

# Joel Feinberg and the Justification of Hard Paternalism

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Joel Feinberg was a brilliant philosopher whose work in social and moral philosophy is a legacy of excellent, even stunning achievement. Perhaps his most memorable achievement is his four-volume treatise on *The Moral Limits of the Criminal Law*, and perhaps the most striking jewel in this crowning achievement is his passionate and deeply insightful treatment of paternalism.<sup>1</sup> Feinberg opposes Legal Paternalism, the doctrine that “it is always a good reason in support of a [criminal law] prohibition that it is necessary to prevent harm (physical, psychological, or economic) to the actor himself.” Against this doctrine Feinberg asserts that when an agent’s sufficiently voluntary choice causes harm to herself or risk of harm to herself, this category of harm-to-self is never a good reason in support of criminal law prohibition of that type of conduct.

Feinberg’s opposition to Legal Paternalism is soft, not hard, because his position allows that the prevention of harm to the agent that would arise from self-harming conduct that is less than substantially voluntary is always a good reason for criminal law prohibition. Transposing the terminology in the usual way, we say that the Legal Paternalism that Feinberg opposes is hard paternalism.

In Feinberg’s hands the opposition to hard paternalism is associated with a doctrine of autonomy and personal sovereignty and revealed to be a fundamental commitment of a liberal political philosophy. The problem of paternalism goes to the heart of the issue, under what conditions and for what reasons it is morally acceptable for state agencies coercively to restrict the liberty of an individual in a decent society.

In my view the achievement of Feinberg in this area is that he canvasses and states the best, most sophisticated available arguments against hard paternalism. The failure of these arguments then shows definitively, or about as definitively as argument ever becomes in moral philosophy, that there is no successful case against hard paternalism to be made.<sup>2</sup> Feinberg sees the advocate of paternalism as wrongly subordinating the individual’s right to her good, and if this subordination is not wrong, in my view we should shuttle back to the broadly utilitarian liberalism of John Stuart Mill, and reconsider the inadequacy of his utilitarian arguments for his version of doctrinaire and absolutist antipaternalism. Very roughly, the conclusion we should reach is not that the welfarist consequentialist should find paternalism a generally desirable policy, but that it can be morally acceptable and even required. But this essay does not try to reach that conclusion, but only takes a step toward it. The step is to argue that the principled arguments against hard paternalism are defective and merit rejection (even by a nonconsequentialist who accepts a right to self-determination).

### FEINBERG’S LIBERALISM

Feinberg identifies the ideal of liberalism with a respect for individual liberty that takes the form of sharply limiting the acceptable reasons for enacting criminal law prohibitions. A criminal law prohibition subjects the person who violates it with liability to serious penalty, normally including imprisonment, and to official condemnation by public officials, if she is apprehended, charged with the offense, tried, and found guilty. Why this narrow focus on the criminal law? Feinberg identifies liberty with “absence of legal coercion,” and the government can limit individual liberty by means other than criminal law prohibition. A court-ordered injunction backed by penalty coerces the individual from the specified behavior, and taxation of

an activity can effectively force those who would have to pay the tax from engaging in the activity. Feinberg replies that the condemnation and normally serious penalties that attach to those who are found guilty of violating penal statutes involve greater coercion than taxation; “there is also a difference in the mode of coercion so significant that it amounts to a difference in kind as well as degree” (*Harm to Others*, p. 24).

The scope restriction in Feinberg’s version of liberalism is not merely pro forma. He explicitly states that he regards the paternalistic aim of preventing people from engaging in self-harmful conduct to be an acceptable reason that appropriately might affect the shape of taxation policy.<sup>3</sup> Without forfeiting its claim to be liberal, a government might, for example, place a tax on the sale of cigarettes in order to gain revenue to fund government activities and to discourage people from smoking. The basis of the latter aim would be the paternalistic conviction that smoking is bad for people’s health and is best avoided by anyone. So far as I can see, Feinberg does not commit himself as to whether paternalistic reasons can be legitimate considerations that weigh in the determination of what one ought to do when a private individual is deciding how to treat another person. Might it be morally acceptable to lie to a person for paternalistic reasons? I might deliberately misinform Sally about the health consequences of smoking, exaggerating the risks, in order to induce her not to smoke, which I believe is all things considered bad for her. I am overriding Sally’s own assignment of evaluative weights to the factors that bear on her decision whether or not to smoke, and acting on the basis of my own evaluation of the goods and bads at stake for her, when I decide to deceive her for her own good.

Feinberg identifies liberalism with the position that wrongful harm to others and wrongful offense to others, mediated by the maxim *volenti non fit injuria*, together are the only good reasons for criminal law prohibitions. (The reference to “*wrongful harm*” and “*wrongful offense*” indicates an account that needs filling in to give substance to the principles in which they occur, but for purposes of this essay I set this issue and Feinberg’s intricate and subtle answers to it to the side.) He adds that the prevention of harm to the self can be a good reason for criminal law prohibition when the harm to the self would arise in a substantially nonvoluntary way. A key element of this doctrine is the idea that harm or risk of harm to an individual subject to which that very individual voluntarily consents never constitutes a good reason supporting criminal law prohibition to prevent the occurrence of the harm. This is antipaternalism, the rejection of hard paternalism. By the same token benefit or likelihood of benefit to an individual which that very individual would not voluntarily seek never constitutes a good reason supporting criminal law prohibition.

Feinberg supports this core component of liberalism as he conceives it by invoking an ideal of personal sovereignty, a right of autonomy that every person possesses. Feinberg eloquently characterizes this right: “The life that a person threatens by his own rashness is after all *his* life; it *belongs* to him and to no one else. For that reason alone, he must be the one to decide—for better or worse—what is to be done with it in that private realm where the interests of others are not directly involved” (*Harm to Self*, p. 59). He also states: “*respect for a person’s autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him*” (*Harm to Self*, p. 68). To these descriptions one should add that it is part of this conception of sovereignty that a person may voluntarily undertake obligations and commitments and may waive or transfer any or almost all of his autonomy rights even as they are pertinent to the distant future. One’s own voluntary choice in the past may then rightfully fetter his voluntary choice in the present. Within limits, the individual’s voluntary choice is also the rightful determinant of what happens to him,

in the sense that another person's acts that threaten to cause harm or risk of harm to the individual that would otherwise be wrongful do not provide grounds for restricting or forbidding the other person's acts if the individual voluntarily consents to bear these adverse consequences.

Does invocation of personal sovereignty, also known as the right to autonomy, point to reasons to accept antipaternalism, or is it rather that the latter is part of the former? After all, we wouldn't say that accepting a whole is a reason to accept a part of that same whole; accepting the whole already includes accepting the part.

Personal sovereignty rules out more than paternalistic restriction. For the Feinberg liberal, personal sovereignty rules out all restrictions except those stemming from wrongful harm and offense to nonconsenting others and nonvoluntary harm to self.

Personal sovereignty as just specified is a broader notion than antipaternalism if the latter is defined as a doctrine concerning the permissibility of criminal law prohibition. A person's right to act in whatever way she voluntarily chooses so long as she does not wrongfully harm nonconsenting others has implications for tort and contract law as well as for criminal law. This right of autonomy also morally constrains individual conduct by ruling out paternalistic restriction of liberty as morally impermissible. In circumstances in which act utilitarianism would dictate that I ought forcibly to restrain my suicidally inclined brother from jumping off the roof, personal sovereignty intervenes and forbids this restriction of my brother's liberty.

Antipaternalism as defined for purposes of the Feinberg treatise, a norm constraining legitimate criminal prohibition, does not address the issue of the proper boundaries of permissible individual conduct.

