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NEWSLETTER ON PHILOSOPHY AND LAW

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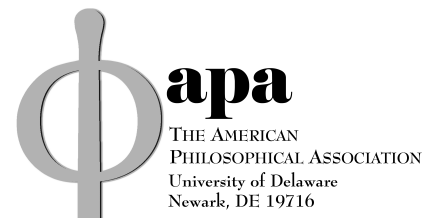
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FROM THE EDITORS

Edition in Tribute to Joel Feinberg

This edition honors the legacy of Joel Feinberg and continues the normative and conceptual analysis that animated his life's work.

Joel died in 2004 from complications arising from his long struggle with Parkinson's disease. As attested through the many obituaries and remembrances written in his honor, his writing is widely regarded among the finest work that contemporary social and legal philosophy has ever produced.

Always a gentleman, beloved by students and faculty, Joel had the remarkable philosophical virtue of a kindly manner combined with a dry wit. It was not uncommon for an unsuspecting speaker to absorb one of Joel's very funny responses to a prized argument only to realize later that the light-hearted humor was also a sharp and piercing critique.

In the classroom, Joel created the feel of a friendly talk on the porch combined with depth and texture, careful distinctions and quick retorts. His teaching was much like his writing. While improving on Joel's analysis of a given topic might be possible, it is never as easy as it might first seem. The simple fact is that he most likely already considered the point in question and his analysis probably already takes it into account.

Ranging across accounts of punishment (Schopp and Knapp), the offense principle (Price), jury nullification (Griffin), and hard paternalism (Boleyn-Fitzgerald), these essays refine, elaborate, and challenge various aspects of Feinberg's defense of liberalism. They are written largely by colleagues who had studied with Joel. They are an engaging set of essays that offer a fine tribute to the legacy of Joel Feinberg.

Steven Scalet, with co-editor John Arthur

ARTICLES

Expressing Condemnation that Fits the Crime

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I. Introduction

In one of his widely recognized works, Joel Feinberg provides a conceptual analysis of punishment that emphasizes the

expression of condemnation as a central element that distinguishes punishment from other penalties and serves several important social functions of punishment.¹ In this analysis, Feinberg explicitly rejects the familiar notion that punishment should fit the crime in the sense that the punishment should inflict pain that matches the moral gravity of the offense. He contends that punishment should fit the crime only in the relatively noncontroversial sense that the condemnatory aspect of the punishment should conform to the requirement of ordinal proportionality. That is, more serious crimes should receive more severe condemnation than less serious crimes.²

In this paper, I examine this minimal interpretation of the requirement that the punishment fits the crime, and I argue that this minimal interpretation is incomplete. Further, Feinberg's later work provides the basis for a more satisfactory understanding of the manner in which punishment should fit the crime. Part II briefly articulates Feinberg's analysis and expands it slightly. Part III examines an initial hypothetical criminal sentencing structure that raises questions regarding the adequacy of ordinal proportionality. Part IV develops an alternative analysis that draws upon Feinberg's later work to articulate an alternative formulation of this property of fit that reflects the expressive function of punishment. Part V concludes the analysis.

II. The Expressive Function

Feinberg develops a conception of criminal punishment as hard treatment of an offender for an offense by an authority that expresses condemnation. His analysis emphasizes the conceptual clarification of, and social functions served by, the expression of condemnation. Punishment expresses condemnation as reprobation and resentment directed toward the offender for his offense.³ That expression facilitates the ability of punishment to serve several important social functions. Feinberg explicitly recognizes four of these social functions. These include authoritative disavowal of the crime, symbolic nonacquiescence as public denunciation of particular crimes or categories of crimes, vindication of the law as emphatic reaffirmation of the prohibition contained in the offense definition, and absolution of parties other than the offender who might be subject to blame or suspicion in the absence of the explicit condemnation of the convicted offender.⁴

Arguably, the expressive function fulfills two additional functions that Feinberg does not explicitly discuss. First, criminal punishment vindicates the standing of victims of crimes. By condemning criminal offenses against these victims, criminal punishment of offenders repudiates these offenses and reaffirms the status of the victims as individuals who qualify for protection under law and who can make legitimate claims on legal institutions for protection and for vindication of their standing. If public officials fail to charge, convict, and punish those who commit crimes against certain victims or classes of victims, such as transients or prostitutes, they acquiesce

in these wrongful harms to these victims, and they effectively concede the derogation of the victims' standing implicit in the crimes.

Consider the significance of some empirical evidence suggesting that capital punishment in some jurisdictions is distributed in a manner that discriminates by race of victim.⁵ One might raise the practical concern that differential punishment dilutes the deterrent effect of capital punishment. This claim is empirically questionable, however, and it fails to address a more fundamental concern. The more fundamental objection to such differential punishment appeals to the expressive function of punishment. This type of discrimination in sentencing apparently expresses differential condemnation, indicating that murders of members of specified classes of persons are less severely wrongful than similar murders of members of other classes, reflecting the lesser standing of persons who are members of the former classes. Thus, this differential punishment expresses differential condemnation, violating the equal standing of the members of those classes and the principle of comparative justice. By convicting and punishing offenders who commit crimes against all categories of victims and subjecting those offenders to punishment in proportion to the crimes they commit and their culpability for those crimes, we conform to the requirement of comparative justice and vindicate the standing of the victims. By providing comparative justice for the victims, we also recognize the equal standing of the members of the various classes of persons to which the victims belong.

Punishment also reaffirms the standing of persons as responsible agents. Historical prototypes of contemporary institutions of criminal punishment reportedly applied punishment to animals or trees that killed human beings. In contrast, contemporary institutions of criminal punishment that contain requirements of culpability, such as the voluntary act requirement, culpability elements, and the insanity defense, apply punishment only to culpable wrong-doers. By limiting punishment to culpable wrongdoers, with the expression of reprobation and resentment inherent in that punishment, we explicitly recognize the special standing of persons as those who possess the capacities of responsible agency. We recognize them as individuals who possess the capacities necessary to comprehend the requirements of law and to direct their conduct through a minimally adequate process of practical reasoning. When a bear attacks a child in a campground, we will probably kill the bear to prevent further attacks, but we do so with a sense of sadness for the child, the child's family, and for the bear because the bear cannot reasonably be held responsible for the harm done. When a competent adult murders a child, in contrast, we severely punish the murderer with a sense of sadness for the child and the family but with anger toward the murderer.⁶ The expression of reprobation and resentment inherent in the severe punishment reflects our recognition that this killer possessed the capacities that qualified him as a highly culpable responsible agent.

Herbert Morris has written of the right to be punished, rather than be the subject of involuntary treatment, as an individual's right to be subjected to the form of coercive behavior control that reflects respect for that offender's standing as a responsible agent.⁷ One might reasonably question whether we should be concerned about vindicating the standing of offenders who culpably commit serious wrongs. This vindication is not limited, however, to these specific offenders. Rather, we recognize and express respect for the standing of the general category of responsible agents by maintaining the criminal justice system as our primary institution of coercive behavior control for those who possess the requisite capacities to

qualify for that standing. The reprobation and resentment expressed by criminal punishment represents our recognition that culpable offenders engage in criminal conduct with the capacities of responsible agency. These capacities enable them to direct their conduct through a minimally adequate process of practical reasoning by taking into consideration the applicable prohibitions, the relevant circumstances, the likely effects of their conduct, and the legally and morally relevant reasons that justify the legal and moral prohibitions. Thus, by maintaining and applying the criminal law as the primary institution of coercive behavior control applicable to offenders who possess the capacities of responsible agency, we express respect for all who possess these uniquely human capacities and condemnation for the culpable misuse of these capacities. In contrast to the early prototypes that applied punishment to animals and trees, contemporary institutions that reserve the expression of condemnation inherent in punishment for those who engage in culpable wrongdoing recognize the unique standing of responsible agents.

III. Condemnation that Fits the Crime

Consider a sequence of offenses selected from one widely accepted source of offense definitions in increasing order of severity and punishment. An offender commits assault if he purposely, knowingly, or recklessly causes bodily injury to another human being. He commits aggravated assault if he purposely or knowingly causes bodily injury to another with a deadly weapon. The offender commits manslaughter if he recklessly causes the death of another human being. He commits murder if he purposely or knowingly causes the death of another human being. These four offenses qualify respectively for maximum periods of incarceration of: one year, five years, ten years, and life.⁸

Then, consider an alternative criminal sentencing statute that prescribes punishment for these offenses by fines of \$1, \$2, \$3, and \$4 respectively. No plausible sentencing statute would prescribe such punishments. Perhaps because these sentences are so obviously inadequate, it might seem natural to reject them without explicitly articulating the properties that render them unsatisfactory. This system fulfills the requirement of ordinal proportionality, but it is unacceptable for several reasons. First, it provides only a trivial difference (\$3) between murder and simple assault. This minimal difference in punishment markedly understates the difference in severity of harm caused by these offenses and the difference in culpability for causing such harm. Thus, these sentences fail to accurately represent the differences in severity of condemnation that are appropriate to these offenses and to offenders who commit these offenses. Murder is a much more serious offense than simple assault, for example, but the sentencing scheme suggests that murder merits only marginally more condemnation. Thus, it fails to accurately express the differential severity of condemnation appropriate to the relative severity of wrongful harms and to the relative culpability of the wrongdoers. Call this requirement the principle of differential proportionality.

Consider the sentencing statute revised to provide the following maximum sentences: assault \$1; aggravated assault \$10; manslaughter \$50; murder \$100. Under this statute, the sentence for murder is 100 times as severe as the sentence for simple assault. Arguably this ratio is at least plausibly related to the relative severity of the offenses. Thus, it meets the requirements of ordinal and differential proportionality. It remains unacceptable, however, because the severity of each sentence is so mild as to trivialize the offense and the expression of condemnation. The sentences apparently express mild disapproval, rather than condemnation. Thus, they seem to express the societal view that killing and injuring others are

minor infractions by societal standards. Call this requirement the principle of severity proportionality.

This requirement does not require that the punishment inflicts harm that matches the offense in type or degree. It does not require, for example, that we torture the torturer or that we rape the rapist. Rather, it requires that sentences accurately express the intensity of condemnation merited by the offenses and the offenders. The specific modality and severity of punishment might vary across societies with different traditions of punishment and conventions of expression. In the United States, for example, some states apply capital punishment for highly aggravated murder, but other states do not. The latter states might apply a life sentence in prison for a murderer who would receive capital punishment in the former states. Some countries might apply maximum sentences that are significantly less severe than either capital punishment or incarceration for life.

Similarly, societies might differ regarding the degree of seriousness they attribute to various offenses. A society that vests great value in public esteem and relatively less value in freedom of expression, for example, might apply very serious punishment to offenses, such as slander, that undermine the victim's public reputation. Liberal societies that place great value in freedom of expression and relatively little value in public esteem do not apply any criminal punishment to slander, although they do allow civil damages. Liberal societies in the Anglo-American tradition that view one's dwelling as a place of safety and personal control prescribe punishment of substantial severity for burglary. A society of nomadic hunters who vested relatively little value in a dwelling, in contrast, might provide relatively mild punishment for such an offense. The requirement of severity proportionality requires only that punishment be of such severity as to express the appropriate intensity of condemnation according to the institutional conventions that represent the principles of public morality embodied by the criminal justice system of that society.

Revise the statute once more. This version of the statute sets maximum sentences at the following levels: assault \$1,000; aggravated assault \$10,000; manslaughter \$50,000; murder \$100,000. These sentences are no longer trivial, and they are arguably within the range of proportion to relative severity. \$100,000 is a very large fine and substantially more than the other fines, reflecting the judgment that murder is a very serious offense and substantially more serious than the other offenses listed. Thus, this sequence of punishments arguably meets the requirements of ordinal, differential, and severity proportionality.

The sentencing structure remains unacceptable, however, partially because it effectively prohibits crimes differentially by economic class. Assault is a serious crime for a low-income person, and the other offenses are proportionally more serious. A wealthy person can afford to commit these offenses, however, and a very wealthy CEO can afford several murders each year.

Revising the sentencing scheme in proportion to income could address part of this concern. Consider, for example, the following maximum sentences: assault - 1 month's income; aggravated assault - 6 months income; manslaughter - 2 years income; murder - 5 years income. Such a system might provide substantial deterrence and fulfill the requirements of ordinal, differential, and severity proportionality. It remains inadequate, however, at least partially for one reason previously suggested by Feinberg. Although there is a technical distinction between fines as a form of criminal punishment and fees or taxes, that distinction is not sufficiently clear or emphatic to provide an unambiguous expression of condemnation.⁹ Some wealthy

individuals or corporations might view such punishment merely as a cost of doing business. Some might begin to view criminal offenses as optional, providing that they are willing and able to pay the price. This concern becomes increasingly troubling as the offense becomes more severely harmful and more clearly wrongful. Criminal punishment that is limited to fines arguably redefines criminal offenses as privileges to be purchased, rather than as wrongs to be condemned.

Incarceration arguably differs from fines at least partially because it provides an unambiguous expression of condemnation. Penitentiaries were originally designed and named as institutions intended to promote penitence and reform by wrongdoers who would reflect, repent, and refrain from further wrongdoing. Prisons may not be highly successful in achieving this goal, but incarceration is widely recognized as a paradigmatic form of punishment in contemporary society. Fines or mandatory compensation become more clearly punitive if they are combined with incarceration or required as a condition of parole from incarceration at least partially because they are associated with incarceration as an unambiguous form of punishment with an inherent expression of condemnation. Thus, incarceration currently fulfills a requirement of semantic fit in that it conveys an unambiguous expression of condemnation of the offense and of the culpable offender's having committed that offense.

This analysis suggests that the mandate that punishment expresses condemnation that fits the crime requires more than ordinal proportionality. It requires convergence between the crime and the punishment along several dimensions. It requires ordinal proportionality in that more serious offenses, defined in terms of the degree of harm done or intended and the degree of culpability, must receive more severe sentences than those imposed for less severe offenses. It also requires differential proportionality understood as differences in severity of punishment roughly proportional to the differences in severity of offense defined, once again, by the harm done or intended and the culpability of the offender. Further, punishment that expresses condemnation that fits the crime must meet the requirement of severity proportionality, understood as requiring punishment that expresses condemnation that accurately represents the seriousness of the offense as defined by the harm and culpability factors.

Finally, punishment that fits the crime must meet the requirement of semantic fit by applying a modality of punishment that unambiguously expresses the appropriate condemnation of this category of offense, of this instance of that category, and of this culpable offender. The fines discussed previously provide an inappropriate form of punishment for serious wrongs because fines are not sufficiently distinct from fees or taxes to provide a clear and emphatic expression of condemnation. Incarceration, in contrast, currently provides a form of punishment that is widely and unambiguously understood as punishment that expresses condemnation in this sense.

