ideals of sexuality, and they may have different views of moral reasoning. If the arguments are to be *persuasive*, there must be enough common

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there are areas of conduct that are harmful to others but that ought not to be regulated. Examples of such areas are some kinds of consented-to harm. For examples, see *infra* text accompanying note 55. I do not believe, though, that one can—to parallel Devlin—settle in advance areas of harm into which the law is in no circumstance to be allowed to enter.

27. See MILL, *supra* note 23, at 14.

28. I have doubts as to whether the definition should allow for act-consequentialists. They can favor rules only as rules of thumb.

ground to allow for a shared starting point. This is one meaning of the widely used (and misused) term "neutrality." Of course, a liberal simply may be looking for a line or argument that *she* finds convincing; she may be satisfied if her argument is sound.<sup>29</sup>

The issue of legitimacy concerns the basic framework for a society; therefore it is reasonable to assume that a liberal wishes to adopt some kind of "justifiable to" restriction on her arguments. It could be a Rawlsian "only principles that all citizens may reasonably be expected to endorse,"<sup>30</sup> or a Scanlonian "only principles which are not reasonably rejectable,"<sup>31</sup> or a Larmorian "principles . . . must be ones which are justifiable to everyone whom they are to bind."<sup>32</sup> Whichever of these one adopts, the idea is to avoid, if possible, appealing to any controversial conception of what is intrinsically valuable.

#### IV.

There seem to be only two possible ways to argue against the idea of a principled restriction on enforcing morality. The first is to consider all the various arguments put forward in favor of such a restriction and to show in each case that they are not sound. I obviously cannot do that here. I have, elsewhere, examined the arguments of Nagel and Ronald Dworkin.<sup>33</sup> Here, I propose a brief examination of Feinberg's argument, and then suggest that it is implausible to suppose that any such argument can succeed.

To avoid begging the question against the legal moralist, Feinberg must produce definitions of "harm" and "wrongdoing" acceptable to the legal moralist such that there are cases of harmless wrongdoing. Feinberg distinguishes between "A harms<sub>1</sub>

29. Of course, she judges this "soundness" according to her own light. Should she use somebody else's light?

30. See JOHN RAWLS, *A THEORY OF JUSTICE* 11-15 (1971).

31. See Thomas Scanlon, *What We Owe to Each Other* 276 (1998) (unpublished manuscript, on file with author).

32. Charles E. Larmore, *Political Liberalism*, 18 *POL. THEORY* 339, 351 (1990).

33. See Gerald Dworkin, *Equal Respect and the Enforcement of Morality*, *SOC. PHIL. & POL'Y*, Spring 1990, at 180, 180-93; Gerald Dworkin, *Epistemology and Coercion* (Dec. 1993) (unpublished manuscript, on file with author).

*B*," which means that "A adversely affects *B*'s interest" and "A harms<sub>2</sub> *B*" which means that "A adversely affects *B*'s interest and in so doing wrongs *B* (violates *B*'s right)."<sup>34</sup> An example of the former, but not the latter, would be A breaking *B*'s leg at *B*'s request (e.g., because *B* is trying to avoid the draft). This distinction now allows Feinberg to state that

there are two ways in which an act can be an instance of harmless wrongdoing. It can be a wrongful act that adversely affects no one else's interest, or it can be a wrongful act that does adversely affect the interest of another person but does so without wronging that person.<sup>35</sup>

In the first case the act, while wrong, does not harm<sub>1</sub> (and a fortiori does not harm<sub>2</sub>) anyone, with the possible exception of the person who commits the wrongful act. In the second case the wrongful act does harm<sub>1</sub> someone besides the agent but does not harm<sub>2</sub> anyone else.

First, let us note that the claim that harmless wrongdoing is possible is the claim that we have an understanding of morality according to which there can be wrongful acts that do not harm<sub>1</sub> or do not harm<sub>2</sub> anyone other than the agent who performs the acts. This means that there can be wrongful acts that either do not set back interests, or if they do, they do not violate anyone's rights. Let us consider these in turn.