Personal sovereignty is broader in scope than antipaternalism as a constraint on acceptable criminal law prohibitions. Personal sovereignty is broader in another way. Antipaternalism rules out one type of reason for interference with individual liberty—namely, paternalistic ones. Personal sovereignty rules out types of interference with individual liberty other than paternalistic ones. One might hold that restriction of individual liberty is justified to prevent what Feinberg calls “freefloating evils.” These are evils that do not consist in damage to anyone's interests. In the context of determining the proper limits of criminal law prohibition, Feinberg gathers this class of reasons for restriction under the heading “legal moralism in the broad sense,” and one might by extension speak of moralism in the broad sense, reasons for restriction of a person's liberty that do not involve any claimed damage to the interests of others. Personal sovereignty rules out restriction of liberty on the basis of moralism; antipaternalism of course does not.

Personal sovereignty is in another way weaker than antipaternalism as we are now understanding it. The former is stated in terms of rights and the latter is stated in terms of there being no good reasons. Personal sovereignty says roughly that one has a right to live as one chooses so long as one does not harm voluntarily consenting others in certain ways that count as wrongful harming. Antipaternalism says that harm or risk of harm to a person who voluntarily consents to absorb the harm or stand the risks is never a good reason for criminal prohibition. It does not say that such harm to a person is never a good reason in contexts other than the choice of criminal laws. The personal sovereignty idea postulates a moral right; it does not say there can be no valid moral reasons that conflict with the right. Postulating a moral right is not always and necessarily to affirm that the right is absolute, is never legitimately overridden by any combination of moral reasons. Let us say personal sovereignty or the right of autonomy is strong if it is absolute in this sense and weak otherwise. A weak right of autonomy would be compatible both with the existence of reasons that oppose compliance with the right and with the existence

of circumstance in which all things considered those reasons outweigh the right, so that what one morally ought to do is act against the right.

The strongest ideal of personal sovereignty and antipaternalism would hold that harm or risk of harm to an individual to which that individual voluntarily consents is never a good reason at all in favor of any choice for one or another action or policy

I am unsure whether Feinberg means to assert the strongest ideal of personal sovereignty or some weaker doctrine, and if the latter, exactly what weaker doctrine he endorses. He certainly holds that antipaternalism holds absolutely: harm to a person who consents to absorb it is never a good reason for criminal prohibition.

If Feinberg allows harm to self as a good reason that should be weighed against others in the determination of choice of morally right action and policy in some contexts, why suddenly does it cease to be a reason when we turn to the issue of criminal prohibitions? Surely his discussions extolling personal sovereignty strongly suggest his loyalty is to the strongest ideal. But whether he asserts a broad absolutism of personal sovereignty or a more restricted absolutism in the realm of criminal prohibition, he is asserting some form of absolutism, and hence runs up against the implausibility of any absolutist prohibitions.

Moral rights protect important human interests. But for any right, upholding it can affect the protected interest to a larger or smaller degree. I have a right that you refrain from stealing my property, and this includes my right that you not steal my extra shirt button, but the latter is surely of small consequence. Any right has this feature. My right not to be killed by unprovoked assault includes my right not to be shot with a gun as target practice by someone in a high rise office building who sees me falling to the ground from an upper story. Since I am certainly going to die from collision with the ground in a couple of seconds, the life I lose to the shooter is as one might say not worth a plug nickel.

The same is true of the right to autonomy, in particular the component consisting of the right not to be subjected to paternalistic interference. The right protects the person's interest in "voluntarily disposing of his own lot in life," in John Stuart Mill's words.<sup>4</sup> But different paternalistic interferences frustrate this interest to markedly different extents: a rule requiring car drivers to wear seat belts is paternalistic, and so is the rule of a theocratic government requiring that one live exactly according to the strict dictates of a particular religion that specifies the proper response to virtually all nontrivial life choices.

Even if a right is deemed important, given that infringements of it vary by degree, and the interests that are counterposed to the right in particular circumstances can vary enormously in their moral weight, it is implausible to uphold the absolutist insistence that any right must be respected whatever the consequences. If the consequences of not infringing<sup>5</sup> the right are sufficiently bad, and the interest that the right protects will only suffer a slight enough degree of frustration, one should in these circumstances act against the right.

In the case of a right against paternalistic interference, the right rules out action for certain reasons, those that involve the interferer's judgment about what will be conducive to the good of the agent. So the good of other (nonconsenting) agents will not be what is counterposed to the right against paternalism when one is tempted to infringe the right, because acting to protect the interests of those others would not be paternalistic. What is counterposed to the right against paternalistic interference is always the good of the individual whose right we are considering infringing. But in a particular case the good of the individual that is at stake can be enormous, and the degree to which paternalistic interference would frustrate the agent's interest

in self-determination can be very slight. Seen in this light, absolutist antipaternalism, like absolutist insistence on upholding any moral right, is fanaticism.<sup>6</sup>

#### HARD AND SOFT PATERNALISM

The paternalism Feinberg opposes is hard paternalism. Soft paternalistic legislation can be acceptable, in his view, as well as soft paternalistic social policy and individual conduct. (Feinberg prefers to call himself a soft antipaternalist, and to say that only one who favors hard paternalism is genuinely in favor of paternalism at all.) To assess his position then we need to be clear what the difference is between hard and soft varieties of paternalism.

Feinberg writes, “Hard paternalism will accept as a reason for criminal legislation that it is necessary to protect competent adults, against their will, from the harmful consequences even of their fully voluntary choices and undertakings” (*Harm to Self*, p. 12). A competent adult is neither crazy nor feebleminded; she is at or above a minimum threshold level of these agency capacities. One can also be temporarily incompetent, as for example when one is extremely drunk. After detailed and brilliant discussion of the complex multi-faceted idea of a fully voluntary choice, Feinberg amends the voluntariness requirement. To qualify as a choice protected against paternalistic interference, the agent’s decision to act must be voluntary enough, where the level of voluntariness that is “enough” or sufficient varies depending on the magnitude and irreversibility of the certain harm or risk of harm that the individual’s proposed action threatens to cause her to suffer. The idea of a voluntary choice collects several dimensions of assessment of quality of choice and integrates them into a single scale. A choice fails to be fully voluntary if it is a forced choice made under coercion or duress, or if it is based on a mistake about a matter of empirical fact that is material to the decision, or if it is made in an emotional state unsuited to clear thinking about what to do, or if it based on cognitive error or mistaken reasoning, or if is not carefully considered. A fully voluntary choice is thought to represent faithfully the agent’s stable values and attitudes and desires.

The antipaternalist norm protects the agent’s freedom now to choose to waive or alienate some or all of her future freedom to act or even personal sovereignty itself. The agent now has authority over her future, should she choose to commit herself now (unless she has already exercised such an authority in the past and committed herself in certain ways already). The person now is also the rightful caretaker of the interests of herself in the future. She can make the protected voluntary choice to save now for her old age or to refrain from such saving. The individual’s present choice to live a grasshopper lifestyle is not properly overridden or constrained by the anticipated preference of a future stage of herself that she behave now as a thrifty frugal ant.

Given the above gloss on the phrase “against their will” in Feinberg’s definition of *hard paternalism*, one sees that the soft antipaternalist cannot allow that interferences with a person’s liberty can be deemed justifiable and not paternalistic provided that the person would endorse the interference at some future time of her life. Voluntariness concerns the quality of the agent’s choice now. The fact that at some future time, with further life experiences, one would not find interference objectionable, does nothing in itself to reduce the hard paternalistic quality of an interference with the agent’s liberty now. The idea of self-determination that is reflected in the constraint against paternalism subordinates the future self to the present self; this is just part of what it means to accord the individual the power of “voluntarily disposing over his own lot in life.”