Incarceration might also serve a distinct preventive purpose of incapacitation in that it markedly reduces the offender's opportunity and ability to commit further crimes during the period of incarceration. That preventive function is not sufficient to render incarceration an unambiguous form of punishment, however, because commitment to a secure mental health facility following acquittal pursuant to an insanity defense can provide a comparable preventive function. Although post-acquittal commitment and criminal incarceration can involve similar limitations of liberty in facilities that appear similar, they carry distinctly different expressive significance. Criminal incarceration provides an emphatic expression of condemnation partially because it deprives the offender of liberty as a result of

an explicit finding that the offender is responsible for criminal wrongdoing. Commitment to a mental health facility under the authority of the police power might reasonably be understood as repudiation of the type of behavior that triggered the commitment, but it explicitly withholds condemnation of the individual as a culpable wrongdoer. Some confined individuals might not recognize or care about the expressive significance of this difference between imprisonment and post-acquittal commitment. The distinction remains important to the integrity of the criminal process and of the mental health institutions, however, because these institutions differ regarding the expression of condemnation.

Sexual predator commitment statutes, for example, raise important concerns in part because they distort the boundaries between criminal punishment and civil commitment by subjecting individuals to criminal punishment for specific offenses and then subjecting them to ostensibly civil commitment based partially on the premise that they are unable to control the conduct that constituted those offenses.¹⁰ Although it might be difficult to become concerned about the fate of individuals subject to confinement for committing sexually violent or exploitative crimes, this failure to maintain a clear boundary between criminal punishment and civil commitment raises important concerns regarding the integrity of both institutions.¹¹ These concerns include the risk that by blurring the expressive significance of each form of confinement, these statutes might dilute the semantic fit of incarceration as a form of punishment that clearly expresses condemnation of criminal conduct by responsible agents.

IV. Semantic Fit and Principles of Political Morality

Feinberg implicitly recognized the requirement of semantic fit when he articulated an important aspect of the justification of punishment as the justification of “our particular symbols of infamy.”¹² Recognizing that punishment expresses condemnation of culpable wrongdoing requires that we express that condemnation in a manner that is consistent with the underlying principles of political morality that justify the applicable criminal law. These principles must justify the prohibition of specified categories of conduct as wrongful and the requirements of culpability that render the wrongdoer eligible for the expression of condemnation inherent in criminal punishment.

In later work, Feinberg provides extensive analysis to support the contention that a liberal society should apply criminal prohibition and punishment only to conduct that violates the harm principle or a limited interpretation of the offense principle. He rejects legal moralism as that position traditionally has been understood and defended. He does not deny, however, that the criminal law enforces morality by prohibiting moral wrongs and punishing culpable wrongdoers through the application of a legal institution that expresses moral condemnation. Rather, he characterizes the criminal process as “a great moral machine, stamping stigmata on its products, painfully ‘rubbing in’ moral judgments on the people who entered at one end as ‘suspects’ and emerging from the other end as condemned prisoners.”¹³

In Feinberg’s view, the criminal law articulates moral prohibitions and enforces those prohibitions through the application of criminal punishment with its inherent expression of moral reprobation and resentment. He limits the legitimate application of criminal punishment to the domain of public morality, however, defined as grievance morality. The criminal law protects individuals by prohibiting wrongful violations of their rights. Thus, an institution of criminal law that conforms to Feinberg’s interpretation of liberal principles of political morality enforces morality, but it does not enforce all of morality. The criminal law in a liberal society prohibits and punishes

only wrongful conduct that causes harm or a limited range of offense to others.¹⁴

A complex conception of autonomy carries substantial weight in this analysis. Feinberg articulates and examines four senses of the concept of autonomy, including autonomy as capacity, as a condition, as an ideal, and as a right.¹⁵ His analysis emphasizes autonomy as a right to self-governance within a domain of personal sovereignty. I focus here on the relationship between autonomy as sovereignty and autonomy as capacity. Autonomy as capacity includes a set of uniquely human capacities, including the abilities to comprehend, reason, and reflect. These capacities enable individuals to understand legal and moral prohibitions and the circumstances to which they apply. Those who possess these capacities have the ability to make decisions and direct action in light of the legally or morally relevant reasons to engage in various actions or to refrain from doing so. Thus, these capacities enable competent adults to direct their conduct through a uniquely human process of practical reasoning.¹⁶

The ability to define and pursue a uniquely human life through the exercise of capacities such as comprehension, reasoning, and reflection provides the basis for autonomy as a right to self-governance or personal sovereignty within a nonpublic domain of primarily and directly self-regarding decisions. These capacities also provide the competent individual with the ability to function effectively as a responsible agent under the rule of law in the public jurisdiction. These capacities enable individuals to direct their own lives in the public domain by exercising the liberties protected by law within the boundaries defined by law, including those defined by criminal prohibitions.

Liberal societies are based on principles of political morality that reflect respect for these uniquely human capacities of responsible agency. The capacities required to direct one’s life through a minimally competent process of practical reasoning provide the basis for equal standing as a participant in the public domain and for sovereignty in the nonpublic domain. Legal institutions that prohibit and punish crimes against persons provide institutional structures designed to protect individuals from wrongful violations of their protected interests. Thus, the criminal justice system is the “great moral machine” that defines and enforces the domain of public morality. It partially defines the boundaries of individual sovereignty by prohibiting crimes involving wrongful violations against individuals, and it forcefully expresses condemnation of culpable violations of those boundaries. By condemning criminal conduct, the criminal justice system vindicates the victim’s standing in the public domain and enforces the applicable boundaries of individual sovereignty. By protecting these interests through the application of punishment that condemns culpable wrongdoing, the criminal justice system recognizes the standing of responsible agents.

Incarceration provides a mode of punishment with particularly cogent semantic fit in a liberal society. It expresses condemnation of culpable criminal conduct by depriving the offender of some of the liberties accorded to those who qualify for equal standing in the public domain, and it limits that offender’s ability to pursue projects or relationships that would ordinarily fall within the protected nonpublic domain of individual sovereignty. Thus, incarceration expresses condemnation of the manner in which the offender has exercised his autonomous capacities by depriving him of part of the ordinary range of liberty within which individuals with full standing have discretion to direct their lives through the exercise of those capacities. Criminal incarceration in a liberal society forcefully directs the attention of the offender and of the

public toward the offender's failure to exercise those capacities within the bounds of individual discretion defined by law. Such punishment denies full standing to the culpable offender, and in doing so, it vindicates the standing of victims by condemning as wrongful the culpable criminal conduct that violated the standing of those victims.

Punishment through incarceration in a liberal society fits crimes against innocent victims, but it does not purport to match the injury or suffering of the victim with comparable injury or suffering for the offender. Rather, it fulfills the requirement of semantic fit because it expresses condemnation of the offender's culpable misuse of his autonomous capacities in a manner that limits his opportunity to exercise the ordinary range of autonomy as a right. Incarceration vindicates the standing of the victim by emphatically repudiating the crime that violated the victim's domain of sovereignty and the victim's standing in the public domain. It expresses this condemnation by subjecting the criminal to a mode of punishment that explicitly limits the equal standing and individual sovereignty of the offender. That is, it fits the crime in that it subjects the offender to punishment that explicitly represents the principles violated by the offense. In doing so, it vindicates the standing of the victim and the underlying principles protected by the criminal offense definition.

The degree of semantic fit might vary with the underlying principles of political morality and with the relevant social conditions and conventions. Confinement to one's residence in an urban area in which few people own property and most commute to their employment and other activities might constitute a substantial deprivation of liberty that expresses significant condemnation. Similar confinement to one's farm in an agricultural area of the same society in which most people own and cultivate land might not be understood as a significant expression of condemnation. Limitations of property rights that precluded the cultivation of the land might express severe condemnation in the latter area, however, while such limitations might not carry comparable expressive significance in the urban area.

Some secondary forms of punishment fulfill the functions of punishment primarily because they reflect semantic fit. Deprivation of the right to vote for convicted felons, for example, might not be experienced as a particularly costly deprivation by many convicted felons. Thus, it would not fit the crime in the sense of inflicting suffering similar to that suffered by the victim, and it might not have substantial deterrent effect. It might, however, fulfill a substantive expressive function insofar as it constitutes an explicit denial of full standing in the public domain. Thus, it would reflect semantic fit in that it would diminish the standing of the offender in repudiation of the offense that violated the standing of the victim. Such forms of punishment might or might not be advisable for other reasons. A permanent deprivation of the right to vote might be quantitatively disproportionate to some offenses, for example, or it might be counterproductive to the process of reintegration into society for some offenders. I claim only that modes of punishment can promote the expressive function of punishment insofar as they manifest semantic fit in the sense that they explicitly appeal to and reinforce the principles of political morality violated by criminal offenses.

Some nontraditional forms of punishment, such as requiring that convicted sex offenders register with law enforcement registries or wear brightly colored bracelets identifying them as convicted offenders might serve some preventive functions. Those functions might include notice to others or deterrence through shaming. These forms of punishment might have more natural semantic fit in societies

that place great value on the individual's rank in the social hierarchy than they have in a liberal society that emphasizes self-governance more heavily than societal approval. They might acquire substantial fit in a liberal society, however, if their use as a form of punishment becomes associated with criminal conviction and condemnation. Similarly, association with criminal conviction and punishment can vest a criminal fine with condemnatory meaning that would not attach to civil compensatory damages of similar magnitude. Alternately, however, ostensibly criminal fines that are lacking in severity or that are applied in a routine, repetitive manner, fail to convey reprobation or resentment, and, hence, they can come to be seen as merely the cost of doing business. Thus, one might reasonably expect a reciprocal relationship between semantic fit and societal practices. Modes of punishment that invoke the central principles of political morality, such as incarceration in a liberal society, express condemnation partially because they provide strong semantic fit. Other forms of punishment, such as fines or proposed shaming techniques, might acquire greater or lesser expressive significance insofar as they are applied or interpreted in a manner that strengthens or weakens the association between those modes of punishment and societal condemnation.

Some modes of punishment, such as torture, are objectionable in part because they lack semantic fit with the underlying principles of political morality. Although there are a variety of arguments rejecting torture as unjustifiable, one argument is particularly cogent in a liberal society that vests fundamental value in autonomy as a right to self-governance grounded in the possession of autonomous capacities. Torture inflicts severe or prolonged pain that overcomes the individual's ability to direct conduct through the exercise of the autonomous capacities, such as reflection and reasoning, that provide the foundation for the standing of persons in a liberal society. By enforcing compliance through torture, the state enforces the criminal law through a method that impairs, rather than appeals to, the individual's ability to direct conduct through the exercise of reason. Thus, torturous punishment seeks to motivate compliance with the criminal law by undermining the individual's ability to apply the capacities of responsible agency that justify reliance on the criminal justice system as the primary institution of coercive behavior control for those who possess those capacities. By applying torturous forms of criminal punishment, the state violates the principle of respect for individual autonomy that purportedly justifies the state in holding this offender criminally responsible and provides the foundation for the standing of responsible agents in a liberal society.

Consider the forms of punishment that might provide semantic fit in a society with different underlying principles of political morality. Suppose a crime occurred in a society organized around principles that emphasized communal or collectivist interests, rather than individual autonomy or rights. In this society, individual liberty and self-determination are not highly valued. Political principles and legal institutions emphasize individual duties to the collective rather than duties to other individuals or protection of individual rights or interests. This society defines a complex set of social relationships among individuals, families, and institutions. These relationships are duty-based in that the roles of individuals are defined in terms of the responsibilities individuals are expected to fulfill in these relationships. The societal ideal consists of a state of social harmony in which all participants fulfill their duties in all relationships. This state of social harmony constitutes the good of the people in the collective sense, and the good for any individual consists of his fulfilling his roles in the social harmony.¹⁷ Individuals strongly identify with the collective entity.

They derive satisfaction, self-esteem, and the respect of others by fulfilling their responsibilities in the communal structure and from the recognition of their standing as valuable participants in communal projects.

In such a society, incarceration might carry relatively little expressive force, particularly if incarcerated individuals are required to engage in labor for the benefit of the collective. Because liberty and self-determination are not highly valued, incarceration merely changes the role in which the individual discharges his duties. Idle incarceration in which the individual engages in no activity that contributes to the collective might carry more expressive significance than incarceration at hard labor. Similarly, shunning might provide a form of punishment that expresses condemnation with clear semantic fit. Banishment might serve as the most severe sentence because categorical exclusion emphatically expresses condemnation by denying the offender's standing as a member of the collective that provides the foundation for the members' significance.

In short, semantic fit requires that punishment take a form that expresses condemnation consistent with the underlying principles of political morality that provide the moral structure of the society. The degree of semantic fit for specific modes of punishment might vary with the underlying principles, the relevant circumstances, or the local practices of punishment and conventions of expression. Incarceration and other limitations on ordinary liberties and standing provide paradigmatic forms of punishment in a liberal society because the principles of political morality that provide the foundation of the liberal society emphasize equal standing and equal liberties in the public domain and individual sovereignty in the nonpublic domain. Thus, incarceration or alternative limitations on ordinary liberties appeal to the underlying principles violated by culpable criminal conduct. Such punishment constitutes emphatic condemnation through the application of the "great moral machine."

V. Conclusion

Feinberg's early analysis reveals the significance of condemnation as a factor that is central to the conceptual analysis of punishment and to several expressive functions of punishment. Although his early analysis rejects the requirement that punishment fit the crime beyond the minimal requirement of ordinal proportionality, his later work provides guidance toward a more comprehensive interpretation. Criminal punishment that fully coheres with underlying principles of political morality would fulfill the requirements of ordinal, differential, and severity proportionality as well as providing semantic fit. Recognizing the expressive function of punishment directs our attention toward semantic fit. Incarceration might serve practical preventive functions such as incapacitation or deterrence in any society, but it carries particular expressive significance in a liberal society that emphasizes protection of the nonpublic domain of individual sovereignty and of equal standing in the public domain.

I do not claim that modes of punishment must inherently appeal to the core principles of political morality to qualify as punishment. I claim only that: (1) various forms of punishment will have greater or lesser degrees of inherent or acquired semantic fit in particular societies; (2) those with greater semantic fit more clearly express the reprobation and resentment inherent in criminal punishment; and (3) those that lack adequate semantic fit undermine the expressive function.