As possible examples of wrongful acts that do not set back interests, Feinberg suggests a "wrongly broken promise that redounds by a fluke to the promisee's advantage" and "[t]respassing on another's land (a violation of his property right) while actually improving his property (advancing his interests)."<sup>36</sup> The problem with these examples is that anyone who wants to defend some kind of identification of harm and wrongdoing is not likely to do so on this level. As the interminable discussions of rule versus act utilitarianism have shown, only die-hard act utilitarians would want to link the wrongness of particular acts to the specific harmful consequences of those acts.<sup>37</sup>

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34. 4 FEINBERG, *supra* note 4, at xxix.

35. *Id.*

36. *Id.* at xxviii.

37. *See, e.g.,* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828,

The more plausible version is to consider an act wrong if it is of a *type*, the general performance of which is harmful. The level of these examples seems particularly ill-chosen because, for the purposes of legislation, it is always act-types that are in question. What we need are examples of types of acts which, while wrongful, do not (usually, tend to) set back interests. Whether it is possible for such acts to exist depends upon one's views about the nature of morality.

What about examples of the second kind, that is, acts that are wrongful but do not harm<sub>2</sub> anyone else although they may harm<sub>1</sub> someone else? As examples, Feinberg considers acts that set back interests but to which the adversely affected party consents.<sup>38</sup> Here it is crucial that Feinberg identifies wronging someone with violating that person's rights.<sup>39</sup> He also often thinks in terms of there being no "victim" or nobody who has a complaint.<sup>40</sup> In these cases, there are wrongful acts with nobody being wronged, hence the notion of harmless immorality—harmless because harm<sub>2</sub> requires that there be somebody who is wronged, immoral because it is wrong in the abstract. Thus the defender of the enforcement of morality must accept the idea of an immoral, wrongful act that is harmless—not because of a lack of setback to interest but because there is no one who is wronged.

The defender of enforcement might adopt several strategies at this point. He might disagree as to whether rights have been violated. Someone who believes in inalienable, nonwaivable rights in a strong sense would deny that the *Volenti* maxim—to one who has consented no wrong has been done—is correct.<sup>41</sup> Alternatively, he might concede that no rights have been violated but not accept Feinberg's stipulation that it is only when rights

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828-31 (1979).

38. See 4 FEINBERG, *supra* note 4, at 127-28.

39. See *id.* at 153.

40. See *id.*

41. See *id.* at xiii. This idea is well worth further thought. It is possible that certain rights, e.g., not to be killed, are not contingent upon consent, and that preventing their violation is only an application of the harm principle. Note that this is consistent with the belief that some acts of euthanasia ought not to be forbidden. If life is no longer good to a person, then consent may affect the moral status of killing.

have been violated that somebody is wronged. Feinberg would not claim that rights exhaust the realm of morality. Why then stipulate that someone has been wronged only when her rights have been violated?

An important substantive thesis about criminalization underlies the stipulation. For Feinberg, the law should be limited to the protection of *particular* values, namely personal autonomy and respect for persons:

The harm principle mediated by the *Volenti* maxim protects personal autonomy and the moral value of "respect for persons" that is associated with it . . . . But there are other moral principles, other normative judgments, other ideals, other values—some well-founded, some not—that the harm principle does not enforce, since its aim is only to respect personal autonomy and protect human rights, not to vindicate correct evaluative judgments of any and all kinds.<sup>42</sup>

## V.

We have a clear thesis. What is the argument for it? Why may the law not protect ideals? In truth, I cannot find a clear argument in Feinberg. He makes statements such as the following:

[M]uch of what we call morality consists of rules designed to prevent evils of a kind whose existence would not be the basis of any assignable person's grievance. . . . [T]hey are evils that "float free" and are incapable of grounding personal grievances. . . . To prevent them with the iron fist of legal coercion would be to impose suffering and injury for the sake of no one else's good at all. For that reason the enforcement of most non-grievance morality strikes many of us as morally perverse.<sup>43</sup>

The liberal then should be willing to concede that the desirability of preventing such evils is a consideration of some weight on the scales, while insisting nevertheless that its weight is insufficient to counterbalance the case for liberty,

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42. *Id.* at 12.