An example may clarify this point. Suppose young adults would voluntarily choose to develop the habit of smoking cigarettes, perhaps because the practice fits an ideal self-image.

Suppose they know that older people tend to disavow these youthful choices and regret the decision to start smoking. The older people, compared with their younger selves, give more weight to the value of good health than to the value of stylish demeanor that conflicts with it. Still, the youths' voluntary enough choice now is to smoke. In these circumstances, there is no soft paternalist rationale for prohibition of smoking to save the future stages of these people from their present voluntary choices—that would be usurping the rightful role of the present self. In much the same way, people today may voluntarily incur debts that their older selves will regard as unwise, but the contract that gives rise to the debt is not null and void on that account. Nor is there a soft paternalist rationale for banning such contracts.

The essence of paternalism is overriding the individual's own evaluation of where her own good lies (along with her decision as to the degree to which she will pursue that good by her choices rather than seek alternative goals). Restriction of people's liberty intended to give effect to their current evaluations of where their own good lies and their own present will as to how far it should be pursued are not rightly deemed paternalistic, as many commentators have noted. Feinberg has always been clear on this point.

Like most soft antipaternalists, Feinberg marshals his intellectual resources to defeat the hard paternalist opponent. He does not treat hard antipaternalism as a serious contender in the dispute.<sup>7</sup> The hard antipaternalist eschews voluntariness qualifications and holds that provided a choice is made by a competent adult freely (that is, in the absence of coercion or duress) and provided the choice does not wrongfully harm any nonconsenting other persons, restriction of the person's liberty to carry out the choice would be wrongfully paternalistic.

Feinberg too quickly and brusquely dismisses hard antipaternalism, so it seems to me. He writes, "The harm to others principle permits us to protect a person from the choices of other people; soft paternalism would permit us to protect him from "nonvoluntary choices," which, being the genuine choices of no one at all, are no less foreign to him" (*Harm to Self*, p. 12). This claim is an exaggeration, like the claim that a person's fully voluntary choices uniquely reflect the agent's settled values, attitudes, and desires. For one thing, a person may voluntarily choose on some occasion to act against settled values, attitudes, and desires. Moreover, a person's settled values, attitudes, and desires may include a disposition to impetuous decision making and an aversion to the careful consideration that renders choices voluntary. A person who makes an impetuous decision to race his car on a windy foggy road may be acting in accordance with his character not against it; and it is also possible the person identifies with the kind of person he is, who makes decisions in this way, and endorses the choice—even if things turn out badly. One may strive to live up to the ideal of oneself as a wild and crazy guy, and this striving may be in some ordinary sense one's own even if it is never subject to careful deliberation. Notice that a person who is making a self-destructive choice in a less than voluntary enough way may bristle with indignation if others attempt to interfere or if the legal rules stand in the way of his preferred way of being. "It's my life and no one else's," this person may say, and this saying registers the authentic note of the aspiration of self-determination and personal sovereignty.

Feinberg explicates the ideal of personal sovereignty by analogy with the notion of national sovereignty and self-determination, but he does not notice that the analogy actually favors the interpretation of personal sovereignty as the hard antipaternalist would have it. After all, a nation's right to sovereignty over its territory includes the right to mismanage its affairs, to base its economic and social policies on dreams and delusions rather than on facts and logic, to go to hell in a handbasket provided doing so does not involve trampling the rights of other nations or violating treaty obligations or the like. No one has ever proposed that it would not

violate the right to national self-determination if the U.S. for example were to send its troops into Mexico to prevent the Mexican government, the legitimate agent of its people, from enacting and implanting policies for the internal governance of Mexico that are based on a set of theoretical and factual claims that are demonstrably false. But if national self-determination protects a nation's freedom to conduct its affairs as it freely chooses, not as it freely chooses provided the choices are fully voluntary or sufficiently voluntary, why not take the same line regarding personal sovereignty and self-determination? There is a legitimate hard antipaternalist ideal that merits scrutiny and should not be dismissed as a nonstarter.<sup>8</sup>

I make these comments not to defend hard antipaternalism but to indicate that the soft paternalist is fighting a war on two fronts and once the strategic situation is appreciated the prospects for victory may look dim. Against the hard antipaternalist, Feinberg needs to qualify significantly his advocacy of personal sovereignty: some limited paternalistic interference with personal liberty is acceptable, according to soft paternalism. It is natural to suppose that the problem with hard antipaternalism is that it protects individuals' freedom to perform actions that are gratuitously or viciously self-harming. Hard antipaternalism is not sufficiently solicitous of the individual's good, the actual quality of life she succeeds in gaining. But this cannot be Feinberg's line, because soft antipaternalism likewise protects gratuitously or viciously self-harming acts provided they are voluntary enough. As Feinberg says, the soft paternalist is not concerned that the agent's self-destructive choices are not tracking genuine values; the concern is that they might not really be the agent's own choices—due to failure of voluntariness. The soft antipaternalist only defends personal sovereignty lite.

On the other front, against the hard paternalist, the soft paternalist cannot wrap herself too closely in the flag of personal self-determination. She herself has a divided response to that ideal, as is indicated by her rejection of hard libertarian antipaternalism. What she has to urge is the enormous overriding moral importance of the line between self-harming choice that is not quite voluntary enough and choice that just passes the threshold of being voluntary enough. What matters morally is whether the agent's choice is voluntary or not and more exactly how voluntary it is. This line places enormous moral weight on the idea of voluntary choice and indeed on the importance of the degree of voluntariness in the case at hand. The soft paternalist's opponents, the hard paternalist and the hard antipaternalist, from opposite sides of the fence, both agree in doubting that the idea of individual voluntary choice will bear the enormous weight that the soft paternalist has to place on it. Voluntary choice is important but does not plausibly have the make-or-break significance that soft paternalism attaches to it. It is a mistake to make a fetish of voluntary choice.

A person who is lucky enough can lead a great life, achieving truly valuable goods, without ever making choices that score high on Feinberg's voluntariness scale. (What determines the good or bad quality of what one seeks depends on whether one's choices would withstand ideal critical scrutiny not whether they are actually subjected to any scrutiny at all.) A person who is unlucky can make a long series of life choices each attaining a high score on the voluntariness scale, each one leading to unmitigated disaster for the agent. Voluntary choice is an imperfect guarantee of gaining what is truly valuable in life. It is a tool that works sometimes, in some circumstances. Like any tool it should sometimes be tossed aside. Perhaps one could tinker with the idea of a perfectly voluntary choice to eliminate any possibility that what is perfectly voluntarily chosen could be against true values correctly appreciated and ranked, but as Feinberg is well aware, one cannot ratchet up the standard of voluntariness too high without

trivializing the soft paternalist position regarded as an interpretation of the ideals of personal sovereignty and self-determination.

#### SUBJECTIVISM ON THE GOOD

Feinberg opposes hard paternalism on the ground that the hard paternalist wrongly subordinates the agent's right—in this case the right of autonomy—to her good. His account of the personal good that is doing the subordinating here is complex and subtle, but broadly subjectivist. What is ultimately in the interest of an individual depends on that person's basic desires, what she wants for its own sake rather than as means to some further end. If one's paramount basic desire is to go around counting the blades of grass on courthouse lawns, then that is one's good.