Feinberg's work reminds us that we cannot achieve a fully satisfactory conceptual and justificatory account of punishment in isolation. Criminal punishment constitutes one important component of a complex set of legal institutions. Ideally, this

comprehensive set of institutions should provide a coherent embodiment of defensible principles of political morality that reflect the uniquely human capacities and potential of persons, their projects, and their relationships. It remains unrealistic to expect any actual set of human institutions to achieve this ideal. As is often the case with Joel Feinberg's work, he leads us along a path that integrates conceptual analysis, justificatory argument, and appreciation of the human condition in search of an ideal toward which we continue to strive. Perhaps we could approximate the ideal a bit more closely if it were not for the obstructionist interventions of Josiah S. Carberry.

Endnotes

1. Joel Feinberg. *Doing & Deserving* (Princeton, New Jersey: Princeton University Press, 1970), 95-118.
2. *Ibid.*, 116-18.
3. *Ibid.*, 99-101.
4. *Ibid.*, 101-05.
5. David C. Baldus, George Woodworth, Catherine M. Grisso, & Aaron M. Christ. "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)," *Nebraska Law Review*, 81 (2002): 499-502.
6. *State v. Joubert*, 399 N.W.2d 237 (Neb. 1986); Robert F. Schopp, "Sexual Aggression: Mad, Bad, and Mad." In *Sexually Coercive Behavior*, edited by Robert A. Prentky, Eric S. Janus, & Michael C. Seto (New York: The New York Academy of Sciences, 2003), 324-36.
7. Herbert Morris. *On Guilt and Innocence* (Berkeley, CA: University of California Press, 1976), 31-58.
8. American Law Institute, *Model Penal Code* §§ 210.0-210.3; 211.1; 6.06; 6.08 (Official Draft, 1962). For the purpose of this paper, I set aside capital punishment.
9. Feinberg, *Doing & Deserving*, 96-97.
10. *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997).
11. Robert F. Schopp. *Competence, Condemnation, and Commitment* (Washington, D.C.: American Psychological Association, 2001), 137-87.
12. Feinberg, *Doing & Deserving*, 116.
13. Joel Feinberg. *Harmless Wrong-Doing* (New York: Oxford University Press, 1988), 155.
14. *Ibid.*, 151-55.
15. Joel Feinberg. *Harm to Self* (New York: Oxford University Press, 1986), 27-51.
16. *Ibid.*, 28-31.
17. Edward C. O'Dowd & Robert F. Schopp. "International Human Rights, Morality in War, and the Structure of Rights," *Pacific Rim Law and Policy Journal*, 2 (Winter 1993): 52-54, 56-60. Although this source addresses one account of traditional Chinese social structure, I make no claim that the brief account in the current paper provides an accurate account of Chinese society.

Feinberg's Offense Principle and the Danish Cartoons of Muhammad¹

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In September 2005, *Jyllands-Posten*, Denmark's largest daily newspaper, published a series of cartoons depicting the Prophet Muhammad. Visual representations of Muhammad are prohibited on standard understandings of the Koran and Islamic tradition.² As a consequence, the drawings would be

highly offensive to many Muslims, no matter what their actual details. But the offense caused by Danish cartoons did not end there. Muhammad was not simply pictured in the cartoons; he was variously shown having horns, wearing a headdress in the shape of a bomb, and proclaiming that suicide bombers had depleted the supply of virgins used to reward martyrs.

Salman Rushdie, whose novel *The Satanic Verses* was deemed so offensive to Islam that the Ayatollah Khomeini issued a fatwa against him in 1989, remarked, “What kind of god is it that is upset by a cartoon in Danish?”³ Regardless of whether Allah was upset by the cartoons, much of the Muslim world was outraged. The publication of the cartoons led to death threats, bomb scares, and deadly riots around the world. Several Middle Eastern countries called their ambassadors home from Denmark, and many Muslims participated in a severe boycott of Danish products. *Jyllands-Posten* ultimately apologized for publishing the cartoons.⁴

In the spirit of freedom of speech and freedom of the press, newspapers across Europe reprinted the cartoons, with the result that some of their editors were sacked. Other newspaper publications were less supportive of *Jyllands-Posten* and of the decisions to reprint the cartoons. An opinion piece in France’s *Le Figaro* suggested that “it is...possible to misuse the freedom of the press.”⁵ Commenting on the reprints of the cartoons, the United Kingdom’s *The Guardian* claimed that “[t]here has to be a very good reason for giving gratuitous offence of this kind.”⁶ Is it true, however, that in a free society offensive behavior must meet a standard of reasonableness? This question takes on special significance for the legal philosopher. Although *The Guardian*’s call for reasonableness was directed only at individuals in decision-making positions in the press, we can ask whether a similar requirement of reasonableness should also be applied by legislators and judges. Specifically, when there is no serious case to be made in terms of the reasonableness of offensive conduct, is the state justified in restricting the liberty of individuals who would engage in it?

In what follows, I suggest that liberals should stand firm behind the negative answer to the legal question. This answer differs from Joel Feinberg’s articulation of the liberal position on offense. Feinberg’s analysis of the moral limits of the criminal law, easily the most sophisticated argument in the literature, counts offense to others as a justification for limitations on liberty precisely when there is little to be said in favor of the reasonableness of the offending conduct. Against Feinberg’s position, I argue that even in the most extreme cases, cases such as the Danish cartoons, limitations on liberty cannot be justified by appeal to the offensiveness of behavior, unreasonable though that behavior may be.

Feinberg’s Offense Principle

In his four-volume work, *The Moral Limits of the Criminal Law*, Joel Feinberg defends what he takes to be the liberal view of justified limitations on liberty by the state, namely, that “the harm and offense principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions” (x).⁷ In short, the state is justified in interfering with individual action not only when so doing is necessary to prevent harm but also to prevent offense to others. The harm principle, which gets its defense in Feinberg’s *Harm to Others* (Volume 1), is hardly controversial, even among those without liberal sensibilities. Whatever else the state can rightly do, it must be able to legislate against harm to others. But Feinberg’s attempt to draw the line of justification at the inclusion of offense is significantly more controversial. Can non-offensive, non-harmful behaviors be legitimately prohibited by law? More important for the liberal, is it permissible to prohibit non-harmful behaviors that do nothing more than cause offense?

Feinberg’s exclusive commitment to the harm and offense principles can thus be challenged from either of two directions. First, some would argue that these two principles provide insufficient means for preventing other kinds of evils with which society has a right to be concerned, most obviously, purely self-regarding behavior and so-called “victimless crimes.” Feinberg addresses this direction of the challenge in *Harm to Self* (Volume 3) and *Harmless Wrongdoing* (Volume 4), respectively, and I will not take up the arguments for the illiberal principles of legal paternalism and legal moralism in this essay. The second challenge suggests—and rightly so, I think—that liberals should be very wary of the offense principle. Before motivating and developing this challenge, however, I will lay out at length the complex conceptual apparatus that Feinberg uses to make sense of the offense principle, as this principle is presented in his *Offense to Others* (Volume 2).

Feinberg begins by pointing out that John Stuart Mill’s *On Liberty* is meant to be an argument for the claim that only harm is justifiably prohibited by the state (ix), a view Feinberg calls “extreme liberalism” (x). Yet even Mill admits that some acts, “if done publicly, are a violation of good manners and, coming thus within the category of offenses against others, may rightly be prohibited. Of this kind are offenses against decency; on which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject...”⁸ Fortunately for us, Feinberg sees the necessity of considering offenses of all kinds, and dwell on them he does. Always the model analytic philosopher, he begins by asking what we are talking about when we consider whether something is offensive.

For a philosophically acceptable answer, Feinberg claims that we must “engage our imaginations in the inquiry, consider hypothetically the most offensive experiences we can imagine, and then sort them into groups in an effort to isolate the kernel of the offense in each category” (10). To this end, he takes us on an imaginary “ride on the bus,” during which we are confronted with slate-scratching, radio-playing, vomit-and-feces-eating, corpse-smashing, self-satisfying, pet-pleasuring, swastika-wearing, and racist-banner-carrying passengers (10-13). Feinberg once joked that he feared that he might become known for his offensive stories, thirty-one in all, noting that—at the time—he was receiving weekly requests to reprint the passage. The stories of “a ride on the bus” are organized into six conceptual categories, distinguished primarily by the nature of our physiological or psychological responses to the offense:

- A. *Affronts to the senses*
- B. *Disgust and revulsion*
- C. *Shock to moral, religious, or patriotic sensibilities*
- D. *Shame, embarrassment (including vicarious embarrassment), and anxiety*
- E. *Annoyance, boredom, frustration*
- F. *Fear, resentment, humiliation, anger (from empty threats, insults, mockery, flaunting, or taunting)* (10-13)

Category C would seem to be most relevant to an analysis of the permissibility of the Danish cartoons, as the drawings certainly constitute—for some people, at least—a “shock to moral, religious, or patriotic sensibilities.” This category includes, for example, a roughly analogous kind of offense in *Story 11*:

A strapping youth enters the bus and takes a seat directly in your line of vision. He is wearing a T-shirt with a cartoon across his chest of Christ on the cross. Underneath the picture appear the words “Hang in there, baby!” (11)

The behavior of this young man mocks not only the central figure of the Christian religious tradition but also what is believed by some to be Jesus' defining act, namely, his crucifixion and subsequent resurrection. But notice that distinctly religious offense falls into at least two of Feinberg's other categories as well. Religious offense crosses categories because, as we have seen, behavior in "a ride on the bus" is sorted not by the subject matter of the offense but by the nature of our physical or psychological response to it. In category D, "shame, embarrassment, and anxiety," Feinberg's *Story 19* has us imagine a confrontation with a passenger wearing a T-shirt that depicts Jesus and Mary in a sex act (12). Religious offense also causes "fear, resentment, humiliation, anger," as evidenced by category F's *Story 28* and *Story 29*, in which our fellow bus passenger wears "a black arm band with a large white swastika on it" or "carries a banner with a large and abusive caricature of the Pope and an anti-Catholic slogan" (13). Utilizing Feinberg's account, we might thus assume that the depiction of Muhammad in the Danish cartoons caused many Muslims to experience offense that could be described in terms of various combinations of shock to moral sensibilities; shame, embarrassment, and anxiety; and fear, resentment, humiliation, and anger.

Behavior of this kind, Feinberg thinks, constitutes a kind of "nuisance" (Ch. 7). Like nuisances more generally, "offending conduct produces unpleasant or uncomfortable experiences—affronts to sense or sensibility, disgust, shock, shame, embarrassment, annoyance, boredom, anger, fear, or humiliation—from which one cannot escape without unreasonable inconvenience" (5, emphasis added). According to Feinberg, this confrontation between the offended and the offender thus calls for "interest-balancing" (6). Drawing attention to the justificatory force of nuisance—experiences that cause not harm but, rather, "irritations to our senses or inconvenient detours from our normal course" (5)—puts Feinberg in good liberal company. Mill tells us, "the liberty of the individual must be thus far limited; he must not make himself a nuisance to other people."⁹ Similarly, the 1957 "Report on Homosexual Offenses and Prostitution" in Britain suggests that while homosexuals and prostitutes should be immune to criminal sanction for their private behavior, public acts—for example, solicitation—deserve no such protection. In a BBC interview, Sir John Wolfenden, chair of the committee, articulates the reasoning behind the recommendations on prostitution in the so-called "Wolfenden Report":

My hope, and our endeavor, I think, is this. At the present time, there are in London, and there are in other places, streets where—oh well—if I am walking with my fourteen- or fifteen-year-old daughter, I have to make a detour around those places. And I honestly don't think I should have to. And what we're really trying to do, again, is to preserve public order and decency and to make it possible for the ordinary man and woman, you and me, to go about the streets as he likes.¹⁰

H. L. A. Hart also claims that the liberal can support legal interventions "in order to protect religious sensibilities from outrage by a public act" and, as a consequence, can punish the offender "neither as irreligious nor as immoral but as a nuisance."¹¹ Hart's attempt at balancing sets the "seriousness of the offence to feelings" against the "sacrifice of freedom and suffering demanded and imposed by the law."¹²

Much akin to Hart, Feinberg suggests that "the offense principle will have to be mediated by balancing tests similar to those already employed in the law of nuisance" (10). More specifically, the *seriousness* of the offense must ultimately be

weighed against the *reasonableness* of the offending conduct (Ch. 8). With characteristic precision, Feinberg gives content to these notions. The seriousness of the offense, according to Feinberg, is determined by judging its "magnitude," while appropriately discounting for offenses that are reasonably avoidable, voluntarily incurred (*Volenti non fit injuria*), or the result of "abnormal susceptibilities" (35). The magnitude of the offense increases with the intensity of the response to the offensive behavior, the length of time the offended state lasts, and the number of people affected by the offense (35). Acting as a counterweight to seriousness, the reasonableness of the offending conduct increases with the importance of the behavior to the person engaging in it, the value of the behavior to society, and classification of the behavior as an expression of an opinion "about matters of empirical fact, and about historical, scientific, theological, philosophical, political, and moral questions" (44). Offending conduct is less reasonable, however, if it is the result of *malice and spite* or could have been carried out in a different manner, at a different time, or in a different place, especially if it could have been carried out in "neighborhoods where it is common, and widely known to be common" (44).

Bare Knowledge and Profound Offense

Liberal pedigree notwithstanding, Feinberg's openness to the idea of balancing risks an association with Lord Patrick Devlin's conservative critique of the Wolfenden Report. Devlin charges that both Mill and the authors of the report are in search of "a fundamental doctrine" or "theoretical limit" concerning what the state can do and, accordingly, try to mark off a sphere of "private morality"—when, in fact, we can do nothing more than "try to strike the right balance [between liberty and authority]."¹³ Admittedly, Feinberg, unlike Devlin, sees the analogy of scales to be relevant only when there are "determinate victims with genuine grievances and a right to complain against determinate wrongdoers about the way in which they have been treated" (25). But the risk for the liberal, and Feinberg readily acknowledges this risk, is in introducing the scales in the first place. For instance, the scales analogy raises the possibility that offense from the "bare knowledge" that some behavior is occurring might be serious enough to outweigh the reasonableness of that conduct (33). This possibility is all the more worrisome in light of the fact that it is not clear how Feinberg can establish the wrongfulness of a piece of offensive conduct, which is necessary for an application of the offense principle (2), independently of the scales and, especially, without considering factors such as magnitude and application of the *Volenti* standard.

Ultimately, then, Feinberg must solve the "bare knowledge problem" (61ff) if his account is to maintain its liberal credentials. Liberals, as Hart points out, cannot count the fact that an individual is offended by the bare knowledge of another's behavior as a reason for prohibiting that behavior. So doing would yield the very illiberal result that the state can prevent people from doing anything that others "do not want them to do."¹⁴ Feinberg claims that Hart "overstates his case" here: "[P]rovided balancing tests are assumed, it is a *non sequitur* to say that the only permitted liberty would be 'the liberty to do those things to which *no one* seriously objects'; rather the sole liberty would be to do those things to which *not everybody* (or nearly everybody) seriously objects" (63). But this reply is hardly comforting for the liberal. It is for good reason, then, that Feinberg faces the problem head-on in his discussion of "profound offense" (Ch. 9).

