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CRIMES AGAINST AUTONOMY: GERALD DWORKIN ON THE ENFORCEMENT OF MORALITY

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INTRODUCTION

My aim here is to redescribe some familiar ground, in aid of the idea that a principle of equal protection of individual autonomy is fundamental to decisions about which moral norms ought to be enforced through the criminal law. It seems necessary to do this, because when a distinguished philosopher such as Gerald Dworkin gives us an unsettling essay on a familiar topic, the source of the disturbance is not likely to be internal to the essay itself, at least not in any obvious way. It is more likely that the problem is in the background. My aim is to illuminate this background. The substance will not be new, but my hope is that the way this Essay brings it into focus will help to rehabilitate the idea that Professor Dworkin attacks.

The aim of this redescription is restricted in several ways, however. First, it is part of an explication of liberal *political* theory rather than an argument that follows from some comprehensive account of morality. My aim will be to show that liberal political theorists plausibly invoke autonomy[1] to explain why they draw the line about criminalization where they do. I leave aside here whether, and if so how, liberal political principles and polity

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1. For convenience, I will use the summary definition of autonomy given by Professor Dworkin himself in *The Theory and Practice of Autonomy*:

> [A]utonomy is conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.

GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 20 (1988).

are justified by a comprehensive moral theory. Second, on the assumption that we live in an *imperfect* liberal democracy, a complex relation will exist between my thesis about autonomy and the actual boundary, in our legal system, between the criminal and the noncriminal. On the one hand, descriptive accuracy will be a test of the autonomy thesis: if it turns out that a proposed principle of autonomy draws a boundary that is radically different from the actual one, the plausibility of the thesis will be in doubt. On the other hand, we must not expect a perfect match between what liberal theory prescribes and what liberal practice in a complex political environment is able to deliver. Rather, we should expect to find and be able to accommodate some inconsistencies and anomalies. Third, the principle I will defend is only a necessary condition for criminal enforcement, not a sufficient one. It thus gives us a good guide to decisions about what must be *excluded* from the criminal sphere (in liberal theory), but it is not by itself a good guide to decisions about what must be, or should be, *included.* For the decision about inclusion, there is no substitute for an appeal to consequences.

I. MORAL NORMS AND NUCLEAR ENFORCEMENT: THE GENERAL PICTURE

Here is a familiar picture: the norms of morality may be represented as points on a plane. Some of these points (color them red, for convenience) indicate requirements and prohibitions; others indicate judgments about what we "ought" to do that nonetheless fall short of requirements or prohibitions (color them yellow, for cautions); still others indicate conduct in which our choices are matters of moral indifference (color them green)—points at which we are permitted to do just as we please.

It is clear that it is logically possible to arrange these red, yellow, and green points on the normative plane in a variety of interesting ways, ranging from something like an exercise in pointilist painting to drawings in a cell biology textbook. The standard way of representing the normative plane, however, is to group the points in each of the normative categories together into a series of concentric figures. On the assumption—or per-

haps a desperate hope—that the least restrictive norms are the most numerous, we typically imagine the green ones—permissions—as being in the largest, outermost figure, perhaps even in an unbounded field. This large green field surrounds the set of nonmandatory "oughts," which in turn surrounds requirements and prohibitions. Moreover, we can represent the fact that the norms of each sort are enforced in more or less strict ways by shading these concentric figures so that the color of each becomes more intense, or darker, toward its center. Then, on the assumption that criminal sanctions are the most severe, and reserved for the most important norms of the most restrictive sort, we have what I call a nuclear picture of the enforcement of morals problem: we think of criminal law as properly enforcing only a small nucleus of the most significant moral requirements and prohibitions.

Wittgenstein has cautioned us not to be captured, in doing philosophy, by pictures that we have not studied carefully from outside their frames, as it were.[2] In the case of the standard picture of the normative plane, this is very good advice. For one thing, it follows immediately from the standard picture that Hart's answer to the enforcement of morals question he considers is necessarily and trivially correct: It cannot follow merely from the fact that something is a moral norm somewhere on the normative plane that it belongs in the nucleus of norms that properly are subject to criminal sanctions.[3] In the standard picture, merely being a moral norm of some sort is neither necessary nor sufficient for criminal sanctions, and being a mandatory moral norm, while a necessary condition, is not a sufficient one. The norm must be a nuclear one. We therefore need some account of what makes a norm a nuclear one, and in a liberal political polity it is natural to think that this account would have to be given in terms of the core principles of the theory, namely autonomy and liberty.