An important complication is that Feinberg introduces the idea of welfare interests, things that one needs to pursue just about any plan of life or to seek to fulfill just about any set of basic desires. One has welfare interests in such things as continued life, bodily vigor and health, mental acuity, command of material resources in the form of private property entitlements, adequate nutrition and shelter, security from bodily attack and physical damage to one's person and property, security from theft, fraud, and extortion. Feinberg holds that one has welfare interests strictly speaking in possession of a minimal threshold amount of each of the welfare interest goods. These welfare interests comprise a for the most part objective component in the subjectivist theory of good. For just about any person with just about any set of basic desires or ulterior interests, one has an interest in satisfying one's welfare interests, whether one subjectively thinks so or not. Only someone with extremely idiosyncratic basic desires will lack a genuine interest in these welfare interests. Also, in some extreme circumstances, such as terminal painful illness (which renders continued staying alive not in one's interest) or the prospect of being sent to work in the dictator's salt mines for the rest of one's days if one is found to be physically healthy (in which case poor health is in one's interest), fulfillment of particular welfare interests can be disadvantageous for any of us.

According to Feinberg, the interests that will merit protection from the state especially in the form of criminal law prohibitions will be our welfare interests, not the ulterior interests they serve. Another complication is that the state generally protects our interest in the welfare interest goods beyond the minimal necessary threshold. We need some money, but the state protects all our private property holdings from loss by theft and fraud.

Feinberg's subjectivism is an important prop to his view that the right to personal sovereignty always overrules considerations of personal good. Kicking away the prop would by itself render his structure unstable. I do not wish to belabor the point, since this essay is not the place for a debate on subjectivist versus objectivist conceptions of human good.<sup>9</sup> I simply want to note that to my mind the subjectivism Feinberg embraces renders somewhat more plausible his insistence that the individual's right to autonomy should never be subordinated to his good. If good is ultimately just satisfaction of desire, then perhaps it is not such a big deal morally speaking. In this framework, if one can make out a robust case for attractively specified individual moral rights, the idea that rights are trumps looks quite plausible.<sup>10</sup> If the good that criminal law prohibitions protect is simply the satisfaction of our welfare interests, which are normally but not always good means to achieving our good whatever it is, the individual's voluntary choice to sacrifice her good so defined in the pursuit of other values, or the individual's voluntary choice to sacrifice her welfare interests for some heartfelt aim, should perhaps always be protected. I don't say subjectivism on the good suffices to render Feinberg's



argument for soft paternalism a success; I just say subjectivism renders his case somewhat more plausible than it would be, if objectivism on the good were deemed to be the correct perspective.

Hard paternalism naturally consorts with a conception of our ultimate striving as not to satisfy whatever desires and aims we now happen to embrace—these could all be failing to track correct values—but to achieve genuinely worthwhile values over the course of one’s life. To the extent we can attribute such an underlying aspiration to anyone whatever her present consciousness and opinions, we cannot rule out the possibility that restriction of an agent’s liberty against her will for her own good may turn her from a track along which she will have a grim life to a track along which her life will be genuinely a life that is good for her. The good properly understood includes autonomy as a key component. A life being ordered about by others and forced to live the life others select for one will not be a good life for the person. But even taking into account the crucial value of autonomy, it remains the case that sometimes a hard coercive shove away from the bad can improve anyone’s life.

In passing, I note that Feinberg’s incorporation of a voluntariness standard into the ideal of personal sovereignty goes some way toward acceptance of an informed desire conception of personal good. Feinberg allows that a gross mistake of fact that is material to a decision one takes automatically renders the decision substantially nonvoluntary. Think of the example of reaching for what one believes to be table salt but what is really a salt shaker full of white poison. Restriction of one’s liberty to ingest the poison is not wrongfully paternalistic according to Feinberg. In a similar way, factual error may determine the shape of a person’s basic desires, so that correcting the factual error would extinguish the basic desire. In such a case, restricting a person’s liberty to act to achieve the basic desire in question, until the false factual belief can be corrected, will cause the basic desire to be extinguished. In this sort of case, what one might call false desire, material to one’s choices, can render those choices substantially nonvoluntary, since the false desire is sustained by mistake of fact.

#### CASUISTRY

Feinberg pursues a sustained campaign of argument in favor of soft antipaternalism. He wages this campaign with clarity, care, and astute insight. Against putative counterexamples to the claim that soft antipaternalism would yield recommendations for policy that we will find acceptable after ideal reflective scrutiny, Feinberg presses in one of two ways. Either the putatively intuitively plausible paternalist prohibition is revealed to be not really desirable policy all things considered, or else the suggested prohibition under examination turns out to be desirable policy after all, but not plausibly an instance of hard paternalism.

Laws to be administratable must be coarse-grained. The social planner designing laws for a society must reckon with possibilities of maladministration and corruption in the implementation of any proposed law by government agency, and with possibilities that the effect of the law on the operation of a society filled with imperfectly rational, not well informed, and generally self-interested people will be bad in ways hard to anticipate. For these familiar reasons, argument about legal paternalism by example and counterexample is almost bound to end up uncertain and tentative. Decisive victory on this terrain is hard to wrest.

The best examples for the paternalist will be laws that require acts that any common sense endorses, or prohibit acts that lead to very uncontroversial bads. J. S. Mill puts this strategy of argument in the mouth of an imagined pro-paternalist opponent. Mill writes, “The only things it is sought to prevent are things which have been tried and condemned from the beginning of the world until now; things which experience has shown not to be useful or suitable to any person’s individuality.”<sup>11</sup>

The things that common sense decries as grossly imprudent (without carrying any compensating benefits for other people)<sup>12</sup> are nonetheless many of the things that people will sometimes voluntarily choose. As Feinberg rightly notes, on his definitions, reasonableness and voluntariness need not run together.<sup>13</sup> One might consider laws that prohibit dangerous recreational drugs that are associated with very unfavorable ratios of short-term pleasure to long-term pain and deterioration of health. A society might be quite permissive and tolerant of recreational drugs, yet draw the line at some drugs that have especially little to offer considering the long-term misery they bring on their users. A society might forbid methamphetamine use, for example, thereby forfeiting the honorific title of “liberal” as Feinberg conceives it, without striking most of us as objectionably illiberal, unduly restrictive of individual liberty. For another example, discussed by Feinberg, consider laws requiring those venturing in the woods during hunting season to wear bright red clothing to reduce the risk of shooting accidents. The literature on paternalism is replete with such plausible examples.<sup>14</sup>

In the face of such counterexamples, Feinberg holds the line. He seeks acceptable nonpaternalist rationales for the laws that are the most plausible counterexamples. Since a paternalist law is one that is justified, if at all, by paternalistic reasons, finding an alternative rationale that justifies the law defeats the counterexample.

Here is a sample argument that conveys the flavor of the enterprise. If we permitted people to go into the woods in hunting season wearing clothing that makes them resemble deer and pheasants and other shooters’ targets, no doubt some people would thoughtlessly put on such clothing without advertent to the risk. For them, the choice to risk being shot in this way is substantially nonvoluntary. If their protection justifies the law, then the restriction of the liberty of those who would voluntarily run the risk is not intended, but a byproduct of seeking other legitimate goals. If we removed the restriction requiring red clothing, there will be more accidental shootings of persons during hunting season. Some of these people will become public charges in state-financed hospitals, a drain on the public fisc. Hunters who accidentally shoot persons who blend into the woods or resemble their targets will face the suffering and regret that comes with accidentally wounding or killing another person. And so on.