Feinberg distinguishes profound offenses from "mere offenses," first, in terms of the way that they feel to offended parties (57, 58). The former, unlike the latter, are "deep...

shattering, serious” (58). Second, one need not directly perceive the offending conduct for the conduct to constitute a profound offense; “one can be offended ‘at the very idea’ of profoundly offensive behavior occurring (58). Third, profound offenses have a particular kind of cognitive component. They attack our higher-order sensibilities, offending “us and not merely our senses or lower order sensibilities” (59). Fourth, it follows that the cognitive component of profoundly offensive behavior is normative in nature. The behavior “offends because it is believed to be wrong, not the other way around” (59). Fifth, in cases of profound offense, the offense is impersonal, not personal: “The offended party does not think of *himself* as the victim in unwitnessed flag defacings, corpse mutilations, religious icon desecrations, or abortions, and he does not therefore feel aggrieved (wronged) on his own behalf” (59).

According to Feinberg, when we balance the seriousness of the offense against the reasonableness of the offending conduct, profound offenses are unlikely to pass the test that mediates application of the offense principle. Yet he fears that special cases might arise in which profound offenses generate an illiberal result if we submit the relevant factors to the balance. What he needs, therefore, is a principled argument against criminalizing profound offenses. Feinberg develops just such an argument by setting a dilemma for the advocate of prohibiting profound offenses. Either the profoundly offended party makes the claim on personal or impersonal grounds. The offended party cannot complain that the offense is personal because, as we have seen, profound offenses are defined by their impersonal quality. In other words, this characteristic is part of what makes them profound offenses rather than mere offenses. Feinberg tells us, “As soon as he shifts his attention to his own discomfiture, the whole nature of his complaint will change, and his moral fervor will seep out like air through a punctured inner tube” (67). But neither can the profoundly offended party appeal to the moral wrongness of the behavior that offends him. For that would be to rely upon an altogether different liberty limiting principle, namely, legal moralism. So Feinberg solves the “bare knowledge” problem associated with profound offenses by showing that alleged wrongfulness of the conduct, not its offensiveness, is really the source of the complaint. In this way, the offense principle avoids the decidedly illiberal appeal to morality that his theory cannot tolerate.

Hard Cases

To this point in Feinberg’s analysis, it might seem that the liberal has little reason to be afraid of the offense principle. A clean theoretical argument relieves the worry that the fate of liberty is left to the uncertain outcome of subjecting particular cases to the scales. But here one of Feinberg’s most important intellectual virtues, his facility to provide needed clarification and qualification, risks taking the argument in an obviously illiberal direction. We learn that what might first strike one as profound offenses are sometimes better described “*personal* deep affronts” (69). As Feinberg puts it,

This argument [against profound offense]...is subject to two strong qualifications. ...It may be possible in certain untypical situations to go between its horns and thus escape its dilemma. A profoundly offended state of mind may be both disinterested moral outrage and also involve a sense of personal grievance, as when the offending cause is an affront to the offended party himself or a group to which he belongs (159-160).

One straightforward instance of “this quite exceptional kind of case” is offensive behavior that targets people in particular racial groups or women: “Racist mockery and abusive pornography received ‘in private’ by willing audiences

can...cause acutely *personal* offense to members of the insulted groups who have bare knowledge of it” (69). In the end, Feinberg has his doubts that this kind of behavior is personal enough to constitute a “bare-knowledge offense” worthy of prohibition by the law (163). Neither the offended individuals nor the group of which they are a part are “direct intended targets” (60), at least not in a way that allows them to say that they were wronged by the behavior.¹⁵

Feinberg is significantly more moved, however, by the offense taken in a different kind of exceptional case, as when Nazis parade in Skokie—a majority Jewish community in Illinois, once home to many Holocaust survivors—or when Klansmen march through Harlem. In these cases, “The offending behavior deliberately seeks out the audience that will be most intensely, most profoundly, most personally offended, and imposes its offense on them as its sole motivating purpose” (164). Feinberg readily acknowledges that we cannot accord a lot of weight to the seriousness of the offense in such cases because it is reasonably avoidable. Somewhat surprisingly, though, he suggests that there is “even less weight” on the other side of the scales “in view of the fact that the ‘social value’ of free expression for pure insults is much less than that of genuine political advocacy and debate (which were not involved), and that the offensive conduct was clearly motivated by malice and spite” (88). Here, Feinberg notes, “Only some speech acts are acts of advocacy, or assertions of belief; others are pure menacing insult, no less and no more” (86). With respect to the Skokie case, he compares the Indiana Supreme Court’s claim that the swastika constitutes protected political speech with according political status to “nose thumbing,” “giving...the finger,” “a raspberry jeer,” and the statement, “Death to the Niggers!” (87).

Why is Feinberg so reluctant to attribute any cognitive content to the Nazis’ behavior? After all, to conclude that the march ought to be prohibited, he does not have to deny that behaviors such as dressing as stormtroopers and wearing swastikas express a political opinion. Feinberg needs only appeal to the distinction between the *content* of political expression and the *manner* in which that content is expressed (39).¹⁶ As he notes, offense can be caused by what is said as well as “by the manner in which the opinion itself is expressed, for example as a caption to an obscene poster of Jesus and Mary” (39). To make this point, Feinberg references the stories in “a ride on the bus” in which a fellow passenger wears a t-shirt bearing the words, “Hang in there, baby” under a picture of the crucifixion or a t-shirt with a depiction of Jesus and Mary engaged in sexual intercourse. This distinction between content and manner allows Feinberg to say that “[n]o degree of offensiveness in the expressed opinion itself is sufficient to override the case for free expression, although the offensiveness of the manner of expression, as opposed to its substance, may have sufficient weight in some contexts” (44). So Feinberg could very well concede that the Nazi behavior expresses a political opinion and, at the same time, claim that the manner in which it is expressed is sufficiently offensive to merit prohibition of the message’s expression in its particularly offensive form.

It is worth noting that the cognitive content of the Nazi behavior is at least as clear as the cognitive content that Feinberg acknowledges the offensive t-shirts to have. Of course, the message of the t-shirts cannot be taken literally. They do not express anything about the wearer’s view that what is depicted actually took place. The wearer does not deny, I take it, that Jesus was crucified, nor does he assert that Jesus and Mary took part in mother-son incest. Instead, the t-shirt expresses the wearer’s more abstract commitment that Christianity is unworthy of our respect. Similarly, the Nazi parade does not aim to convey the belief that the marchers are actual members of the

German Nazi regime. In the Skokie case, the behavior expresses something such as the political view that Jews are unworthy of our respect as fellow citizens. Part of Feinberg's mistake is to think that the Skokie Jews are the only recipients of this Nazi message. If we see the message as directed only at the Skokie Jews, then it does look to be little more than an insult. But at least to outside observers, the marchers' behavior expresses a clear—and clearly reprehensible—political opinion.

Is there a similar explanation of what the Danish cartoons express? Surely they do not suggest that Muhammad is a devil or that he was a terrorist. Neither are they meant to convince us that suicide bombers will no longer get their just reward. Rather, the cartoons raise meaningful political questions about the connection between Islam and terrorism. This challenge to Islam uses the form of a cartoon to exploit central components of the religion. According to the editor responsible for the original publication of the cartoons, the message of the cartoons is less threatening still: "The one with the bomb in his turban doesn't say, 'All Muslims are terrorists,' but says, 'Some people have taken Islam hostage to permit terrorist and extremist acts.'"¹⁷ In any case, what is expressed lends itself to substantive propositional analysis.

In fact, the profound nature of the offense requires that the offending conduct have cognitive content. First, the cognitive content of the cartoons is what gives the offense much of its depth. Second, the cartoons' cognitive content explains why perceiving them is unnecessary for the offense caused by the behavior. The profound offense is connected to belief, not perception. In cases of this kind, that is, simply knowing about behavior that conflicts with one's belief system is sufficient for offense. This connection to belief allows, third, for offense at the cartoons to be a matter of one's higher-order sensibilities, not one's lower-order sensibilities. Fourth, the beliefs or sensibilities that get challenged by the cartoons are normative in nature. The offensive behavior threatens the offended party's view of the way things ought to be. Therefore, fifth, the reason the cartoons offend is not understood in terms of a contingent feature of Muslims—for example, their idiosyncratic personal reactions. What it disrespects is thought to be much bigger than this. So, the cartoons must have cognitive content if they are to be powerful enough to challenge basic beliefs about the world and the way it should be. We cannot both accept that we must attend to the power of dangerous symbols and, at the same time, deny that these symbols have the cognitive content that gives them their power in the first place.

Moral Belief as a Constituent Element of Personal Deep Affront

As we have seen, Feinberg holds that the profoundly offended party cannot think of himself in his complaint. But to make it easier to collapse the notion of personal deep affront into the category of profound offense, we need only say that the profoundly offended party does not think *only* of himself or even *primarily* of himself.¹⁸ The dual nature of this kind of grievance is clearly present in the Danish cartoon case. The main offense may be to Allah or Muhammad, yet it is equally true that the offensiveness of the behavior has the potential to cause Muslims to think of themselves, especially of the distress and uncertainty they feel simply by knowing about the publication of the cartoons. Feinberg has this to say about a variation on the Skokie case:

Their feelings would be so deeply lacerated that they would be powerfully motivated to lash out at their tormentors, and even though this violent response would be natural and predictable, it cannot be permitted by the law. Thus, frustration of natural

impulse, confusion over what would be right, and the clash of profound loyalties commingle with other elements in the offended party's turbulent mental states—hatred, felt desecration of venerated memories, moral outrage, fear and revived despair. If there is no plausible way for him to escape or prevent the experience, and no legal way to give vent to his barely controllable impulses, and no social value in the malicious conduct that torments him, then he is forced by his own legal system to suffer for no respectable purpose (91-92).

In large part, it is this felt component that converts a mere offense into a profound offense and, so too, into something more, namely, a personal deep affront. Ultimately, then, we must return to the scales to determine whether the Danish cartoons can be prohibited as a wrongful offense on Feinberg's account. That is, we must consider the seriousness of the offense caused to Muslims by the cartoons and weigh it against the reasonableness of the offending conduct.

In terms of the criteria for magnitude, the offense looks serious indeed. First, if the reaction of offended Muslims is any indication, the general response is quite intense. In some cases, feelings were vented by deadly rioting. Second, the duration of the offense exceeded what we might expect for a daily publication. The cartoons were reprinted across Europe as well as in a Jordanian paper. They are also easily accessible on the Internet. Third, the extent of the offense was great even in Denmark, which is home to roughly 200,000 Muslims. But focusing on Denmark's Muslims does not characterize the full extent of the offense. One of the facts of globalization is that there are now far fewer information boundaries. The offensive behavior extended around the world, making the cartoons accessible—in principle, at least—to all Muslims. Admittedly, once one knows about the cartoons, the offense is reasonably avoidable. Muslims do not have to go on the Internet and seek out the cartoons. We can assume, however, that some unsuspecting Muslims happened upon the cartoons in their daily reading of one of the many newspapers in which the cartoons appeared.

Should we discount the offense of Muslims who actively sought out the cartoons? The editor of the Jordanian paper that republished the cartoons justified the decision on the grounds that the protestors should know whether the cartoons were sufficiently offensive to merit the protests. There is thus a good sense in which part of the offense was voluntarily incurred. But if we are open to the idea that offensive behavior can constitute a personal deep affront, it stands to reason that potentially affronted parties would have some justification for ascertaining what is being said about them in public.¹⁹ Surely we cannot blame them for engaging in the very behavior that would be necessary for making a reasoned response. For the value of free speech assumes that people on all sides of the argument have access to what others have said so that they too can have their say. The possibility of reasoned response is critical in this case, if—as I have suggested—what is being expressed by the cartoons is something about the connection between Islam and terrorism.

Finally, the offense taken by Muslims is not the result of an abnormal susceptibility. For Muslims at least, the response to the cartoons seems to be quite standard. Moreover, their offense hardly looks abnormal among religious people more generally. Most anyone committed to the idea of the sacred can abstract from their particular commitments to comprehend the offense in this case. The Bush administration, for example, said that the cartoons are offensive in the same way that anti-Christian or anti-Jewish cartoons are offensive.²⁰

Whether the discounting factors for the seriousness of the offense are sufficient to undermine the case for a legal prohibition on the cartoons depends on the reasonableness of the offending conduct, the opposing weight on the other side of the scales. The first contributing factor, personal importance, does not obviously offer strong support for the reasonableness of publishing the cartoons. In terms of preference satisfaction, the importance that publication of the cartoons might have for the cartoonists or newspaper editors would seem to be hardly greater than the importance that marching in Skokie might have for the Nazis. Drawing on more objective criteria of importance does little to help. Prohibiting cartoons altogether would certainly make it hard for cartoonists to carry out “the activity by which the actor earns his living” (37), something that is certainly personally important to them. But a targeted prohibition on particular kinds of cartoons need not entail this kind of interference. A claim of personal importance must therefore appeal to the fact that the activity serves more abstract values such as “health, talent, knowledge, or virtue,” or that it “is an integral part of a pattern of activities central to his love life, family life, or social life” (37). The success of such appeals will clearly depend upon one’s beliefs about the contribution that the offending behavior makes to these values and about the worthiness of the way of life that the conduct supports. Offended parties, unlike those who carry out the offensive behavior, are apt to question the instrumental value of the behavior as well as the value of the ends at which it is aimed. The extent to which we can characterize the cartoons as “wanton, perverse, or gratuitous” (37), Feinberg’s view recommends, would also cut against a judgment of reasonableness.