Of course it will be possible, within the standard picture of concentric figures on the normative plane, to propose a very restrictive definition of morality—one, for example, that defines

2. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 34, 193 (1953).
3. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY 4-5 (1963).

matters of moral concern as involving only the most significant sorts of requirements and prohibitions. This will make it true by definition—or at any rate, thinkable—that moral status might be sufficient to justify criminal enforcement of a given norm. Such a restrictive definition of morality would, for example, place eudaemonistic and perfectionistic considerations in a larger—or perhaps wholly separate—category of the "ethical" and would reserve large areas of the plane for nonmoral and even nonethical norms.

One of the things I want to suggest, though I will not take time to develop it, is that unacknowledged differences about the concept of a moral norm often generate differences about whether moral norms should be enforced criminally. If one wishes to reserve the term "moral" for the most important region of the most restrictive class of norms on the normative plane, then I suppose it is plausible that he might think that *all* moral norms are at least *candidates* for such criminal sanctions. If one takes a more traditional, wider view of moral norms, however, it will seem preposterous to think that mere moral status makes them candidates for criminal law enforcement.

It seems to me that this conceptual difference to some extent explains the debates between Mill[4] and Fitzjames Stephen[5] and between Hart[6] and Devlin.[7] Both Devlin and his predecessor believe that matters of moral concern are right at the core—in the nucleus—of our normative concerns and are therefore, of course, always candidates for the most serious type of enforcement we can devise—typically, criminal enforcement.[8] Both Hart and his predecessor, however, have it in mind that morality encompasses ideals as well as duties, permissions as well as requirements, matters that seriously affect great numbers of people as well as matters of rather transient, local importance.[9] To them it seems

4. *See* JOHN STUART MILL, ON LIBERTY 13 (Currin V. Shields ed., Liberal Arts Press 1956) (1859).

5. *See* JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 135 (R.J. White ed., Cambridge Univ. Press 1967) (1873).

6. *See* HART, *supra* note 3, at 4-5.

7. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 13 (1965).

8. *See id.* at 24-25; STEPHEN, *supra* note 5, at 143.

9. *See* HART, *supra* note 3, at 70-74; MILL, *supra* note 4, at 12-13.

obvious that making a case for the criminal enforcement of a moral norm requires something more than merely acknowledging that it is a moral norm. The debate between the two sides continues partly because this conceptual difference is largely ignored and partly because each side is eager to address the central issue raised in Professor Dworkin's essay—the issue of whether there is a principled line that can be drawn around the class of norms that are fit for criminal enforcement.

II. AUTONOMY IS THE THEORY; LIBERTY IS THE PRACTICE

What are the candidates for a "principled line" here? Professor Dworkin's argument addressed the possibility of drawing a line in terms of "the protection of autonomy and equal respect for persons."[10] I agree with him that this is a good candidate to examine, but before doing so it is useful to retreat a moment to consider the general nature of criminal law.

Criminal law has several notable features. First and foremost, it is an area of public law in which (roughly speaking) the initiative for prosecution resides with the state, and the sanctions it imposes on wrongdoers are designed predominantly to satisfy public purposes rather than to compensate or satisfy individual victims. Second, criminal penalties at their worst typically involve thoroughgoing forfeiture of fundamental liberties, confiscation of property, or even in some cases the taking of life itself. Civil sanctions at their worst never intentionally take life itself, and when they take fundamental liberties—such as freedom of movement, speech, or custodianship of one's children—they typically are quite limited in extent and leave intact not only most of the individual's sum total of liberty, but most of the very liberty that the sanctions restrict. Third, criminal penalties at their worst stigmatize the wrongdoer in a way that civil sanctions do not. When we convict someone of a crime we are, in the paradigmatic case, branding the convict as someone who has violated the social contract, or who has demonstrated that he is a threat to people generally or to fundamental social institutions—in

10. Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 931 (1999).

addition to being someone who has violated a person's rights, or who has in some other way harmed individuals.