43. *Id.* at 79-80.

since it is impossible to name anyone who can demand "protection" from the evils in question.<sup>44</sup>

Their free-floating character makes it doubtful indeed that they could ever be sufficiently evil to warrant legal coercion by means of the criminal law. That blunt and indiscriminating instrument, unless aimed at serious harms and wrongs, is quite likely to cause more evil than it can possibly prevent.<sup>45</sup>

The last point is hardly a matter of principle. Devlin can agree that it is prudent not to use the law in such cases but still insist that, as a matter of principle, it cannot be ruled out. As for the previous quotes, they seem to either beg the question or to be conclusory.

It is a rather complicated question to decide whether Feinberg's view is a principled objection to legal moralism. His initial view of legal moralism is that "it is always a *relevant reason* of at least minimal cogency in support of penal legislation that it will prevent genuine evils other than harm and offense."<sup>46</sup> On this view, Feinberg concedes that legal moralism is correct. He believes, however, that the liberal can salvage his position by insisting that "as reasons go it is not much of one . . . rarely if ever enough to offset the presumptive case for liberty. . . . In specific cases of proposed legislation then, liberals, despite their grudging concession, can nearly always oppose moralistic statutes."<sup>47</sup>

The most plausible interpretation of Feinberg is that moralistic considerations are almost never good reasons. If reason exists to suppose that attempts to determine the few cases in which moralistic considerations *are* good reasons result in more errors than drawing a line in advance and ruling them all out, the result is the antimoralism Feinberg wants.

Turning to his argument, it is striking that it is unlike his argument against paternalism. That argument involves a fair bit

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44. *Id.* at 174 (emphasis added).

45. *Id.* at 220.

46. *Id.* at 5.

47. *Id.* at 5-6.

of theory about the nature of personal sovereignty and contends that drawing the boundaries as the paternalist suggests is in conflict with a conception—an ideal—of the autonomous person.<sup>48</sup> His argument against legal moralism, however, consists largely of making various illuminating distinctions about kinds of evils and then simply asserting that some of them are not serious enough to warrant preventing by coercion.<sup>49</sup>

His general argument is that, given the importance of personal liberty, if we are unable to justify a restriction of liberty by pointing to someone who can complain, we cannot restrict liberty. Various ideals, though, are at least as important to us as some of our minor grievances. If it is inappropriate to view children as commodities, if surrogacy implicates this attitude,<sup>50</sup> and if it is worth paying the costs of preventing some couples from having children in this way, the burden of proof that must be overcome before restricting liberty seems as easily surmounted as it would be in the case of many harms.

Looking at what forms the great part of Feinberg's discussion—the treatment of specific cases of harmless immoralities—strengthens this point. For a number of such cases, he is forced either to disagree with the existing law or to find explanations other than legal moralism. In what he calls the “[s]tubborn counterexample,”<sup>51</sup> he considers Irving Kristol's story of consenting gladiatorial contests in Yankee Stadium before consenting adults.<sup>52</sup> Feinberg claims that although there is “evil” involved, it is “a free-floating one, an evil not directly linked to human interests and sensibilities. That evil consists in the objective regretability of millions deriving pleasure from brutal bloodshed and others getting rich exploiting their moral weakness.”<sup>53</sup>

The evil is not directly linked in that there is no causal link to making people worse in terms of their sensibilities, but if it is a bad thing for people to derive pleasure from brutality, the evil is

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48. See, e.g., *id.* at 171.

49. See *id.* at 124-75.

50. I take no stance on this substantive issue.

51. See 4 FEINBERG, *supra* note 4, at 328.

52. See *id.* at 128-32, 328-31.

53. *Id.* at 130.



still connected to human interests and sensibilities because people's sensibilities are exhibiting a degraded character. Why don't we all have a complaint and a legitimate claim not to have such events take place in our society? Ultimately, Feinberg argues either that there are sufficient questions of voluntariness and sufficient dangers such that we can invoke the harm principle or that, if we cannot, we have to swallow the poison pill and "boldly insist . . . that the law be kept from interfering, and thereby reject the force of the story as a counterexample."<sup>54</sup>