The social value of the activity is similarly debatable and, as noted above, the argument for the good of such cartoons for society as a whole cannot garner additional weightiness by drawing on the importance of free expression.²¹ Recall that Feinberg’s view of the contribution that free expression makes to reasonableness privileges only content of expression, not manner of expression. On Feinberg’s scheme, it would also seem that the presence of available opportunities to produce the cartoons in a way that would be “inoffensive to others” (44), say, in private gatherings of non-Muslims, speaks against the reasonableness of the conduct in this particular case. Finally, the nature of the locality—a country with a substantial Muslim population—makes this kind of behavior quite “rare and unexpected” (44), thereby failing the “Nature of the Locality” test.²² In fact, one justification of the publication of the cartoons appealed to the near inability of an author of a children’s book on Muhammad to find someone willing to illustrate the book.²³

The remaining standard for determining reasonableness is motive. On Feinberg’s account, motivations of malice or spite detract from reasonableness. Yet, as a *Guardian* editorial puts it, “The cartoons... offend and provoke. But that is what cartoons do, whether they are good or bad.”²⁴ Cartoons are thus akin to parody, caricature, satire, all of which regularly have a spiteful or malicious edge to them. Does this make them unreasonable? The answer to this question, like the questions of personal importance and social utility, is itself a matter worthy of open discussion and public debate, not of being put on the scales that mediate the offense principle. Interestingly, Feinberg readily expresses his “reluctance to restrict the offense principle to ‘reasonable offense’” because

it would require agencies of the state to make official judgments of the reasonableness and unreasonableness of emotional states and sensibilities, in effect closing these questions to dissent and putting the stamp of state approval on answers to questions

which, like issues of ideology and belief, should be left open to unimpeded discussion and practice (36-37).

He fails to recognize, however, that the same worries arise with respect to state-sanctioned judgments of reasonableness for offending conduct.

Unlike an appeal to legal moralism, using the offense principle to prohibit conduct such as the Danish cartoons does not interfere with the liberty of the cartoonists simply on the grounds the behavior is wrong. Nor does the offense principle explicitly count the fact that some people think a particular piece of behavior is wrong as a reason for prohibiting that behavior. Again, Hart rightly tells us that “[n]o social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned.”²⁵ But Feinberg’s notion of personal deep affront allows beliefs about the wrongness of certain kinds of behavior to squeeze in through the back door. In some cases, especially where religion is involved, a person’s beliefs can be integrally connected to his identity. So even “bare knowledge” of actions deemed unacceptable by a religious view can constitute a personal deep affront. In these cases, the reasonableness requirement subjects the individual who wants to engage in the potentially offending conduct to a higher standard of proof. He must prove that the value of his behavior makes it not only reasonable but also reasonable enough to outweigh the seriousness of any offense he might cause. The offended party, however, need prove nothing about the value of what is believed to be disrespected. He need only show that he and others holds the relevant beliefs about value and that when their belief system is confronted with particular kinds of behavior, they experience serious offense.

The liberal should reject Feinberg’s defense of the offense principle because the case for reasonableness is subject to the same sources of contention that make particular kinds of behavior offensive to some but not to others. People disagree about the value of individual conduct and the worthiness of the kinds of lives to which it contributes. Their experience of religious offense, especially personal deep affront, is bound up with their beliefs about identity and the wrongness of particular kinds of behavior. In practice, the requirement of reasonableness is therefore tantamount to an illiberal limit on individual liberty. Liberal legal philosophy cannot accept any such limit and, so, must make room for the publication of profoundly offensive religious cartoons. Because Feinberg is in no position to show that this kind of behavior must be allowed and because it is his commitment to the reasonableness requirement that renders him unable to do so, we have good reason to question whether the offense principle can be properly mediated after all.

Endnotes

1. For research assistance, substantive commentary, and editorial advice, I want to thank Kate McKinney, Cassie King, Andrew Salek-Rahem, Stefanie Simon, and, especially, Steven Scalet.
2. See Jane Kramer, “Images,” *The Talk of the Town*, *New Yorker* (February 27, 2006); and “Q&A: Depicting the Prophet Muhammad,” BBC News (February 2, 2006) http://news.bbc.co.uk/2/hi/middle_east/4674864.stm. Both articles also discuss more permissive interpretations of Islam, especially among the Shia.
3. Salman Rushdie, interview by Bill Moyers, June 23, 2006, *Bill Moyers on Faith and Reason*, PBS, http://www.pbs.org/moyers/watch_rushdie.html.
4. See “Cartoons and Their Context: Freedom of Speech,” *Guardian* (London) (February 3, 2006); Oliver Roy, “Holy War: The Cartoon Brouhaha Really Illustrates the Divisions within the Muslim Community, not with the West,” *Newsweek International* (February 13, 2006); “The Twelve Muhammad

Cartoons: a Survey of the European Press,” and *signandsight* (February 2, 2006) <http://www.signandsight.com/features/590.html>.

5. “World Press Eyes Cartoon Controversy,” BBC News (February 3, 2006) http://news.bbc.co.uk/2/hi/middle_east/4677464.stm.
6. “Cartoons and Their Context: Freedom of Speech,” *Guardian* (London) (February 3, 2006).
7. Unless otherwise noted, all internal quotes are to Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 2, *Offense to Others* (Oxford: Oxford University Press, 1985).
8. John Stuart Mill, *On Liberty*, edited by Elizabeth Rapaport (Indianapolis, IN: Hackett, 1978), 97.
9. *Ibid.*, 53.
10. John Wolfenden in BBC interview (September 4, 1957). http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid_3007000/3007686.stm.
11. H.L.A. Hart, *Law, Liberty, and Morality* (Stanford, CA: Stanford University Press, 1963), 41.
12. *Ibid.*, 43.
13. Patrick B. Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), 102. See also 117.
14. Hart, *Law, Liberty and Morality*, 47.
15. Oddly, however, in what Feinberg presents as a paradigmatic case of personal deep affront—using a dead body for crash tests without the consent of the next of kin—the offensive behavior is not directed at the individual who actually experiences the offense, namely, the deceased party’s widow.
16. At pp. 88-89, Feinberg describes a hypothetical Skokie case in which he does make this distinction.
17. Charles Ferro, “Igniting More Than Debate,” *Newsweek International* (February 13, 2006).
18. Feinberg acknowledges that in “peeping-Tom and racial insult cases... there is a merging of [personal and impersonal] offense” (59).
19. In this sense, the Skokie case and the case of the Danish cartoons differ from Feinberg’s cases of profoundly offensive behavior being carried out in private. Women and blacks would not be similarly justified in seeking out discrete venues that show violent pornography or racist films.
20. See Joel Brinkley and Ian Fisher, “U.S. Says It Also Finds Cartoons of Muhammad Offensive,” *New York Times* (February 4, 2006).
21. This is not to say that *Jyllands-Posten* did not make a case for the social value of the cartoons, citing “a tendency toward self-censorship among people in artistic and cultural circles in Europe” (Charles Ferro, “Igniting More Than Debate,” *Newsweek International* [February 13, 2006]). It is rather to say that Feinberg cannot draw upon the social value of the offensive manner of expression, despite that part of what was meant to be expressed was precisely this social value.
22. Feinberg makes both points in the summary of his analysis of a KKK march (96).
23. The children’s book illustrator, but not the cartoonists, remained anonymous.
24. “Cartoons and Their Context: Freedom of Speech,” *The Guardian* (February 3, 2006). See also, Ronald Dworkin, “The Right to Ridicule,” *The New York Review of Books* (March 23, 2006).
25. Hart, *Law, Liberty, and Morality*, 47. Hart does seem to think that blasphemy falls within the scope of the law when carried out in an “offensive or insulting manner” (44).

Harm and Homicide

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No act seems more deserving of its criminal status than homicide.¹ Explaining what makes it deserving of that status, however, turns out to be a complicated matter. Accounting for the evil of its essential component—the victim’s death—has troubled philosophers since Epicurus. And settling on what distinguishes those killings that deserve criminal sanction and those that do not is at the heart of some of the most pressing issues in law and policy—the legal status of abortion, euthanasia, the death penalty, innocent bystanders to war, and members of other species. Among the very best places to turn for insight into these matters is the work of Joel Feinberg. The breadth, insight, clarity, rigor, and balance of his writing on the legal issues surrounding life and death has few rivals.

There is a theoretically and practically important issue concerning homicide that Feinberg’s work bears on, but that Feinberg himself never wrote about explicitly. In order to see the issue, consider the following example. Imagine two men, each of whom is convicted of killing one of his siblings so as to gain a greater share of an inheritance. One of them killed his twenty-year-old ambitious and talented brother. The other killed his fifty-year-old unmotivated brother, who is of decidedly ordinary abilities. Otherwise, their crimes are similar—both men killed using the same means, inflicted the same amount of pain in the process of killing, premeditated the killing to the same degree, stood to gain the same amount from the death of their sibling, regret their actions equally, and so on. It seems fitting to say that, whatever punishment these killers deserve, it should be the same. More particularly, it seems that their punishment should not differ in virtue of the characteristics of the differences in the age, ambitions, or talents of their victim. We would find it both odd and unpersuasive, for instance, if one of their lawyers were to argue that her client’s sentence should be lightened relative to the other’s in virtue of whom her client killed.

Jeff McMahan has called attention to a feature of commonsense morality that provides a straightforward explanation of these intuitions. Commonsense morality, McMahan claims, holds that “the extent to which it is wrong to kill a person is unaffected by facts about the victim other than those that may make him or her *liable* to be killed, or *deserve* to be killed, if indeed it is possible for a person to deserve to be killed—that is, facts other than those that may make him non-innocent in the relevant sense.”² If this is right, we can ground our intuitive sense that our fratricidal murderers deserve the same punishment in our moral commitments. Since their killings differed only with respect to age, talents, and ambitions of their victims, their killings were equally wrong. Further, since these characteristics of the victims are not plausibly relevant to the criminals’ culpability for their actions, their killings are equally blameworthy. Finally, since wrongdoers deserve punishment proportionate to the wrongness and/or blameworthiness of their actions, the killers deserve the same punishment.

This is hard to square with harm-based theories of criminal punishment, however. According to such theories, the appropriate punishment for a crime is at least partly a function of the amount of harm the criminal caused or intended to cause in committing the crime; the greater the harm caused or intended, the stiffer the punishment should be. But it is natural to say that some deaths are worse for their victims, and hence harm them more, than others. All else being equal, dying at

twenty is a worse fate than dying at fifty. Losing the opportunity to complete projects from which one derives meaning is worse than losing years of indolence. Being denied a life promising success seems worse than being denied a life that promises failure. Consequently, if we hold all else equal, murdering one's older and unmotivated sibling of ordinary abilities causes less harm than murdering one's younger, more ambitious, and talented sibling. On harm-based theories of punishment, then, the former murder warrants less punishment than the latter.

So, given some plausible assumptions, harm-based theories of punishment conflict with common sense regarding the punishment our fratricidal murderers are due. The issue, then, is simply who is right. Is it appropriate to give some killers more or less punishment in virtue of how much the victim stood to gain from the rest of her life?

The remainder of this essay develops an answer to this question. I begin by showing how Feinberg's account of the harm of death and his theory of punishment lead to the recommendation that killers be punished in proportion to the harm they cause their victims in virtue of ending their lives. I then turn to the question of whether the commonsense rejection of that recommendation can be justified. Here I focus on McMahan's recent proposal that the commonsense view is a consequence of two commitments: first, that killings are wrong in virtue of failing to respect the worth of the victim; and second, that the worth of all people is equal. The prospects of justifying the commonsense view by appeal to these commitments, I argue, are dim. But McMahan's proposal does suggest a psychological explanation of the intuitions in conflict with Feinberg's theory. Moreover, this plausible explanation reveals these intuitions to be understandable mistakes. Given this error theory, and the difficulties of constructing a theoretical defense of the commonsense position, I conclude that we have good reason to follow the implications of Feinberg's theories and make the punishment for homicide sensitive to those characteristics of the victim that bear on how much she loses in virtue of dying. I end with some suggestions of how we might incorporate this recommendation into current sentencing law.

I. Feinberg on Death and Punishment

Feinberg held, along with commonsense morality, that the amount of harm a person suffers from death is not constant. In general, he believed, death harms the one who dies by "setting back" or frustrating his interests.

To extinguish a person's life is, at one stroke, to defeat almost all of his self-regarding interests: to ensure that his ongoing projects and enterprises, his long-range goals, and his most earnest hopes for his own achievement and personal enjoyment, must all be dashed.³

And the number of unfulfilled projects, enterprises, and hopes for the future varies from time to time and from person to person. Consequently:

The degree of harmfulness of a person's premature death thus depends on how premature it is, given the interests that defined his own particular good. ...Almost everyone will die with some interests that will be defeated by his death. ...But the person who will die at thirty is in a condition of greater harm on balance...than the person who will die at eighty. That is because death defeats fewer interests, and especially fewer important interests, of the latter than the former.⁴

This result should not be surprising, since Feinberg rightly treats life as being of only instrumental value to the person whose life it is—our continued life is good for us in virtue of being a precondition of pursuing the goals we set for ourselves, the achievement of which, in turn, constitutes our good—and the instrumental value of a thing typically varies from time to time and from person to person. (For those who are tempted by the thought that their life is intrinsically valuable to them, compare the following ways one's life might end: in the first case, one dies in one's sleep on one's eightieth birthday; in the second case, one week before one's eightieth birthday one falls into a coma that lasts many years, and from which one never awakens. No one, I suspect, will think that the second ending would be more in their own interest than the first, despite the fact that it involves many more years of life.) When we keep in mind that the instrumental value consists in its being a precondition for the pursuit and attainment of objectives in which one has a stake, moreover, it is clear that life is of greater value to those who have more to live for, where how much we have to live for is partly a function of the strength and number of our future-oriented goals and our prospects for achieving them. Death constitutes a greater setback to an ambitious and talented person, therefore, than to a person who has only a comparatively weak investment in the future and has little prospect for success, since the prospects for future fulfillment for the former person are greater than for the latter.

There are two ways in which this account of the harmfulness of death can be combined with Feinberg's theory of criminalization to reach the conclusion that the penalty for murder should vary according to characteristics of the victim such as her age, ambition, or talent. This is because, for Feinberg, there are two senses in which a particular criminal penalty can be appropriate. The first sense is derived from the "ultimate justifying aim" of the criminal law: deterrence. In particular, Feinberg endorses a version of the harm principle, according to which:

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.⁵

This principle can ground an argument for there being good reason to pass a law that made the penalty for murder sensitive to certain intrinsic attributes of the victim, since such a law might well reduce harm. Imagine, for instance, a law mandating that the younger an adult murder victim was, the stiffer the penalty the murderer would receive.⁶ In those not infrequent cases in which murderers choose between a number of potential victims, the more severe potential penalty for killing younger people should incline them to choose older victims. *Ceteris paribus*, the harm that these murderers cause by killing would be reduced. Similar gradations in punishment could be used to track other dimensions along which the harm of death typically varies, to similar effect.

Of course, it is possible that the harm reduction such sentencing laws promise could be offset by some other effect of the law. Perhaps, it could be argued, the imagined law would give some citizens the impression that killing older people is not such a bad thing to do, and hence would lead some to kill when they would not have otherwise.