What makes this all very messy, of course, is that all three of these features are matters of degree and that some criminal penalties lack one or more of these features altogether. The stigma, for example, is often minimal or lacking altogether for tax offenses in our culture, and criminal penalties that involve only fines may, depending on their scale, impose little or no significant loss of liberty or property. Moreover, as a practical matter, the state will not pursue many minor crimes in the absence of a formal complaint by the victim, and in some cases restitution to the victim is a prominent part of the criminal penalty. Now add to that some facts about civil actions: that the state can be a party to civil actions; that civil sanctions can involve purely punitive damages; that some civil actions (such as sexual harassment cases) are stigmatizing; that class action suits are sometimes undertaken for the public good without the knowledge or consent of most of the victims affected; and that some civil damage awards can be confiscatory. All of this makes it very difficult to draw up a set of necessary and sufficient defining conditions that will cleanly and clearly separate the criminal from the civil sphere in anything other than a purely formal or nominal sense.

It seems to me, then, that if we were looking for a principled line that adequately describes the *actual* boundary in our system between the criminal and the civil, we would be doomed to fail. Principles may underwrite the distinction between the central, paradigmatic features of criminal law and the central, paradigmatic features of civil law. When it comes to defining the actual boundary between criminal and civil law, however, it seems safe to say that political power, administrative efficiency, and historical accident have been more influential than the deliberate application of a moral principle. Moreover, the odds of finding that the results of this messy process just happen to correspond neatly to the line that one *would* draw by the deliberate application of moral principles seem very long indeed.

For these reasons, if we are going to undertake the hunt for a principled line, perhaps we should consider only the central, paradigmatic cases—that is, the area of law in which all three

core features of criminal law are clearly present and clearly distinct in either degree or kind from anything found in civil law. Our question then becomes whether there is a principled line that marks off this area of the criminal law—the area where the sanctions are deeply stigmatizing, involve serious restrictions on individual liberty, and are defined and administered to serve the purposes of public rather than private law.

Can a principle of "autonomy and equal respect" mark off this area of the law? In liberal political theory, it seems to be the appropriate candidate. Protecting individual liberty is by definition a central concern for any liberal polity, but the reason liberals insist on a polity that protects life, liberty, property, and the pursuit of happiness is that liberal political theory valorizes the powers of autonomous agency and ascribes the capacity for such autonomous agency, in equal measure, to all mature, healthy human beings.[11] Implementing that value requires the most extensive possible protections for the development, maintenance, and exercise of the capacity for autonomous agency consistent with equal protection for all. Restrictions on liberty—restrictions on the ways in which individuals exercise their autonomy—will always require justification, but restrictions which compromise the *capacity* for autonomous activity itself (as opposed to its mere exercise in a particular case) will require the strongest possible justification.

This distinction often gets lost in political debates about liberty, especially when libertarianism is conceived of as a variety of liberal political theory. Libertarians who conceive of liberty as intrinsically valuable, and thus conceive of the protection of liberty as a fundamental moral principle, are not liberals. Perhaps, rather, it is best to say that they are at one end of a continuum which includes liberals for whom the fundamental moral principle is the protection of autonomy. For those liberals, the protection of liberty is an instrumental principle, adopted as a way of implementing a commitment to the development, maintenance, and exercise of agency powers in everyone. Such liberals will accept restrictions on liberty that are necessary to develop or

11. *See, e.g.*, MILL, *supra* note 4; JOHN RAWLS, A THEORY OF JUSTICE (1971).

preserve agency powers; that is, the basic liberal argument for paternalistic intervention. Such liberals will be relatively untroubled by restrictions on liberty that leave "as much and as good" for the agents involved—that is, satisfy a general version of the Lockean Proviso[12]—or that are the inevitable by-product of autonomous choices by the agents themselves and do no harm to others (e.g., Mill's harm principle[13]). The fact that Professor Dworkin writes a skeptical essay about autonomy and the enforcement of morals, though it limits my liberty in some sense, does not limit it in a morally or politically significant sense.

All of this is fairly standard and I need not belabor it here. Let us instead proceed, then, to outlining an argument for using a commitment to autonomy to draw a principled line that marks off the norms that properly are subject to criminal sanctions.