One counterexample does not make a refutation. There are sufficiently many, however, ultimately to force the liberal into implausible positions. A few of my favorite things that have been criminalized include the following: dwarf-tossing, informational blackmail (the threat to reveal true information about the sordid past of a reformed person), the sale of one's heart (for transplantation), and consensual slavery.<sup>55</sup> All of these share the feature of inflicting harms on consenting persons. Of course, a liberal who opposes legal moralism may try to use a notion of moral paternalism to explain these cases.<sup>56</sup> This suggests that liberals such as Hart who support (limited) paternalism are already on shaky grounds, as Feinberg clearly recognizes.<sup>57</sup> No such interferences are grounded on the basis of a victim who has a complaint. Once one abandons the grounding in individual complaint, however, the extension to legal moralism seems plausible.

## VI.

In the final part of this Essay, I will outline an argument that, while by no means conclusive, suggests why there may not be a good argument in favor of the liberal's position. It is an argument that depends upon a plausible idea of what making moral judgments involves. Let me start with a well-known quota-

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54. *Id.* at 329.

55. Of course I recognize the two alternative strategies—deny the legitimacy of illegalization or find an alternative normative basis to regulate the activity.

56. A moral paternalist believes that the law may restrict conduct when doing so is (morally) better for the actor herself. Note not just that she *is* made better, but that being a better person is better *for* her.

57. See 4 FEINBERG, *supra* note 4, at 165-66.

tion: "We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience."<sup>58</sup>

This passage links the idea of right and wrong with the idea of punishment. Indeed, it makes the connection conceptual in character. It comes not from a "Devlinite" but from the patron saint of liberalism, John Stuart Mill. It seems to me not only to enjoy a good liberal pedigree but also to embody a correct insight into the idea of moral wrongness. If an action is wrong, that provides a reason—perhaps conclusive, perhaps not—for not doing it. It also provides a reason—perhaps conclusive, perhaps not—for discouraging the performance of such actions.<sup>59</sup>

Of course, it does not *follow* from the fact that an action ought not to be done that any third party ought to discourage it, to criticize it, or to forbid it by means of the criminal law. All of these, however, seem appropriate responses. Wrong (immoral) actions are *not to be done*, but that means that they are the appropriate targets of our criticism and our discouragement.

Of course, there may be good reasons in particular cases for not criticizing someone who acts wrongly even though the action itself remains criticizable. It surely, then, cannot be the case that we could claim some principled reason for never actually criticizing those who act wrongly.

Again, the issues of whether an action is criticizable and whether one ought actually to criticize it are distinct from the issue of whether one ought to try to stop it in some more direct fashion. Questions of interference by means of moral and social pressure require rather different treatment. There seem to be spheres of autonomy within which we believe it wrong for others to interfere, even with actions that are wrong and therefore ought not to be done. What this shows, however, is that the step

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58. JOHN STUART MILL, *Utilitarianism*, in COLLECTED WORKS OF JOHN STUART MILL 203, 246 (J.M. Robson ed., 1969) (1861).

59. Consequentialists would deny this inference. Taking steps to discourage is always a separate act, which requires a separate calculation. This seems to misunderstand the connection between thinking something wrong and regarding it as something to be discouraged. This issue, though, requires a separate discussion.

from “wrong” to “subject to interference” requires additional argument. Of course, the step from “harmful” to “subject to interference” or from “deeply offensive” to “subject to interference” requires additional argument as well. All I am claiming is that, because “wrongful” implies “ought not to be done,” the category of immoral acts establishes the same threshold for the legitimacy of state interference as does the category of harmful or offensive acts.<sup>60</sup>

Could there be, in principle, reasons for not discouraging immoral actions by means of the criminal law? Could the nature of the sanctions make a difference? Is it the fact that criminal sanctions involve the loss of liberty, and in extreme cases life, that makes that kind of difference?

The first thing to note is that the criminal law operates with more than the sanctions of deprivation of life or liberty. It also imposes monetary fines. Unless liberals really mean to defend a weaker thesis, e.g., that the threat of loss of freedom or life may not be used to enforce morality, they are arguing that enforcing morality by means of criminal fines is illegitimate.<sup>61</sup> It also can not be the severity of the sanction that accounts for a principled restriction. Most of us would rather spend a week in prison for assaulting a colleague than face the aversion and ostracism of our professional peers.