This strikes me as a stretch. Provided the minimum penalties for homicide remain very severe, it is hard to believe that anyone would infer from graded punishments that killing is not such a bad thing to do. But since Feinberg's theory of criminalization

is, at root, consequentialist, any argument in favor of such a law made from within this theory must remain speculative. When it comes to the punishment that a criminal *deserves* for homicide, however, things are more straightforward. The punishment deserved for violating the criminal law is a matter of fairness, and fairness, Feinberg claims, dictates that the punishment fit the criminal's blameworthiness:

Fairness requires that relevantly dissimilar cases should be treated in appropriately dissimilar ways, and what could be more "relevant" to the degree of moral condemnation expressed by a punishment than the degree of moral blameworthiness of the one to be punished?⁷

And while blameworthiness is a complex notion, Feinberg clearly thinks that the amount of harm involved in a crime is a core determinant. In the course of arguing that failed attempts should be punished as severely as completed crimes, he writes:

But what, apart from the wrongness of his act, determines the degree of blameworthiness of the actor? ...A sound if blurred insight is that the harm intended is much more important an indicator of an offender's desert than the harm actually caused. Far more useful, however, than the concept of intentionality, are the four "culpability conditions" first proclaimed in the Model Penal Code—acting purposely, knowingly, recklessly, or negligently in regard to some harmful result.⁸

The formulation "acting...in regard to some harmful result" is rather strained, but the context makes the basic idea clear enough: for Feinberg, a criminal's degree of blameworthiness partly depends on the harm her crime would have caused were it not for the intervention of good or bad luck. In the context of laws against homicide, a criminal's blameworthiness for committing murder would thus depend on the amount of harm that would have been caused by her purposeful or knowing performance of a normally lethal action in the absence of luck. Similarly, a criminal's blameworthiness for committing involuntary manslaughter would depend on the amount of harm that would have been caused by her reckless or negligent performance of a normally lethal action (or inaction) in the absence of luck. (For simplicity's sake, I will follow Feinberg in using "harm intended" as shorthand for the notion of the harm that an action would have caused but for circumstances attributable to luck.)

Although it would be nice to have a full analysis of what an action would cause were it not for the intervention of luck, this is not necessary to see that killers often differ with respect to how much harm they intend in causing the death of their victims. If a killer takes a characteristic to be relevant to the harmfulness of death, and takes the victim to have that characteristic, then they are culpable for causing the amount of harmfulness associated with that characteristic, since their causing that amount of harm is hardly attributable to bad luck.⁹ For instance, among the many murderers who believe that dying young is worse for a person than dying when one is old, those who purposely or knowingly kill victims they take to be young typically intend more harm than those who purposely or knowingly kill victims they take to be old.

It may be that the two different ways in which a punishment can be appropriate for Feinberg pull against each other. We have just seen that deserved punishment tracks blameworthiness, which depends on the amount of harm intended. Earlier, we saw the case for thinking that the harm principle justifies sentencing laws that are sensitive to the amount of harm

victims suffer in being deprived of life. Here, though, making punishments relative to the harm actually caused seems preferable, as doing so would give criminals an incentive to discover which victims will suffer least from being victimized. If there is this tension in his account of punishment, however, it is one that many others share. For many theorists hold that punishment should be a function of the gravity of the offense and the criminal's culpability for performing it. And since the gravity of an offense is typically taken to depend at least partly on the amount of harm it causes, these theorists will also be committed to balancing the amount of actual harm and the amount of harm intended to determine the appropriate punishment for a given crime.

In any event, it is clear that Feinberg is committed to saying that our fratricidal murderers ought to be punished differently: the murderer who killed his older and unambitious sibling of ordinary abilities should be punished less severely than the murderer who killed his younger, more ambitious, and talented sibling, for the former murder both caused and intended less harm. This is a result his theory will share with many others according to which harm caused or harm intended plays a role in determining the appropriate penalty for a crime.¹⁰

II. The Commonsense View and Respect for Moral Worth

On reflection, it is peculiar that commonsense is at odds with Feinberg here. To be sure, there is a certain intuitive attractiveness to the view that all wrongful killings are equally wrong regardless of the intrinsic qualities of the victim, and hence that punishments should not be sensitive to such characteristics. But as we have seen, this commits commonsense morality to the view that even when a killing causes the victim more harm, as it typically does when the victim is murdered at twenty rather than fifty, this difference in harm is thought to make no moral difference with respect to how wrong or blameworthy the killing is. If this were right, the relationship between the harm caused by wrongfully ending a person's life, and the wrongness or blameworthiness of doing so would be very unusual.

Is there a way to vindicate this commonsense view? Although he ultimately neither endorses nor denies the view, Jeff McMahan has proposed a strategy. He believes that the commonsense view is grounded in a commitment to the equal moral worth of people. What makes wrongful killings wrong, McMahan suggests, is that they are actions that fail to respect the worth of their victims. And since all people are of equal worth despite variations in their intrinsic characteristics (such as age, ambition, or talents), such variations are irrelevant to how wrong a wrongful killing is.

The prospects of vindicating commonsense by appealing to such an account are not good, however. The first problem is that commonsense clearly holds that the amount of harm an action causes partly determines how wrong a non-lethal action is. The more harm is suffered by the victim of a wrongful assault, a wrongfully broken promise, a wrongful lie, or a wrongful betrayal, the more wrong and blameworthy the action is. When it comes to the relevance of harm to wrongness and blameworthiness, then, commonsense treats lethal actions as a special case.

This special exception for wrongful killings is difficult to justify within McMahan's failure-of-respect proposal. The proposal is most plausibly construed as a general account of wrongness: generally speaking, actions are wrong in virtue of their incompatibility with respect for the worth of the victim. If this is right, then it is hard to see how such an account can make sense of the fact that the amount of harm a victim suffers

always seems relevant to how wrong non-lethal wrongs are, but is sometimes not relevant to how wrong wrongful killings are. For while it is certainly true that killing a person is an extreme violation of her worth, it seems to be the same kind of violation as that involved in, say, non-lethal torture. In both killing and non-lethal torture, for instance, it is plausible to say that wrongdoers treat their victims as mere instruments for the promotion of some other ends, rather than as ends-in-themselves. It is also plausible to say that wrongdoers of both sorts claim an authority over the victim that they have no claim to: both kinds of wrongdoers deny their victims control over how their lives go. If we focus solely on the notion of violating a person's worth, then, there does not seem to be anything capable of explaining why non-lethal violations are made worse to the extent that they cause more harm, but lethal wrongs are not made worse to the extent that they deprive the victim of a future that is particularly valuable to her.

In response, it might be thought that the difference between non-lethal and lethal harms is not a matter of their involving qualitatively different violations; instead, it might be that destroying a person is the maximal violation of a person's worth. Wrongful killings are as wrong as an action can be, on this proposal, and hence the characteristics of the victim cannot affect how wrong they are.

The trouble is that, contrary to this suggestion, commonsense does not treat all wrongful killings as maximally wrong. Some wrongful killings are more wrong than others. To take only the most obvious kind of example, wrongfully killing in a way that causes the victim great pain is commonly understood to be worse than wrongfully killing a victim painlessly.

It is worth pausing to note the strange results that are generated by holding this view while denying that the harm a killing does the victim in death is relevant to its gravity. Consider, for instance, the following case:

Tony reluctantly decides that he must kill Bruce in order to avoid dishonoring his family, but resolves to do as little wrong in killing Bruce as possible. Tony has two poisons at his disposal. One poison will kill Bruce immediately and painlessly. The other will give Bruce one hour of stomach cramps, and then cause his death two years later.¹¹

Of course, from Bruce's perspective, it would be far better if Tony were to use the slower-acting poison: on balance, Bruce will be much better off if he experiences an hour of stomach cramps and dies two years later than if he dies immediately, albeit painlessly. But, if painful killings are worse than painless ones, and the amount of harm a victim suffers in virtue of dying is irrelevant to how wrong killing him is, Tony must give Bruce the poison that kills him now, for he will thereby do a lesser wrong. If commonsense would reject this result, then it must reject one of the two theses that generate it: either that the harm a wrongful killing causes before the victim dies is relevant to how wrong it is, or the claim we are concerned with here—namely, that the harm a wrongful killing does in death is irrelevant to how wrong it is.

Finally, one might be tempted to look at the specific harm in question—the harm of death—in order to give an explanation within the parameters of the failure-of-respect account of the difference between lethal and non-lethal wrongs regarding the relevance of harm to wrongness. After all, the harm of death is particular to lethal wrongs. The trouble, though, is that the amount of harm the victim suffers from her death is not irrelevant to all questions of wrongness, for it can play a role in determining *whether* killing is wrong. To see this, first consider the following case:

Martha and Esther are hiking in a remote forest when Esther is bitten by a poisonous snake. The poison immediately renders Esther unconscious, and will cause her death within five minutes. Martha has a dose of the only extant antidote. Unfortunately, the antidote will cause the Esther's death in two years. Understanding these facts, Martha administers the antidote, which kills Esther two years later.¹²

And now compare Martha and Esther's case to this one:

Pierre and Ted are hiking in a remote forest when Ted is bitten by a poisonous snake. The snake's poison immediately renders Ted unconscious for ten minutes, and will cause his death two years later. Pierre has a dose of the only extant antidote. Unfortunately, this antidote will cause Ted's death in five minutes. Understanding these facts, Pierre administers the antidote, which kills Ted five minutes later.

In both cases, the partner kills the victim by administering the antidote, but only in the second has the partner done something wrong. And the fundamental difference in these cases is how much life the victim loses when she is killed: Martha's killing seems permissible in virtue of the fact that she thereby prolongs Esther's life by two years; Pierre's killing seems wrong in virtue of the fact that he thereby shortens Ted's life by two years.

This pair of cases shows that the amount of harm a killing does the victim in virtue of causing her death can determine whether that killing is wrong. It is atypical, however, in that it involves a life-prolonging killing. This peculiar feature might be thought to matter, for there is a sense in which Martha does not harm Esther at all—in which case we are not comparing a more harmful killing to a less harmful killing, but a harmful killing to a beneficial one. But there are also situations, I believe, in which whether harmful killings are wrong depends on how much the victim loses in virtue of her death. Consider first the following case:

Eva has just hacked into the computer network of a terrorist organization. She sees that the terrorists have launched a guided missile, and that they have programmed it to hit a target labeled "Oprah's Orphanage: 20 residents." The missile is to hit its target within seconds. Eva can reprogram the missile so that it hits an alternate target on the terrorist's list. Out of concern for her favorite talk-show host and the orphans she has seen on TV, she reprograms the missile to hit a target labeled "Isolated Orphanage: 25 residents." She succeeds: seconds later the missile hits its new target, killing all 25 people inside.

And now compare Eva's action with Harry's:

Harry has just hacked into the computer network of a terrorist organization. He sees that the terrorists have launched two equally powerful guided missiles, only one of which is programmable. The programmable missile is aimed at a target labeled "Oprah's Orphanage: 20 residents," and will reach it within seconds. The fixed-target missile is aimed at a target labeled "Isolated Orphanage: 25 residents," and will reach it within minutes. He realizes that "Oprah's Orphanage" is the orphanage sponsored by his favorite talk-show host, which he has seen profiled on TV. He cannot alert any of the targets, but he can re-program the programmable missile so that it hits an alternate target on the terrorist's list. Out of concern for his favorite talk-show host and the orphans he has seen on TV, he

reprograms the programmable missile to hit “Isolated Orphanage: 25 residents.” He succeeds: seconds later, the programmable missile hits its new target, killing all 25 people inside; several minutes after that, the fixed-target missile hits the target again, but since all the residents have already been killed, it causes no additional casualties.

Many will feel that Eva has done something wrong but that Harry has not. The most plausible explanation of this moral difference, however, concerns how much the missile victims lose in virtue of their deaths: Eva intentionally causes her victims to lose many years of life, whereas Harry intentionally causes his victims to lose only minutes of life.

So far, we have seen that commonsense morality holds that the amount of harm an action causes its victim typically bears on how wrong it is; it holds that the amount of harm a killing causes its victim before the victim dies bears on how wrong the killing is; and it holds that the amount of harm a killing causes in virtue of ending the victim’s life bears on whether the killing was wrong. Despite all this, commonsense morality also holds that the amount of harm a killing causes in virtue of ending the victim’s life does *not* bear on the degree to which a killing is wrong. We have also seen how this complex picture frustrates various strategies for vindicating commonsense morality by appeal to a failure-of-respect account of wrongness. Though suggestive, this is not a conclusive argument against the commonsense view. It remains possible that some elaboration of the failure-of-respect account could match the complicated counters of the commonsense view of the relationship between harm and wrongness. Or it could be that some other account of wrongness will be able to do so. I believe, however, that trying to vindicate commonsense morality’s position on harm and killing is a losing proposition—not only because of the peculiar specificity of the exception commonsense morality makes for the harm of death, but also because there is a ready explanation of the commonsense view according to which it is a product of an understandable confusion.

III. An Error Theory

If we read McMahan’s proposal as an explanatory rather than justificatory account of the commonsense view regarding harm and killing, it is far more compelling. On this reading, the proposal is that commonsense resists the implications of Feinberg’s theory because commonsense takes these implications to conflict with the equal moral worth of all people. If we say that those who kill twenty-year-olds warrant a stiffer penalty than those who kill fifty-year-olds, we seem to be saying that twenty-year-olds are more worth protecting than fifty-year-olds. This alone suggests that to follow Feinberg here is to deny the equal moral worth of all people, for if one thing is more worth protecting than another, it seems that it must be worth more. In addition, if we say that the killers of twenty-year-olds warrant stiffer penalties than the killers of fifty-year-olds because death inflicts a greater loss on a twenty-year-old than on a fifty-year-old, we seem to be saying that the twenty-year-old’s prospective life was of greater value than the fifty-year-old’s, and this too seems to imply that the twenty-year-old is worth more.

This strikes me as a plausible diagnosis of the intuition that we should not make the penalties for murder vary with features of the victim such as her age. But if so, the intuition rests on a confusion. The reason Feinberg must recommend that killers of younger people receive stiffer penalties than the killers of older people is that the life that younger victims are deprived of is generally worth more to them than the life that older victims are deprived of. But to say that one person’s future *life* is of greater

value *to him* than another person’s future life is of value to her is not to say that the former *person* is, morally speaking, worth more. There is an important distinction between the value the future holds for a person, and that person’s moral worth. In the context of assessing killings, however, this is a distinction that commonsense morality seems to elide.