I confess to some skepticism about this mode of argument. Feinberg seems to be holding a line come what may rather than following the argument in an open spirit. At any rate, suppose one stipulates that the features that give Feinberg his nonpaternalist rationales for what look superficially to be paternalist policies are not present. Imagining such variants on the cases, I find the case for restriction of liberty still seems persuasive, and not surprisingly, because prevention of the harm to the individuals engaging in unreasonably risky behavior is the salient factor in the examples as originally described. So suppose that it turns out the dissemination of the relevant facts about hunting season and its dangers is so pervasive that there simply are no less than substantially voluntary choices to venture into the woods wearing risky clothing. Perhaps a culture of flamboyant risk-taking for its own thrill has found deep roots in the young adults of the hunting community. Moreover, the state requires and is able efficiently to enforce a requirement that those venturing into the woods without appropriate clothing in hunting season must purchase insurance that will take care of costs that will result if they suffer injury by accidental shooting. Finally, the cost that falls on the hunters who would sometimes accidentally kill hikers if the red clothing requirement is suspended, we stipulate, is minimal or nothing. Hunters, a prudent culturally conservative bunch, are disjoint from the set of people who want to risk hiking without brightly colored clothing, and not at all sympathetic to these young fools. The hunters take due and reasonable care to be careful, but if an accident occurs,

they lose not a moment feeling guilty or regretful about the tragedy of the situation. Even with these stipulated facts, I find my conviction that the paternalist law is obviously good and sensible policy is unaltered. The costs that fall on the imprudent choosers themselves suffice to justify state prohibition of the grossly imprudent conduct. You might say, we need to alter the culture of risk-taking that produces the behavior in question, but it may be that enforcing a paternalist ban is as good a way of any of dampening this culture, or perhaps it cannot be dampened by any means, yet eliminating this particular avenue for its expression produces strongly beneficial effects on people's lives in the aggregate.

I am not sure what the rules of the game are supposed to be, when soft paternalists discuss counterexamples. A genuine moral right that is supposed to be never overrideable should stand up to farfetched but possible counterexamples. The thinkable and clear counterexample defeats the assertion of the moral right. If on the other hand we are arguing at a lower level of abstraction, about what practical policies will satisfy our values to the greatest feasible extent all things considered, then we need (a) to clarify what our fundamental values really are and (b) to consider actual careful circumstances in their particular detail. The stylized and simple thought experiments in the arsenal of soft paternalist arguments do not address the concerns of actual choice of policy in any particular setting. I suspect that the case for paternalism will win out at this lower level of abstraction, but serious argument here would need to be different in kind from what we are considering. I conclude that if the soft paternalist arguments must be interpreted as thought experiments at the level of ideal theory, then at that level, the counterexamples succeed in defeating the case for the absolutist right to autonomy that Feinberg espouses and defends.

Feinberg informs his readers that he is doing applied moral philosophy and crafting principles fit to serve as moral constraints for legislators and constitution-makers.<sup>15</sup> He also explicitly eschews systematic moral theory. He is not constructing a moral system from moral first principles but instead starting at the level of common sense judgment about proper uses of state power and the limits of state authority.<sup>16</sup> I do not by any means rule out doing moral philosophy at any level of abstraction. Given certain facts, what should we do? This question can frame an intellectually respectable inquiry given any specification of facts from the most general to the most particular. However, Feinberg's inquiry as he conducts it seems inherently slippery. The given facts are not specified. The idea of doing applied moral philosophy seems to presuppose first principles that are to be applied, but Feinberg proposes no such principles. But then it is unclear how to assess the mid-range principles Feinberg does propose. They are claimed to hold on the condition that certain facts obtain, but what these are remains unclear. Moreover, Feinberg explicitly distinguishes his brand of antipaternalism from that of J. S. Mill, on the ground that in *On Liberty* Mill does not oppose paternalism on principle but only contingently (*Harm to Self*, p. 59). Mill holds as a first principle that utility should be maximized and proposes refraining from paternalism as a strategy to be employed toward the end of utility maximization. Feinberg does not espouse antipaternalism merely as a means toward some further moral goal; to this extent his disagreement with Mill is understandable. But to my mind what it is to be a principled antipaternalist does not emerge into plain view in Feinberg's writing and I cannot discern any coherent and plausible conception implicit in what he does assert.<sup>17</sup>

#### THE DISTRIBUTION OF THE GOOD

The claim that the right to personal sovereignty should never be subordinated to the gain to an individual's well-being that violation of her sovereignty could achieve looks more plausible

than it should if one abstracts from the wide differences in choicemaking ability across human persons. Through no fault or choice of their own, some people by genetic endowment and favorable socialization have lots of this ability and a disposition to employ it fully on appropriate occasions of choice. Others have less ability and less disposition to deploy what ability they have. People vary by degree in these respects; for simplicity let us just speak of good choosers and bad choosers. On the whole and on the average, good choosers will tend to gain higher well-being in life, and bad choosers less. A perfectly good chooser who aims prudently to seek her good throughout her life would never benefit from any paternalistic law (unless the law cuts off unwanted options and saves her decisionmaking time), since she will always make the best choice from whatever set of options she faces. Poor choosers can benefit from paternalism and some could expect to benefit substantially from intelligent paternalist policy over the course of a lifetime.

Some bad choices that bad choosers would be prone to make and that would lessen their life prospects will be foreclosed by a regulatory regime of soft paternalism of the sort Feinberg would endorse. But to reiterate, voluntariness is not reasonableness. Wherever the soft paternalist sets the sliding scale that identifies choices that are voluntary enough, of the total set of choices that individuals make that are in the sphere of protected individual liberty so defined, the voluntary enough choices made by bad choosers will tend to be less advantageous for them than the voluntary enough choices made by the good choosers.

There is then a distributive justice aspect to the issue of paternalism. Embracing hard paternalism and enforcing sensible well-being enhancing paternalistic rules, society will be enacting policies that are comparatively better for the bad choosers among its members than for the good choosers. If our distributive justice ethic should be egalitarian in the sense of giving priority to gaining a benefit for an individual, the worse off she would be in the absence of that benefit, then we have reason to weight more highly the gains that the bad choosers get if paternalism is embraced than any gains that good choosers get if paternalism is eschewed. This is so, because on the whole and on the average, the bad choosers will cluster in the group of people that is badly off in lifetime well-being and the good choosers will more frequently be better off. From the standpoint that values boosting human well-being, the more prioritarian our weighting of well-being gains and losses, the more attractive hard paternalism appears.

Of course this consideration develops entirely within the consequentialist well-being oriented component of our morality. For many of us, this component is not the whole. In particular, Feinberg appeals to a nonconsequentialist right of personal autonomy, a right not to be subjected to paternalistic restriction of liberty that each of us owes to every other person and which should be respected regardless of the consequences that ensue. So far in this essay I have argued against the claim that we do owe one another respect for personal sovereignty as Feinberg construes it. But looking at the distributional consequences of enforcing the right of autonomy that Feinberg upholds casts that putative right in an unflattering light. To put the point aggressively, antipaternalism, most especially hard antipaternalism but definitely Feinberg's soft paternalist compromise variety, looks to be an ideology of the good choosers, a doctrine that would operate to the advantage of the already better off at the expense of the worse off, the needy and vulnerable.<sup>18</sup>

#### ANIMADVERSIONS ON KANTIANISM

In a memorable section of *Harm to Self* Feinberg contrasts the doctrine of personal sovereignty that he champions with the Kantian account of autonomy and dignity.<sup>19</sup> He disparages the Kantian account and supports his contempt with shrewd arguments. Nonetheless

to my mind he fails to notice a crucial truth that is in the neighborhood of the Kantian assertions. This truth does not vindicate Kant and his followers but does sink Feinberg's ideal of personal sovereignty.