Is it perhaps the condemnatory or expressive function of the criminal law? We have already seen that the immoral is what is not to be done. Those who do such wrongs are to be condemned, at least in the sense that they are condemnable. The distinct questions of who is, or ought to be, in a position to condemn and of whether it would do good or harm to condemn remain.

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60. More exactly, one would have to show either that the other premises used by those who seek to establish harm or offense as good reasons for criminal sanctions—and surely other such premises are required—themselves can help show that “wrongful” falls in the same category, or that different, but equally plausible, premises can help establish this. I have tried to do a bit of both.

61. I am ignoring the use of tort law, administrative law, and others as means of regulating immoral conduct. For an interesting discussion of stronger and weaker forms of a delegalization thesis, and for a general position similar to mine that has been worked out in some detail, see WILLIAM A. EDMUNDSON, *THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY* (1998).

Perhaps it is a good idea, in general, for the state to restrict the amount of condemnation in which it engages. These questions, however, seem to be matters of good judgment and prudence, not matters of principle.

The criminal law is an institution whose central rationales include making it less likely that acts that ought not to be done are not done and serving as a vehicle for condemning those who do what ought not to be done. The existence of principled reasons for ruling out (in advance) the criminal process as a means of discouragement therefore seems quite implausible.<sup>62</sup>

Principled reasons do exist for excluding certain subclasses of immoral actions from the criminal law. A good example is free speech. Here we find a class of actions that are immoral (e.g., denials of the holocaust, racial insults) and that we seek to immunize from criminal prosecution. Such acts pass the initial threshold for being considered legitimate objects of state interference. We believe, however, that there are reasons for maintaining a sphere of autonomy for individuals to engage in such actions. Some of these reasons are what I would consider policy rather than principle. Consider, for example, the claim that, though it would be within our right to interfere with such acts, granting interference powers to the state is too dangerous. Some of these arguments are matters of right themselves.<sup>63</sup> Note, however, that this class of acts is not merely immoral but also harmful, so that it constitutes an exception to the harm principle as well. If the existence of such a protected class counts as proof that the state ought not interfere with immoral acts, it also shows that the state ought not interfere with harmful acts.

We may recognize a "right to do wrong in other spheres,"<sup>64</sup> but these are consistent with believing that the "mere immorality" of

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62. What about arguments concerning a realm in which we are wary of the criminal law, e.g., the family? First, we do not exclude the criminal law (e.g., child neglect and domestic abuse); we rather use the law sparingly. Second, where we do not use it concerning immoral actions, e.g., fathers who ignore their nonfinancial responsibilities to their children, the reasons are efficacy and the importance of preserving a realm of privacy. These considerations are weighed against the importance of the wrongdoing.

63. For a particularly good example, see Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83 (1985).

64. Jeremy Waldron, *Right to Do Wrong?*, 92 ETHICS 21, 21-39 (1981).

an action brings it within the legitimate sphere of the criminal law. It is not that there is some further set of features (harm, offense, etc.) that must be added to immorality in order to bring the conduct within the legitimate sphere of state regulation. It may be that there are further features that, linked to a suitable principle, exclude it. This is just what is true for other features such as harm and offense.

The nonenforcement thesis has been popular with liberals because they think the prospect of convincing others about the morality or immorality of various controversial acts is dim. If I am right, however, the prospect of convincing them of the nonenforcement thesis is even dimmer. As Bertrand Russell observed with respect to logical matters, postulation has all "the advantages of theft over honest toil."<sup>65</sup> I encourage liberals who wish to argue against, for example, the criminalization of homosexual sex, to engage in the honest toil of arguing that the reason such conduct ought not be criminalized is that there is nothing immoral in it.<sup>66</sup>

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65. BERTRAND RUSSELL, INTRODUCTION TO MATHEMATICAL PHILOSOPHY 71 (1993).

66. I wish to thank my commentators Lawrence C. Becker and Jeffrie G. Murphy for their comments, which are included in this issue. I did not, for the most part, change my mind—partly because I did not want to face the Mae West challenge: Does it work any better now? Thanks as well to Shelly Kagan and Robert Adams.