When we say that all people have equal moral worth, we are saying that whatever concern and respect is due to one person in virtue of being a person is due to all others in equal measure. If there are constraints against harming, breaking promises, or lying, for instance, the constraints must give all people equal protection against being harmed, having a promise made to them broken, or being lied to. But, as commonsense recognizes, all this is compatible with saying that some harmings, promise-breakings, and lies are graver than others in virtue of the magnitude of the costs they impose on their victims. There is no tension in saying that it is worse to deprive a person of something that is very valuable to them than to deprive a person of the very same worth something that is far less valuable to them. This is so even when it is some characteristic of the more aggrieved victim that explains why they suffer more. For instance, a broken promise that costs a desperately poor person \$100 is commonly understood to be worse than a broken promise that costs a very rich person \$100. What commonsense rules out is claiming that some such wrongs are graver in virtue of being wrongs against a person who is more worthy in the sense of being due a higher degree of respect or concern.

With respect to wrongful killings, we saw above, commonsense follows this reasoning to a point. It recognizes that holding some killings to be graver offenses in virtue of involving greater amounts of pain is perfectly compatible with the equal moral worth of all people. In this case, it is obvious that the grounds for this comparative judgment have nothing to do with comparative moral worth. Instead, we recognize that the killer that kills painlessly deprives his victim of her future life, but the killer who kills painfully deprives his victim of both her life and her freedom from pain. No one worries here that we are treating the victim who suffers more pain as being more worthy than the victim who suffers less pain.

When it comes to the harm of being deprived of a future life, however, commonsense balks. Why? The answer, I believe, has to do with the fact that, in many cases, the characteristics of people that make them suffer more from death are also characteristics that we admire. Many people find it natural to admire youth, ambition, and talent. These characteristics are also qualities that make a person’s future life worth more to them, and consequently are qualities that make their deaths a greater harm to them. So, when we contemplate giving stiffer punishments to those who cause their victims more harm in death, we are often contemplating giving stiffer punishments to killers who have killed those who have traits that we admire. And it is plausible that this fools us into thinking that the basis for the judgment that it is more wrong or blameworthy to kill the young, ambitious, and talented is that people with these traits are worth more. For if we are tempted to hold some people to have a greater worth than others, it will be those whom we hold in greater esteem. On our guard against this temptation, we reject a view that appears to give in to it.

On reflection, of course, Feinberg’s theory of punishment is not inegalitarian. The reason for punishing the killers of younger people more severely than the killers of older people has nothing to do with holding that young people are of greater moral worth than old people. It is, rather, because death deprives them of a future that is of greater value to them, just as a \$100 loss constitutes a greater deprivation for a poor person than for a rich

person. The resistance to the implications of Feinberg's theory of punishment, according to this explanation, is the product of a sensitivity on the part of commonsense to anything that smacks of elitism. Practically speaking, this sensitivity is probably worth having. But once we recognize that it is raising a false alarm, that it is responding to a proposal that is not elitist, we can and should ignore its warnings.

This explanation also has the virtue of accounting for an exception to McMahan's claim that, according to commonsense, "the extent to which it is wrong to kill a person is unaffected by facts about the victim other than those that ... may make him non-innocent in the relevant sense." Many people, I believe, take the killing of people who are especially vulnerable to be worse and/or more blameworthy than the killing of people who are generally more able to defend themselves. For instance, killers who have preyed on those who are frail, or physically or mentally disabled, seem to have committed a graver wrong and to be more blameworthy. As I will discuss in more detail below, this judgment is reflected in the sentencing law of many jurisdictions. Here, commonsense treats some killings as worse than others in virtue of characteristics of the victims, even when these characteristics have no bearing on the victim's innocence. Given the preceding, however, we should not be surprised that commonsense finds no conflict between this view and its commitments to moral equality. Psychologically speaking, few would be tempted to say that characteristics that make someone particularly vulnerable are also characteristics that make some people of superior worth. When it is a characteristic of adults, at least, vulnerability is often associated with something commonsense regards as a misfortune. Consequently, we are not fooled into thinking that giving stiffer punishments to those killers whose victims are particularly vulnerable is elitist.

The explanation also accounts for some of the particular contours of the commonsense view that we charted in the previous section. There we found a number of situations in which commonsense holds that the amount of harm a victim suffers in virtue of her death is relevant to the wrongness of killing her. In all these cases, though, something other than admirable qualities of the victim accounted for the differences in the amount of harm that death caused the victims: the differences were attributable to differences in poisons, antidotes, and missiles. So, again, there is nothing in these cases to fool commonsense into thinking that allowing a role for the amount of harm the victim suffers in virtue of dying is to abandon a commitment to moral equality.

The position I have extracted from Feinberg's work starts with the common and well-motivated view that the harm of death varies, and combines it with a theory of criminal punishment that is well-motivated and, in its more general features, widely endorsed by philosophers and legal scholars. In contrast, there is no apparent justification for the commonsense exclusion of the harm of death from the determinants of how wrong a wrongful killing is. Indeed, as the case of Tony and the two poisons showed, it is doubtful that the commonsense position on harm and killing is internally consistent. Further, there is a good explanation of why commonsense holds this position according to which it arises from a mistaken triggering of our warranted sensitivity to moral elitism. We have more than sufficient reason, then, to follow Feinberg and part with commonsense on the matter of the punishment homicides warrant.

IV. Some Judicial and Legislative Implications of Feinberg's View

The explanation of the commonsense view offered above does raise a worry about implementing the account I have attributed

to Feinberg. Mistaken though it is, it may be difficult for us to shake the intuition that punishing killers in proportion to the harm their victims suffer in virtue of dying contravenes our commitment to moral equality. So, were courts to give killers the punishment that their crimes truly warrant, this might give some the misimpression that governments have abandoned their commitment to extending equal protection under the law to all their citizens, and this could have bad consequences.

If so, there may be a conflict between the governmental duty to punish justly and the desire for policies that have the best overall consequences. Whether or not there is such a conflict depends on how bad the consequences of contravening the commonsense intuition would be, and whether these costs are offset by the reduction in the harm that is likely to result from imposing harsher punishments on those killers whose victims stand to gain more from their futures. But if ignoring the amount of harm killers cause in causing their victims' deaths is to commit only a very minor breach of justice, the possibility of a net social cost could perhaps be a sufficient reason to follow the current commonsense view as a matter of practice.

Ignoring the amount of harm a victim suffers in virtue of dying, however, is a substantial breach of justice. To see that this is so, it is enough to recognize how drastically killings differ in the amount of harm the victim suffers in virtue of dying. For instance, on average, killers of twenty-year-olds deprive their victims of roughly twenty-eight years more life than killers of fifty-year-olds do.¹³ To get a handle on how much twenty-eight years of life is worth to a person, imagine how much an ordinary person would sacrifice at twenty in order to prolong their life for twenty-eight years: consider how much pain they would be willing to endure and how much of what they care about they would be willing to give up. To the extent that people are good judges of what is in their own interest, depriving a person of twenty-eight more years of life is at least as bad for them as causing them all this pain and hardship. If an assailant who caused a victim that amount of pain and hardship were given the same punishment as an assailant who merely pinched his victim, this would be a massive breach of justice. And since the difference in the harm caused by those who kill twenty-year-olds and those who kill fifty-year-olds seems comparably large, it is implausible that giving such killers the same punishment could be only a minor affront to justice.

If we are to avoid serious injustice in punishment, then, sentencing authorities ought to take the amount of harm the defendant caused or intended the victim to suffer in virtue of her death to be a determinant of the sentence imposed for homicide. This might be done in the current U.S. legal context in a number of ways. The most obvious is that judges who have discretion to adjust the sentences of those who commit homicide could take the amount of harm the killer caused or intended to cause the victim in virtue of her death as a factor in determining his sentence. There are, in addition, several legislative initiatives that are likely to be warranted by the preceding arguments. For instance, sentencing guidelines for non-capital cases could stipulate that the length and conditions of imprisonment as well as the criminal's eligibility for parole vary according to how much of a harm the murder "intended" in causing the victim's death. Not surprisingly, this would require a revision of the sentencing statutes in many jurisdictions. To take one important example, under the sentencing guidelines that currently inform federal court judges, the only provision for adjusting the sentence of convicted killers that refers to the victim's characteristics allows for increasing the penalty if the victim was particularly vulnerable. Further, for first-degree murder where capital punishment is not imposed, the guidelines direct judges to give all defendants life imprisonment without the possibility of parole, irrespective of

the victim's characteristics. One way of accommodating the implications of Feinberg's theories would be to revise these guidelines so as to allow prison terms to reflect the victim's age, ambitions, and prospects for fulfillment (and/or the killer's awareness of these factors).

Similarly, legislators could make the amount of harm a murderer causes or intends the victim to suffer in virtue of her death a factor that determines whether a murderer receives the death penalty. This should probably be done in two ways. First, under current constitutional law, a murderer cannot be put to death unless he or she is "death-eligible," where being death-eligible is, in part, a matter of having committed a murder that was "aggravated"—that is, a murder whose circumstances "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."¹⁴ In order to satisfy this constitutional requirement, death penalty states and the federal government have drawn up lists of aggravating circumstances. These lists ought to contain an entry for killing a victim that stood to gain more from her continued existence than the victims of others found guilty of murder.

As it stands, they do not. The details of the lists vary across jurisdictions, and there are over forty-five factors that make at least one appearance on state or federal lists of aggravating circumstances.¹⁵ But for one, all these factors are clearly irrelevant to the amount of harm that death caused the victim. The sole exception is whether the victim was a child.

It is tempting to think that in treating the killing of a child as an aggravating circumstance, legislators, at least, have implicitly agreed that the punishment for murder should be responsive to the amount of harm death does the victim. After all, children typically lose more life from being killed than adults do. There is good reason to think, though, that the explanation for these provisions derives instead from children's vulnerability. Children's relative defenselessness makes them particularly easy prey, and so it may be important to protect them with especially strong deterrents. Further, we ordinarily think that anyone who preys on the defenseless must be especially vicious, and hence especially deserving of punishment. This interpretation is bolstered by the fact that in several jurisdictions the "young victim" aggravating circumstance appears alongside, or is bundled with, other "vulnerable victim" categories.¹⁶ New Hampshire, for instance, makes the vulnerability rationale explicit: there, a murder is aggravated if "the victim was particularly vulnerable due to old age, youth, or infirmity."¹⁷

Whatever these legislatures' intentions might have been, though, it is doubtful that the "child victim" aggravating circumstance is the appropriate way to bring sentencing law into line with Feinberg's theories of death and punishment. For according to Feinberg (and others), death typically harms children, especially young children, less than it does young adults. This is so for two reasons. First, young children do not have actual interests derived from "ongoing projects and enterprises, long-range goals, and hopes for their own achievement" because they are incapable of formulating the kinds of desires necessary to produce such objectives. Second, the interests whose frustration can constitute harm must be actual rather than potential. As he puts it, "One can grieve for an interest that might have been fulfilled, but was not; but that is quite another thing than grieving for a nonexistent interest that might have become real, but never did."¹⁸ Consequently, young children have less of a stake in their future, and are thus less harmed by being deprived of it, than typical adults.

The second aspect of the capital sentencing process in which the harm of death could be taken into account is when juries are deciding whether to give the death penalty to "death-eligible" defendants. At this stage, the defendant is given the

opportunity to argue that some fact mitigates either his crime or his blameworthiness for committing it. Given that juries are unlikely to treat the fact that the murderer knew that a victim was older, lacking in ambition, or unlikely to successfully pursue her goals as a reason in favor of clemency, an explicit instruction to the effect that they take such considerations as mitigating factors may be in order.

Such changes to our current sentencing regime will not come easily. They will make many uncomfortable, and perhaps even strike some as offensive. My impression is that if I am right to attribute to Feinberg the position I have developed here, he would have responded to this resistance with charity and sympathy but, ultimately, would have been undeterred by it. In the concluding sentence of an essay in which he defends the well-motivated but counter-intuitive position that mere attempts should be punished with equal severity as completed crimes, Feinberg has this to say about one of his opponents:

Professor Fletcher's mistaken analyses...I realize, were animated by an unusually powerful (and commendable) motive to avoid elitism. Even though, on some scale of "cognitive blameworthiness," these mistakes are not very blameworthy, they can nonetheless cause considerable mischief, intellectual or other, and in actual cases, make the worse appear the better cause.

In the face of resistance to the well-motivated but counter-intuitive recommendation that those who commit homicide should be punished in proportion to the harm their victims suffer in virtue of their deaths, precisely the same response would be fitting.¹⁹

Endnotes

1. Throughout, I use "homicide" to refer to all and only illegal killings. I use "murder" to refer to homicides in which the killer purposely or knowingly kills the victim.
2. "Challenges to Human Equality," forthcoming in *Journal of Ethics*. It is important for McMahan that the commonsense intuition is restricted to the wrongness of killing persons, where a person is a creature that has full moral status. When I speak of "killing" in what follows, it will be the killing of persons to which I refer.
3. Joel Feinberg. *Harm to Others* (New York: Oxford University Press), 82.
4. *Ibid.*, 93.
5. *Ibid.*, 26.
6. The qualification "adult" is needed here because, according to Feinberg's theory, young children stand to gain less from their continued existence than do most adults. I explain why in Section IV. In the remainder of the paper, I will take the qualification as understood.
7. Joel Feinberg. *Harmless Wrongdoing* (New York: Oxford University Press, 1988), 150.
8. Joel Feinberg. "Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments against It," *Arizona Law Review*, 37 (1995): 131-32.9.
9. Actual awareness of the presence and significance of the factors relevant to the harmfulness of death is surely sufficient for excluding these factors from the domain of luck, but is probably not necessary. Perhaps, for instance, a reasonable expectation that the killer be aware of these factors and their significance is enough.
10. A particularly clear example is Doug Husak, whose "principle of proportionate sentences" holds that "the punishment a defendant deserves should be proportionate to the seriousness of his criminal conduct," where "the seriousness of criminal conduct is a function of two variables—harm and culpability." See Douglas N. Husak, "Transferred Intent," *Notre Dame Journal of Law, Ethics & Public Policy*, 10 (1996): 92.

11. This case elaborates a problem McMahan raises for the respect-for-life proposal in his *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), 248.
12. This case is borrowed from Kasper Lippert-Rasmussen's "Two Puzzles for Deontologists: Life-Prolonging Killings and the Moral Symmetry between Killing and Causing a Person to be Unconscious," *Journal of Ethics*, 5 (2001): 400.
13. Elizabeth Arias. "United States Life Tables, 2002," *National Vital Statistics Reports*, 53:6 (November 10, 2004): 3.
14. *Zant v. Stephens*, 462 U.S. at 877 (1983).
15. Jeffrey L. Kirchmeier. "Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme," *William & Mary Bill of Rights Journal*, 6 (Spring 1998): 345-459.
16. As of 1998, eight of the seventeen jurisdictions that considered a child victim to be an aggravating factor also considered an elderly, handicapped, or disabled victim to be an aggravating factor. See Kirchmeier, *op cit.*, 420-421.
17. N.H. Rev. Stat. Ann. 630:5(VII)(g) (1996).
18. Feinberg, *Harm to Others*, 96-97.
19. I would like to thank Doug Husak for helpful discussion of some of the issues dealt with in this paper.