III. THE ARGUMENT FOR DRAWING THE LINE WITH AUTONOMY

Suppose that autonomy is something of incomparable value for human beings, that our autonomy is the thing most precious to us and is the basis for human dignity, respect for person, and moral worth. The argument for such a proposition is of course likely to be a long one, especially if it is given in German. I, myself, prefer the ones given in Greek and Latin by the Stoics. For the sake of argument, however, suppose we accept the belief about autonomy that it is an incomparable, unique, and superlative good.[14] The immediate inference from this is that we cannot

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12. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1967). Robert Nozick gave the principle its felicitous name. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 178-82 (1974). For additional discussion of the principle and of Nozick's treatment of it, see LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 32-40 (1977), and Lawrence C. Becker, *Property Rights and Social Welfare*, *in* ECONOMIC JUSTICE: PRIVATE RIGHTS AND PUBLIC RESPONSIBILITIES 71, 71 n.4, 75 n.12 (Kenneth Kipnis & Diana T. Meyers eds., 1985).

13. *See* MILL, *supra* note 4, at 13, 91-93.

14. Professor Dworkin himself rejects such a claim:

> There is an intellectual error that threatens to arise whenever autonomy has been defended as crucial or fundamental: This is that the notion is elevated to a higher status than it deserves. Autonomy *is* important, but so is the capacity for sympathetic identification with others, or the capacity to reason prudentially, or the virtue of integrity. Similarly,

then try to "balance" autonomy against other goods, because its value is incommensurable to theirs. By hypothesis, the value of autonomy is uniquely greater than that of other things, therefore it naturally would assume a very special place in our hierarchy of preferences—it would have lexical priority, to use Rawlsian jargon.[15] Seeking, cultivating, and protecting autonomy would have priority for us because autonomy would be uniquely, superlatively good; we would not compromise that good in pursuit of others because we could not compare its value, for us, to the value of other goods. This gives us the principle, by contraposition, that the only admissible justifications for limiting autonomy in a given case will have to do with what is necessary for seeking, cultivating, or protecting autonomy in other cases. To put this in more familiar terms, we might say that the only reason for which we legitimately may limit the autonomous activity of one person is in order to seek, cultivate, or protect the autonomous activity of that person or others. It is natural to suppose that this limitation principle is implicitly proportional, that the justification for limiting one's autonomy will require showing that the limitation is necessary for seeking, cultivating, or protecting an equal or greater amount of autonomy in that person or in others. Finally, then, on the assumption that in the central, paradigmatic cases, criminal sanctions always limit the autonomy of the person on whom they are imposed—and limit it in the most severe way that we can devise—we conclude that such sanctions are only appropriate in defense of autonomy itself.

> although it is important to respect the autonomy of others, it is also important to respect their welfare, or their liberty, or their rationality. Theories that base everything on any single aspect of human personality, on any one of a number of values, always tend toward the intellectually imperialistic. One way in which this is done is by assimilating other concepts to that of autonomy. I have tried to avoid this by sharply distinguishing autonomy from other concepts. But having done this there is the tendency to claim that the concept is not only distinct but also supreme. I believe that autonomy is both important normatively and fundamental conceptually. Neither of these precludes the possibility that other concepts are both important and fundamental.

DWORKIN, *supra* note 1, at 32.

15. *See* RAWLS, *supra* note 11, at 244.

This is a very familiar form of argument—more familiar, probably, to Professor Dworkin because of his important work on autonomy.[16] Why, then, is he so skeptical about using this argument to draw a principled line around the class of acts that legitimately may be criminalized? Evidently, one thing about which he is skeptical is the assumption in the final step of the argument that criminal sanctions are the most severe type that we can devise, in terms of their consequences for autonomy.[17] He also evidently thinks that existing accounts of the matter from liberals do not establish adequately—or perhaps do not even give plausible arguments for—the unique value and lexical priority premises in the argument.[18] He has an even more general source for his skepticism in the thought that some sort of license to enforce is implicit in the very concept of a moral norm, and that whether or not the enforcement should be by way of the criminal law is a question that is to be answered, ultimately, by consequentialist considerations rather than by applying some deontological principle.[19] These are formidable challenges.