Consider the humanity formulation of the categorical imperative: Act so that you treat humanity, whether in your own person or in the person of another, never merely as a means but always also as an end in itself. In this context humanity is the distinctive capacity of human persons, rational agency capacity—the ability to set ends, devise plans to achieve chosen ends, and choose actions to further plans. Rational agency capacity is the capability to perceive reasons and to choose to act according to the balance of reasons. Kant deploys this principle to argue against the permissibility of suicide for pain relief. The claim is that in committing suicide I cut short my tenure as a rational agent, and that doing this in order to secure relief from pain is in effect exchanging the benefit of pain relief for the value of maintaining rational agency capacity for a time. Any such exchange would be to treat my rational agency capacity as a mere means to attaining some benefits. What's wrong with that? The Kantian answer is that rational agency capacity is a good of unsurpassable value, the source of human dignity, what distinguishes us from mere animal nature. Treating rational agency capacity in oneself or another always as an end in itself and never merely as a means is treating it according to its proper value, but since rational agency capacity has unsurpassable value, no trade-off of any amount of rational agency capacity for any amount of merely finite benefits satisfies this stringent requirement.

This rehearsal of Kant on suicide draws from the *Groundwork* discussion. Feinberg examines elaborations of this account in the *Lectures on Ethics*. There he finds religious arguments. The rough idea is that being owned by God, and assigned to the post of life on earth, we are not at liberty to quit our post at our own discretion, and are not at liberty to waste or destroy the life or body that really belongs to God, not to us.

Feinberg concludes his discussion by saying there are two basic flaws in Kant's conception: "First, it locates a person's dignity in abstract characteristics not peculiar to him, rather than, at least partly, in his own individuality. . . . Second, the human relationships of which Kant makes metaphorical use—trusteeship, military hierarchy, and chattel ownership, are not themselves persuasive models of 'dignity' (to put the point mildly)" (pp. 96-97).

Feinberg's brusque treatment of Kant has merit. There are several issues here, some of which are central to Feinberg's own conception of personal sovereignty and autonomy and to what (according to me) is flawed in that conception. To anticipate the discussion to come, I shall claim that Feinberg is roughly correct in the first criticism against Kant quoted above and roughly incorrect in the second criticism. Neither Kant's views as Feinberg characterizes them nor Feinberg's own eloquently stated views capture the truth on this terrain.

Consider again the argument against suicide for pain relief.<sup>20</sup>

1. It is always morally wrong to exchange rational agency capacity for mere benefits.
2. Suicide for pain relief exchanges rational agency capacity for mere benefits.
3. Suicide for pain relief is always morally wrong.

The argument concludes that suicide done for a certain reason is always wrong. Now apply this to an end-of-life scenario. I am dying from a dread disease that incapacitates before it kills, and kills slowly and painfully. Being incapacitated, there is nothing significant I can do, for myself and others. But my rational agency capacity remains intact, to an extent. Each day that I am alive I can work at some crossword puzzles. Since my pain is very great and unfortunately cannot be alleviated significantly by pain-killing drugs, if I stay alive I am

condemned to suffer many months at great cost to myself and no compensating gain to self or others. Nonetheless, in this scenario, suicide for pain relief is morally wrong, according to the no-exchange argument. Surely something has gone drastically wrong somewhere in the reasoning leading to this harsh conclusion.

Moreover, part of what has gone wrong is the Kantian extravagance that Feinberg pinpoints. Rational agency capacity is a complex of abilities, each of which varies by degree. Its value is great, no doubt, but finite, not “unsurpassable.” But as the separate components of rational agency capacity dwindle, and overall capacity shrinks, the overall value also shrinks. Moreover, our reverence for rational agency capacity is to a large degree reverence for the potential that rational agency capacity gives the bearer in most normal circumstances of human life. This is potential to develop one’s individuality in particular ways, to make something worthwhile of one’s life for oneself and others, to achieve any of an enormously wide range of great goods according to our choices and the luck of circumstances. In abnormal unfortunate circumstances, when this potential disappears or almost entirely disappears, what is left can be of very modest value indeed, and it can be perfectly reasonable to trade off the good of continued existence for some extra period of time as a (somewhat) rational agent against other goods that one can secure by cutting short one’s existence. The idea that these tradeoffs, which are sometimes difficult and complex and sometimes obviously favor cutting short one’s life, always automatically are wrong to contemplate because they offend against the unsurpassable value of rational agency capacity itself, is simply not credible. But even rational agency capacity in full flowering, possessed by a capable intelligent human in fortunate circumstances, is reasonably assessed at some large but finite value. The basic idea of the no-exchange constraint is misguided.

This argument in support of Feinberg does not amount to a vindication of Feinberg’s own position. Feinberg’s position sweeps very broadly and requires us to accept as morally permissible any substantially voluntary suicide when suicide does not involve harmful wrongdoing—violations of the rights of persons other than the agent contemplating suicide.

1. One has the moral right to do whatever one chooses so long as one does not thereby wrongfully harm others.
2. One has the moral right to commit suicide so long as one does not thereby wrongfully harm others.
3. Merely failing to confer benefits on others does not constitute wrongfully harming others.
4. One has the moral right to commit suicide when the harm done is only to oneself and the suicide has effects on others only by resulting in failures to confer benefits on them.

As we have seen, Feinberg constrains the right to harm oneself by the requirement that the choice that results in harm to self must be voluntary or at least voluntary enough to qualify as substantially voluntary. Taking that constraint as given, we note that the argument just rehearsed applies to cases such as one I will label the Pouting Young Adult. Tom is unreasonably distressed at some disappointment he has suffered. Perhaps he has been bested in competition for a job he coveted. Perhaps his romantic partner has called it quits. Perhaps a particularly charming rabbit he saw at the Humane Society pet adoption center and hoped to choose and make his pet was adopted first by another person. Whatever the cause of his distress, he is unhappy, and feels vaguely cheated by the world at large, and wants at the moment nothing more than to express his disappointment by committing suicide. He is not deceived, is aware that if he lives, he will come to forget his disappointment and go on with his life, but he right now has no

interest in doing that. He wants above all to die. He is not mentally ill or incompetent, he just has unusual, and unusually self-indulgent and immature, preferences.

Feinberg's position on personal sovereignty and autonomy dictates that the pouting young adult has a moral right to kill himself and it would be wrong for the criminal law to interfere (for example, by laws against assisted suicide, which would bear on a person who might respond to a request by Tom of our example for help to make his suicide attempt a success). Extrapolating from Feinberg's arguments, it would seem he should also be committed to the position that it would be wrong for other people to intervene forcibly or with coercive threats to dissuade Tom from carrying through his suicidal intention.

In contemplating the application of Feinberg's views on personal sovereignty and autonomy to this sort of case, one feels—I feel, anyway—that something has gone radically wrong.

It should be added that it is a great merit of Feinberg's position that he accepts the implications of his chosen position without prevarication, evasion, or denial. He does not play fast and loose with the no doubt complicated notion of voluntary choice to insulate himself from troubling counterexamples by claiming that no such choice as we are contemplating could really be voluntarily made. In fact he discusses a case not so different from that of the Pouting Young Adult and calls it the “litmus test for distinguishing the paternalist from the liberal” (*Harm to Self*, p. 133). The generic case is one in which the agent is not deceived factually about the circumstances germane to her choice and is choosing voluntarily (or voluntarily enough) but is choosing to satisfy basic desires that strike many of us as bad, perverse, or distorted.