Notice first that the form of this argument is more general than my brief sketch may imply. I began with a very strong premise about the value of autonomy, which led to a very strong premise about its priority in our hierarchy of preferences and then to a very restrictive premise about the conditions under which autonomy could be limited. We need not suppose, however, that liberals like Mill, Hart, or Joel Feinberg would have to sign onto anything quite this Stoic or Kantian to make a similar argument. All they would need is a premise about the value of autonomy (or liberty) that supports the claim that it has some sort of priority for moral agents—a priority that imposes an unusually heavy burden of proof on anyone who proposes to limit a person's capacity for autonomy, or the free, harmless exercise of it, in pursuit of other values. That much, together with the assumption that paradigmatic criminal sanctions always limit

16. *See* DWORKIN, *supra* note 1.

17. *See id.* at 25-28 (arguing that obeying the law does not necessarily involve a forfeiture of autonomy).

18. *See id.* at 29-30.

19. *See* Dworkin, *supra* note 10, at 939-40.

autonomy in this way, will be enough to draw a pale, wavy, and somewhat smudged line of the principled sort Professor Dworkin is considering.

Next, let us think briefly about whether it is plausible to hold that autonomy necessarily has some sort of lexical priority for us. I think it is plausible to hold that classic liberal position, at least in terms of what counts as a good human life. Consider the limiting case: a conception of the good life as one of subordination, or the forfeiture of autonomy—to God, nation, family, or whatever. It is plausible to think that the value of such a life for the person involved will come from the perceived righteousness, nobility, exhilaration, or pleasure of the life so lived—of the sustained, purposive living of a subordinated life. That means preserving the value of such a life will involve the preservation of autonomy in a very fairly strong form, a form in which one persistently acquiesces to being dominated. To go further than that—to seek a form of life in which autonomy in even that sense is extinguished—is to venture into territory in which the very question of a good life, as something worth pursuing, does not arise. It seems plausible to think that whatever that form of life is, it is not anything recognizable as the life of a moral agent. A fairly strong form of autonomy, then, is a necessary good for moral agents with respect to what counts, for them, as a good life.[20] Moreover, other candidates for basic or necessary goods, such as air, water, food, and shelter, are subordinate to autonomy in this sense: If we are suddenly deprived of those other basic goods but are still able to act autonomously—however briefly—in many circumstances we are still able to make good lives for ourselves by resupplying ourselves with those goods. If, however, we suddenly are deprived of the capacity for autonomy itself, none of the other basic goods provides us with an instrument for bootstrapping our way back to autonomy and

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20. Dworkin agrees:

> There are various connections between autonomy as I have conceived it and metaphysical and attitudinal features of persons. Our notion of who we are, of self-identity, of being *this* person is linked to our capacity to find and re-fine oneself. The exercise of the capacity is what makes a life *mine*.

DWORKIN, *supra* note 1, at 32.

thus to what is necessary for a good life. This seems enough to support the notion that autonomy is uniquely valuable and that its preservation should have some sort of lexical priority for us.

Finally, consider what the connection is between the lexical priority of autonomy and the criminal enforcement of morality. Considerations of autonomy give us a way of marking off a class of moral harms that are especially severe, for the reasons just given. Moreover, the harms in this class are especially appropriate for public law as opposed to private law remedies. Damage to a person's autonomy typically imposes a burden on us all, making it an appropriate matter of public, as opposed to merely private, concern. Such damaged autonomy also typically compromises the ability of the injured person to seek and obtain remedies privately. Further, the autonomy principle is scalar in a way that maps reasonably well onto the main outlines of the criminal law. In particular, it overlays the notion that wrongs should be scaled in terms of the nature of the perpetrator's intent (mens rea) as well as the nature of the harm done to the victim because, if autonomy is involved, both things are pressing matters of social concern. It also maps onto the notion that the consent of the victim, or the victim's voluntary assumption of risk, may sometimes, but not always, negate the justification for imposing criminal sanctions.