In flailing about for a response to the Pouting Young Adult one might well avail oneself of an insight that J. David Velleman registers in an ingenious attempt to defend the Kantian line on suicide. Velleman observes in the course of his discussion: “That's what I miss in so many discussions of euthanasia and assisted suicide: a sense of something in each of us that is larger than any of us, something that makes human life more than just an exchange of costs for benefits, more than just a job or a trip to the mall. I miss the sense of a value in us that makes a claim on us—a value that we must *live up to*.”<sup>21</sup>

At least one significant point that Velleman makes in this quote is entirely independent of the standard Kantian gloss he places on it. He identifies the value in us that makes a claim on us as dignity, which should be ascribed to all persons on the ground that they possess rational agency capability. Now the Kantian story is up and running. Morality requires that we respect the dignity in each person. This is a value that is in persons but not for them—not an aspect or component of their well-being to be traded off against other perhaps competing aspects or components. In virtue of having dignity, a person is an entity whose well-being matters morally, but according to Velleman it would be a kind of category mistake to treat dignity as a value to be balanced against one's own or for that matter other people's well-being. It then turns out that “the value of what's good for a person is only a shadow of the value inhering in the person, and cannot overshadow or be overshadowed by it.”<sup>22</sup>

But one could chuck this entire Kantian apparatus and retain the idea that there is something as it were in us that is connected to what gives us worth as persons and that makes a moral claim on us. This thought might naturally be elaborated as a watered-down secular equivalent of a sanctity of life doctrine. In all but extreme and rare unfortunate circumstances, being a live human being, having a life to live, is a precious and valuable opportunity, the opportunity to make something worthwhile of our life, something good for ourselves and others. Treating this precious opportunity as though it were trivial or did not matter would be deeply

immoral. It would be wrong to treat anyone's life including one's own as valueless or of slight account (provided that we are not dealing with one of the circumstances in which, tragically, this value is absent). The opportunity of having a life to live is associated with a moral duty, vague in its content but nonetheless substantive and I think of paramount importance, not to waste one's life but to use well the opportunity to live in a worthwhile way that is productive of significant good for self and others. One wants to instill a sense of reverence for life in one's children and one wants to live in a society whose culture supports both the appreciation of the value in the opportunity and the understanding of the duty to live up to the opportunity, make the most of it that one can. Everything said here in this paragraph is in the nature of commonplace remark, indeed cliché—but true and important nonetheless.

I have asserted baldly that each person has a moral duty to make something worthwhile of her life, something good for herself and others. As stated, the duty is owed both to oneself and to others, the set of persons whose lives might be improved if one fulfills the duty. I would interpret the duty to others as satisfied provided one does not waste the opportunity provided by having a life, but uses it with tolerable efficiency so that some person or persons within the set are benefited from one's mode of life. Corresponding to my duty to make something of my life for self and others, each of the others who might gain from my living has a right to benefit from my reasonable pursuit of some reasonable plan of life unless someone else benefits in this way. The duty in question is disjunctive (one must benefit someone in the set of those one might benefit), and the corresponding right takes a corresponding shape.

The duty to make something worthwhile of one's life has a hard paternalist component. One has the duty to live usefully, in a way that benefits either self or others. So one has a conditional duty to live in a way that is useful to oneself, generates good for oneself. One has a duty to make something worthwhile of one's life for oneself if one does not make something worthwhile of one's life for others.

To focus attention on the justifiability of hard paternalism, set to the side the duty to others component of the duty to make something worthwhile of one's life and consider only the duty to self component. Suppose Robinson Crusoe alone on his island can do nothing worthwhile for any persons other than himself, but he can live his life in a way that confers significant goods on himself. If Robinson Crusoe faces the choice of the Pouting Young Adult, my view is that he has a moral duty not to toss away his life for frivolous reasons even if he makes the choice to cut short his life at the good enough level of voluntariness so Feinberg's bar is passed and the right of personal sovereignty is triggered.

The duty to make something worthwhile of one's life as described so far is vague in the extreme. How worthwhile must one's life be to avoid violating the duty? My sense is that the duty as most of us would conceive it is vague in its requirements. There is a large range of benefit to self and others, such that anywhere within this range, an individual whose life falls within the range uncontroversially satisfies the duty. There is a gray area between this range and a lower range within which the individual does not uncontroversially satisfy the duty, but comes close enough so that coercion to induce him to live better, even if not self-defeating, would be wrong, and a gray area between that range and a still lower range in which the person is uncontroversially failing to satisfy the duty to a tolerable extent. Here are cases where the individual is egregiously failing to satisfy the duty, and in this range coercion might all things considered be justified (even for strictly hard paternalist reasons).

The secular sanctity of life doctrine incorporates the idea that rational agency capacity has special value, for it is this that makes the human person's life normally a great opportunity.



Lacking rational agency capability, a cat, though a marvelous animal, cannot accomplish anything remotely as fine as a human person can.

Although the opportunity for continued life is, for most people in most circumstances, a great good linked to a corresponding duty, in grim circumstances the opportunity has little value and may have disvalue. Moreover, if we are lucky enough to live to extreme old age, infirmity and the inexorable approach of death reduce the value of continued life in perfectly ordinary ways. As the opportunity value of continued existence shrinks, the corresponding duty fades to insignificance and eventually disappears altogether. Notwithstanding the sanctity of life, for many people, death, when it actually comes, is a blessing.

The secular sanctity of life doctrine admits of a variety of interpretations, within different ethical frameworks. But even as crudely stated it provides a rough but serviceable way of distinguishing suicide for pain relief and the Pouting Young Adult suicide and finding the former to be permissible and the latter impermissible. Velleman's Kantianism wrongly finds both instances of suicide impermissible and Feinberg, while leaving conceptual room for moral criticism of the Pouting Young Adult (and for that matter of suicide for pain relief), must hold that the individual's right of personal sovereignty covers both suicides, so that the individual has a moral right to cut short her life in both cases equally and equally in both cases, it would be wrong for others, and certainly for the state by criminal law prohibition, forcibly to intervene.

Consider again Feinberg's two criticisms of Kantianism. The first is that it is wrong to make a fetish of rational agency capacity. This criticism hits home, and it is a merit of the secular sanctity of life doctrine that it is not vulnerable to this criticism. Feinberg associates this criticism with a further thought, that it is a mistake to locate the source of human dignity in abstract characteristics common to people rather than, at least partly, in an individuality that is peculiar to each individual. But the capacity for individuality, for developing one's talents in any of a great variety of worthwhile ways so as to seek particular accomplishments of value, is itself another abstract characteristic common to people. The actualization of this potential is valuable, but I don't see that what has special value is what is unique and special in my own individuality. The many traits that make me unique could all have been different without much affecting the value of my life or my worth as a person and surely without augmenting or diminishing whatever we choose to call my human dignity. If you could make perfect copies of me, the existence of the replicas would destroy my uniqueness without lessening my worth or value.

But the main point is that Feinberg's confident assertion of his second criticism shows he is tone-deaf (at least in this context) to a consideration many of his readers will surely regard as crucial. The second criticism is that Kant's religious metaphors make hash of any sensible idea of human dignity. This flat assertion sounds flatly wrong. There is nothing at all incongruous in the project of linking the idea of human dignity to the conception of a value that makes claims on us and that we must live up to. This is the idea expressed by Velleman, which I have claimed is entirely detachable from the Kantian dress in which he clothes it.

Without venturing into philosophy of religion, one may quickly note that such ideas as that man is to God as a vassal to a kind of feudal lord, a superlord, does not in any obvious way demean human beings, if one's idea of God is the idea of an all-loving deity with all of the traditional perfections. An atheist can accept that if there were such a being, which there surely is not, it would not be wrong to regard oneself and other human persons as her vassal.<sup>23</sup>

Among the metaphors for a human's relationship to her life that Feinberg regards as offensive, one is trusteeship. This idea in its secular articulation is exactly correct and shows the

flaw in the personal sovereignty idea as Feinberg conceives it. Just as an owner of the land is the steward of the land, always under some significant obligation to use it well and pass it on in a nondegraded condition to future generations, so an individual person in relation to her own continued life is a steward or trustee. My life is mine to live, but not in any way I might want or arbitrarily might choose. I owe a duty to the moral community to use well the opportunity that the option of continued existence offers, not to waste it or let it spoil.

Another metaphor to which Feinberg takes exception but which strikes me as unexceptionable is the sentry at her post. Just as the sentry on duty is not at liberty to quit her post on whimsical or flimsy grounds, so too an individual with a life to live has not the moral liberty to cut short her existence on whimsical or flimsy grounds. The sentry metaphor illuminates in a further respect. It would be rigidly dogmatic to deny that in extreme circumstances even a soldier fighting a just war is morally permitted to abandon her post, desert the war effort, take it on the lam. In some situations standing fast by one's post either will do no good or the probability that one will be sacrificing oneself for no significant moral gain (or that the gain one might attain would come at an excessively high cost to oneself, a cost that morality does not demand that one bear) is sufficiently high that all things considered, abandoning one's post is at least morally permissible and perhaps even morally required. And the same goes for the duty of the human person not to cut short her life by suicide (or suicidally reckless risk-taking).

The antipaternalist line on suicide that Feinberg asserts is strictly speaking a discussion of criminal law not individual conduct, though the issues are surely linked. Feinberg's right of autonomy requires that he approve an unfettered legal right to assist another person to commit suicide just in case procedures are in place that ensure that the decision is voluntary enough on the part of the person who is choosing suicide. But this standard can be satisfied by the Pouting Young Adult as well as by people who are reasonably choosing suicide in their dire circumstances. Feinberg's position sweeps too broadly.

#### CONCLUSION

I have attempted to cast doubt on the ideal of personal sovereignty as Feinberg eloquently expounds it. Like many memorable philosophical achievements, Feinberg's accomplishment in the arguments here examined is to present the best case articulated to date on behalf of a version of liberalism that is in some ways attractive and sensible but ultimately indefensible.

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<sup>1</sup> . JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW*, vol. 1 HARM TO OTHERS (1984), vol. 2 OFFENSE TO OTHERS (1985), vol. 3 HARM TO SELF (1986), vol. 4 HARMLESS WRONGDOING (1988).

<sup>2</sup> . For Feinberg's ideas on how moral argument proceeds and what it can achieve, see his lucid comments in *HARM TO OTHERS*, at 16-19. Feinberg defends the Rawlsian method of seeking an ideally well considered reflective equilibrium. In his words, moral argument is always argumentum ad hominem. We seek to persuade an interlocutor starting from premises she accepts, or can be brought to accept by considerations that have intuitive appeal.

<sup>3</sup> . FEINBERG, *supra* note 1, *HARM TO OTHERS*, at 23-24.

<sup>4</sup> . J. S. MILL, *ON LIBERTY*, chapter 5, para. 10.

<sup>5</sup> . I borrow the term "infringing" from JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990). She notes that we need a term to specify an action that does what a moral right forbids while leaving it open whether or not the action is morally wrong all things considered. She suggests we use the term "infringing" in this sense and contrast infringing a right with violating it, the latter implying that the action in question is morally wrong. That all infringements of rights are violations would then be a

substantive moral claim that would have to be argued; the very idea of a moral right does not settle the question.

<sup>6</sup> . The view asserted in the text might seem to be paradoxical. Surely fundamental moral principles hold without exception if they hold at all. Even if the fundamental principle makes a conditional claim, the assertion that the principle with its condition satisfied holds without exception must be granted or we have not yet penetrated to the fundamental principles of a moral conception. A morality that takes moral rights as fundamental must then assert rights that hold without exception. In response: no moral rights such as present moral theories countenance plausibly holds without exception. One might assert that everyone has a right to be treated with respect, where this right is thought to admit no exceptions, but then the right turns out to be acceptable only if it is interpreted as formal and nonsubstantive, so that the right to be treated with respect means the right to be treated as fundamental moral principles (whatever they might be) dictates one should be treated.

<sup>7</sup> . Feinberg characterizes hard antipaternalism in *HARM TO SELF*, p. 15.

<sup>8</sup> . I tried, not very consistently or successfully, to defend something close to hard antipaternalism in *Mill versus Paternalism*, 90 *ETHICS* 470 (1980).

<sup>9</sup> . On this topic, see DEREK PARFIT, *REASONS AND PERSONS*, Appendix I (1984); JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* (1986); THOMAS HURKA, *PERFECTIONISM* (1993); L. W. SUMNER, *WELFARE, HAPPINESS, AND ETHICS* (1996).

<sup>10</sup> . The idea that rights are trumps is asserted by RONALD DWORKIN in *TAKING RIGHTS SERIOUSLY* (1978). Thomson suggests that a better metaphorical expression of the place of rights in morality would identify rights with “spongy side constraints.” But on her view the spongy constraints have a core of iron. I hold that moral rights are spongy all the way through—any right can be overridden if opposed by bad consequences that may consist of trivial bads or goods that might be gained by sufficiently many people.

<sup>11</sup> . MILL, *supra supra* note 3, chapter 4.

<sup>12</sup> . We may distinguish virtuous and vicious imprudence. Virtuous imprudence involves reasonable, net beneficial sacrifice of the agent’s interest in order to benefit others. Vicious imprudence is imprudence with no compensating benefits for others. A reasonable paternalist policy targets vicious not virtuous imprudence.

<sup>13</sup> . FEINBERG, *supra* note 1, *HARM TO SELF*, AT 112.

<sup>14</sup> . See for example, Gerald Dworkin, *Paternalism*, and *Paternalism: Some Second Thoughts*, both reprinted in DWORKIN, *THE THEORY AND PRACTISE OF AUTONOMY* (1988). See also Dan Brock, *Paternalism and Promoting the Good*, in ROLF SARTORIUS, ed., *PATERNALISM* (1983).

<sup>15</sup> . FEINBERG, *HARM TO SELF*, *supra* note 1, at 4.

<sup>16</sup> . *op. cit.*, at 16-19.

<sup>17</sup> . How can I say out of one side of my mouth that the question to which Feinberg answers “accept soft antipaternalism” is unclear and out of the other side of my mouth that the correct answer to this question is “reject soft antipaternalism”? Answer: Feinberg’s defense of soft antipaternalism does not hold up on its own terms. So far as one can discern what is at issue, one has good reason to disagree with Feinberg and accept the moral legitimacy of paternalism. However, it is also true that the question as posed by Feinberg is not well-defined. To this extent, my defense of the moral legitimacy of paternalism must be provisional.

<sup>18</sup> . For more in this vein, see my *Paternalism, Utility, and Fairness*, reprinted in GERALD DWORKIN ed. *MILL’S ‘ON LIBERTY’: CRITICAL ESSAYS* (1997).

<sup>19</sup> . See FEINBERG, *HARM TO SELF*, at 94-97; see also 35-39.

<sup>20</sup> . And contrast this argument with Feinberg’s soft antipaternalist treatment of the issue of the moral acceptability of suicide in *HARM TO SELF*, chapter 27.

<sup>21</sup> . J. David Velleman, *A Right of Self-Termination?*, 109 *ETHICS* 612 (1999).

<sup>22</sup> . Velleman, *op. cit.*, 613.

<sup>23</sup> . I suspect that even if as I believe the argument from evil is correct, so that the idea of an all-loving omniscient all-powerful God is inconsistent with the basic facts of life on earth for humans and other

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animals, one could still regard the idea of vassalage to a God as traditionally conceived (if this conception were fully coherent) as fully compatible with sensible ideals of human dignity.