I am not, therefore, persuaded by the final section of Professor Dworkin's essay, in which he suggests that there are reasons for thinking that no principled line can be drawn around a subset of moral norms marked off for criminal sanctions.[21] Ultimately, he proposes that the notion of enforcement is implicit in the very concept of a moral norm, and because the actual severity of sanctions does not correspond to a principled distinction between criminal law and other sorts of legal enforcement, or even between legal enforcement and informal social enforcement, the real work that liberals need to do is in deciding what the moral norms are in the first place. What he evidently means by moral norms are what I have called requirements and prohibitions—along with, perhaps, those nonmandatory "oughts" that verge on

21. *See* Dworkin, *supra* note 10, at 942-46.

the mandatory and that, like some matters of etiquette, we do enforce fitfully. What he is arguing is that the honest labor that liberals need to do is in deciding which of those moral norms should be enforced criminally. That sounds right to me as far it goes, but as I have suggested, I think ending the search for a principled line may be premature.

IV. CASES AND CONCLUDING REMARKS

Applying this high altitude argument to the dirty details of human conduct is no simple matter. Thoroughgoing attempts to do so can easily get bogged down in a swamp of slippery distinctions about what counts as a genuine harm to one's capacity for autonomous action and what counts as a significant limitation on the exercise of one's agency powers. The general outlines of liberal concerns are clear enough: hostility to the death penalty, and to the use of deadly force generally, as long as other options are available; lesser hostility to maiming, physical torture, and terrorism; similar concern about the crippling effects of psychological abuse and psychologically debilitating environments; concern about the social conditions necessary for developing and sustaining autonomy, which translates into special attention to child welfare, the oppression of women and minorities, addictive substances that deform autonomy, and the indirect consequences of prostitution, informational blackmail, dwarf tossing, pornography, and a host of other practices; special protection for civil liberties; and a general reluctance to expand the robust, paradigmatic criminal enforcement of morality.

Liberals disagree among themselves about the details. I suggest, however, that some of this disagreement is the result of attempting to force the principle of autonomy to do too much. Here I gladly join Professor Dworkin in his skepticism. Even if we accept the principled line drawn by autonomy, we should recognize that it only settles matters of an exclusionary sort. When we can show that a given practice of autonomous adults poses no threat to the development or protection of autonomy in others, we have a conclusive reason for rejecting paradigmatic criminal sanctions against that practice, even if the practice violates other moral norms. That is why some liberals feel justified,

in debates about the limits of criminal law, in avoiding the honest labor of deciding whether or not homosexuality, for example, violates moral norms of a nonmandatory sort. It is enough to have shown that the practice does not cross the line drawn by a concern for autonomy. Such exclusionary arguments, however, do not settle arguments about whether merely crossing the line is ever sufficient to justify criminal sanctions. Moreover, they do not settle questions about using some weakened form of criminal law to regulate matters that do not cross the line.

Finally, it is fair to wonder whether my redescription here has somehow changed the subject; whether there is really any firm connection between the sort of argument I have outlined and the great debates about the enforcement of morals between liberals such as Mill, Hart, Feinberg, and the other Dworkin on one side and, for lack of a better term, conservatives such as Fitzjames Stephen and Devlin on the other. I think there is a firm connection. I think liberals are in general convinced that there is a special value, and hence a special priority, that must be assigned to autonomy. Some liberals, like Hart, are ambivalent enough about this to object to the Rawlsian notion of the lexical priority of liberty.[22] But I take it that by definition, if they are liberals, they are not as deeply ambivalent about, or as dismissive of, the priority of autonomy as are the conservatives (like Devlin) who are preoccupied with defending the social and moral "fabric" of society. Liberals remain preoccupied with restricting methods of repairing or reinforcing the social fabric when those methods compromise autonomy; conservatives are more inclined to take a stitch in time even if it does compromise autonomy, and to use whatever mending techniques work best when things start to come unraveled. It seems to me that this is a persistent difference between liberals and their critics, and the honest labor liberals need to do is to secure each step in the argument I have outlined: that the value of autonomy is extraordinary; that this extraordinary value entails an extraordinary priority for autono-

22. *See* RAWLS, *supra* note 11, at 244 ("By the priority of liberty I mean the precedence of the principle of equal liberty over the second principle of justice. The two principles are in lexical order, and therefore the claims of liberty are to be satisfied first.").

my; that this extraordinary priority entails extraordinary limitations on the ways in which autonomy may be sacrificed for other values; and that, in general, this means that criminal sanctions that seriously limit autonomy cannot be imposed to control some form of immoral behavior simply because that behavior is immoral.