Jury Nullification, Democracy, and the Expressive Function

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One of the core theses of my doctoral dissertation was that democracy is an intrinsically just collective decision making procedure because it publicly affirms the equal basic social standing of each minimally morally competent member of societies where collective decisions are necessary. The idea that legislative procedures generally, and democratic procedures in particular, have a public affirmation function was inspired by Joel Feinberg's analysis of criminal punishment which, he argued, was distinguishable from other forms of authoritative harsh treatment because punishment includes essentially an expressive function.¹ While Feinberg had focused on a community's moral assertions in the application of law, I had been led to think about moral assertion via public institutions in the antecedent making of law. In this paper I want to examine the connection between these two ends of the legislative continuum—the procedures for making law and the procedures governing the application, or non-application, of law to specific cases. In particular, I examine the phenomenon of jury nullification.² I suggest in this paper that jury nullification may have a significant role to play in political justice despite its apparent clash with democratic principles and the rule of law.

It is no simple task to define precisely what jury nullification refers to in the literature that addresses it. At a minimum, we can say that jury nullification involves a jury rendering a verdict that is at odds with the verdict that would seem logically to follow from the application of a valid law under which a criminal defendant is accused and the evidence is presented at trial. The discretion of jurors to render such verdicts emerged from a series of now legendary developments in the practice of trials by jury in English common law—the decline of the attain through which jurors could be punished or otherwise harmed for verdicts deemed to be incorrect as determined by subsequent juries or by judges, the prohibition on an authority trying an accused twice for the same criminal offense, and the

jury's charge to render general verdicts as opposed to mere special verdicts (by which jurors limit themselves to determine only the facts, leaving to the judge the matter of applying the law to these facts to decide the guilt or innocence of the accused).³ The criminal law operates in such a fashion that the jury may render any verdict they choose and they may not after the fact be held accountable for it—in the form of punishment nor even by being compelled to explain the basis of their decision.

The immunity from review, however, does not extend to the verdicts. If the jury convicts, that verdict may be set aside by the judge, should the judge determine, for instance, that the evidence presented at trial does not sustain the guilty verdict. However, if the jury yields an acquittal, that verdict is final and may not be overturned, even when it is obvious that the evidence clearly indicates the accused to be guilty of violating the applicable law. This liberty of the jury to render verdicts, either for conviction or for acquittal, regardless of even their own findings of fact under the law, would seem to fly in the face of democratic principles and the rule of law.

For the sake of clarity, I will treat democracy as consisting in two basic elements: (1) popular sovereignty, in which the people who are to be governed by the laws are also author of those laws, and (2) the laws are determined by a majority rule procedure that distributes equally the political power to make law.⁴ It is assumed that these principles are consistent with representative legislative assemblies, election to which is determined in a voting scheme where each minimally competent member of the society gets an equal vote.⁵ The rule of law requires, among other things, that persons be equally subject to valid legislation publicly declared. The conjunction of democratic principles and the rule of law implies that justice requires that juries apply the law to the evidence and render a verdict accordingly. There is something amiss when a law that has been duly passed after explicit popular deliberation⁶ is disregarded in an individual case because jurors, either for no reason or for unjust reasons, exercise their discretionary powers for acquittal in the face of clear evidence of guilt. Instances of such cases are frequently thought to be found in trials of white defendants acquitted by white juries of murdering black victims in the American south despite clear evidence of their guilt.⁷ Not only are acquittals that manifest grievous miscarriages of justice permanent,⁸ they also bear, as a flip side to punishment, an expressive significance of their own. If, as Feinberg argued,⁹ punishment vindicates the law, acquittals that are enforced by the criminal justice system call into doubt the validity of laws *not* enforced in cases where they have obviously been violated. In addition, victims of criminal activity where the accused are acquitted despite the evidence are not afforded the equal protection of law.¹⁰ If there is good reason for law to be made democratically, there is further injustice.

The jurors who acquit are not elected representatives of the community; if they rely upon some standard independent of the valid law, they substitute their standard for that which ostensibly represents the community's considered judgment on the matter at hand. Additionally, because jury verdicts neither make law nor establish precedent, they issue a judgment based upon standards that they will not themselves be subject to, unlike legislatures who are subject to their legal enactments. Schopp summarizes the anti-democratic nature of juries who nullify nicely: "By engaging in nullification, jurors—who are not democratically elected—reject laws established through a democratic process in order to apply standards—to which they are not themselves subject—to individuals who had no opportunity to vote in the process by which those standards were selected."¹¹

It would thus seem that from an analysis of the liberties of jurors, the rule of law, and democratic principles, there is good reason to be skeptical about the legitimacy of nullification. Might jurors be disabled then from undertaking nullification? Not without substantial attacks on well entrenched elements of law: constitutional prohibitions on double jeopardy, juries rendering general verdicts, or juror immunity from censure based upon the verdict rendered. Such repeals would render juries unrecognizable. So, in a sense, the liability for jury nullification is destined to remain so long as juries as we know them continue to exist. The central question surrounding nullification in the present day involves the manner of swearing in and instructing jurors to their trial function. This question is unhelpfully but often formulated by asking whether nullification ought to be regarded as a (mere) power or a right.¹² If nullification is a juror right, advocates argue, then they ought to be informed of their discretionary power by the judge at trial and ought not to take an oath to the effect that they will take the law from the judge and apply it (mechanically) to the facts as they find them. Further, if nullification is a juror right, it is argued that defense attorneys should be permitted in the course of the trial to urge the jurors to disregard the applicable law and render a verdict that reflects their evaluation of both the law and the facts. In contrast, those who regard nullification as a mere power treat this jury capacity simply as a by-product of the historical development of the conjunction of the elements mentioned above—general verdicts, double jeopardy prohibitions, and immunity from post-verdict punishment and review. Instructing juries that they may *rightfully* go beyond determining the facts in a case or that defense counselors might urge them to do so would ensure that “our government will cease to be a government of laws, and become a government of men.”¹³

Yet there is an important irony in this observation because the doctrine of jury nullification itself developed as part and parcel of the movement toward the rule of law and law reflecting popular will. When trial by jury eventually replaced alternative forms of trial (trials by oath, ordeal, and battle) in England, they were primarily public in nature, giving the local population access and influence over the achievement of justice. By the close of the sixteenth century, juries deciding cases were able to render a verdict according to their own consciences and so were not bound by evidence or the judge’s instructions. Even by this time, acquittals were final, though guilty verdicts deemed by the judge to be unfair could elicit reprieves for convicted prisoners and recommendations for pardon from the king.¹⁴ Jurors themselves officially earned immunity from punishment for their verdicts as a result of the Edward Bushell trial in 1670, though Levy suggests that in fact punishing jurors became rare in the wake of the acquittal of Nicholas Throckmorton in 1554.¹⁵ The bulk of these achievements of English common law were transmitted into the colonial legal systems in America, and American colonial trials continued to entrench jury powers as elements in the movement toward popular sovereignty over non-representative royal prerogative and toward the rule of law. The decision in the colonial trial for libel of John Peter Zenger in New York in 1735 reaffirmed the jury’s role as determining not merely the facts but also the law.¹⁶ In the colonies especially, the link between trial by jury and escaping local oppression and tyranny at the hand of royal governors was strong, partly because these governors were seeking ways around¹⁷ jury trials since juries had demonstrated a willingness to acquit despite judicial instructions to apply the law to even uncontested evidence. The state constitutions of the seceding colonies placed a right to trial by jury behind only protecting religious freedom in the list of constitutionally protected individual rights, and at the Constitutional Convention of 1787, trial by jury was the first right recognized.¹⁸ In *Federalist 83*, Hamilton comments,

“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; of if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”¹⁹

At the point of American independence, then, it was well established that while there was a *presumption* that juries were the proper judges of fact and the court the best judge of law, this presumption was not in fact binding and, in the words of Supreme Court Justice John Jay, “both objects are lawfully with [juries’] power of decision.”²⁰ Nullification was an essential component in the aspiration for a rule of law, the application of which law reflected the community conscience on justice. Jeffrey Abramson writes that “the jury emerged, at the time of the American Revolution and through the early days of the nineteenth century, as a premier institution of local self-government, empowering the enfranchised with an effective voice to interpret and enforce the laws in their community.”²¹

It might be objected here that the political system actually established in the United States just after the colonial secession was hardly a democracy in the sense I defined above, so that jury nullification, while perhaps serving the ends of rule of law and protection of individual liberty, was not established toward the end of democratic rule. There is something to this line of thought, for as the U.S. legislative bodies emerged as sovereign entities, the willingness of courts to recognize juror discretion recedes. In part, this decline occurs because the laws which might be disregarded by nullifying jurors would not have their origin in a parliament in which they had no representation, but rather in their own legislatures. In addition, there was a shift in the conception of the democracy and consequently its relationship with the rule of law. Democracy had developed, as Abramson’s remark quoted above suggests, as local self-government with a strong protection of individual liberty. Juries could be expected to know the local convictions about the requirements of justice. The unification of the separate states into a growing federal structure required, under the commitment to the rule of law,²² consistency and unification of the standards against which people were held responsible. In a sense, the referent of the term “people” had changed. By the 1850s federal judges were steadfastly refusing to instruct the jury that they could *rightfully* disregard the law, and preempting defense counsel arguments to the jury to nullify the law.²³ While the ability to render without liability verdicts independent of what would follow from applying the law to the facts remained with juries, we might say that the criminal law in the United States eventually arrived at the position that is consistent with democracy properly construed and the rule of law—local juries were no longer thought authorized to judge the acceptability of the democratically established law in question. From the point of view of political theory adequately justifying democracy and the rule of law, there might be an inevitable concession to the possibility of discord between verdict and the law as the price of maintaining trial by jury as we know it, but a concession is not a sanction. Jurors ought not to be encouraged, by judges or defendants and their counsel, to disregard the law before them.

Are there any lessons to be drawn from consideration of the historical development of jury nullification? I wish to make both a methodological point and a substantive point. Methodologically speaking, the history is relevant for the question of what we ought to do in the here and now. Henry Sidgwick, in commenting on the relationship between ethics and politics, emphasizes that the question to which mankind generally requires an answer is, “What is a man’s duty in his present

condition?” Answering such a question, he correctly explains, is not exhausted by a successful execution of the development of ideal theory, either of ethics or politics, or their conjunction.²⁴ It requires as well attending to our “existing circumstances,” and our existing circumstances are hardly to be understood without tracking the stages of development of our society. John Rawls makes the same point in *Theory of Justice*, concluding that at certain stages of historical development, it may be the case that political rights to participation in the public scheme are justifiably distributed in unequal fashion.²⁵ Nonetheless, his argument for the two principles is an undertaking of ideal theory, which he regards as a preliminary move to answering Sidgwick’s question. Joel Feinberg’s four-volume work on the moral limits of the criminal law in a liberal democratic society is also a work first and foremost in ideal theory—he writes, “Our question can be understood as one posed for an ideal legislature in a democratic country. ... This book is a quest not for useful policies but for valid principles.”²⁶ At the level of principle, a democratic country with a commitment to the rule of law may find no place for treating jury nullification as a *rightful* departure from legal rules, and jurors may not regard themselves from this point of view as enjoying a *lawful* discretion to disobey valid law. Robert Schopp’s sustained treatment of this specific issue from this idealized point of view is, I am inclined to conclude, compelling.²⁷ But even if this is correct, it leaves open the possibility that when we take stock of our society’s actual state of development, jury nullification may play a remedial role, even a significant role. This possibility is not ruled out by the entailments of ideal theory.

Schopp’s cogent analysis of jury nullification is a work in ideal theory. This is illustrated in the simplifying assumptions he makes regarding the normative structure necessary for determining whether there can be any legitimate role for nullification. He opts for a broad characterization of contemporary liberal theory that extends from democratic political procedures to a criminal justice system. While such liberal political principles “provide a philosophical foundation for legal systems such as those established in the United States,” he goes on to offer the disclaimer that he does not assume that “criminal justice systems currently operating in the United States are ideal legal institutions.”²⁸ I will not take issue here with the broader commitment to liberal political theory,²⁹ but I do want to focus on the democratic element, comparing our actual institutions with the ideal.

Why is the democratic element crucial? In arguing that instructions to jurors that they may rightfully disregard the law are unjustified, Schopp relies upon the facts that the laws are established by a procedure that treats everyone equally,³⁰ and that the laws express the conventional public morality. Nullification undermines this state of affairs. In general, nullification entails that criminal defendants are held to a standard—that of the jurors—distinct from that which the citizens at large have determined democratically. More specifically, when acquittals are the result of nullification and there are identifiable victims, the nullifying acquittals publicly express these victims’ less than equal standing before the law, a clear failure of respect. It seems that for these connections between equal standing, democratic procedure, and the laws conceived of as expressing the community’s conventional public morality to obtain, the actual procedure must genuinely live up to the democratic ideal. The degree to which the actual process deviates from the ideal seems correspondingly to diminish the confidence we can have that laws resulting from the procedure genuinely express conventional public morality, or at least, that they express it in a way that manifests the equal basic standing of each of the members of the community. Notably, this applies not just to nullification, but presumably more

generally to the general practice of punishment. The degree to which punishment may succeed in expressing the moral condemnation of the community, and perform the various derivative expressive functions that Feinberg identified, seems to depend upon the degree to which the legislative enactments have a genuinely democratic pedigree.

So, then, we must ask to what degree our actual procedures compare with the democratic ideal. This is undoubtedly a far-ranging question beyond the scope of this piece, but a few observations might be made. First, the manner in which concentrated wealth is converted into political influence raises substantial questions about the degree to which legislative representatives genuinely represent their constituents or their judgments about which ends ought to be pursued through law. Even the perception that legislative influence is subject to the highest bidders has led some law makers to attempt substantive reform, but such reforms depend for their success on the support of those who are suspected of the behavior needing reform. A contributing factor but an independent second worry is the fact that, apart from more local referenda, exercising democratic prerogative as a voter is typically restricted to choosing between only two viable candidates. The legislative structures, for historical reasons that make alternatives unlikely, is stably dominated by two parties. Given the complexity of system of rules that have become necessary (or at least entrenched) in a society as large and heterogeneous as is ours, it seems nothing short of incredible that the two existing political parties adequately give voice to the range of interests that the population desires to see manifest in their public institutions. Thirdly, the procedures for voting and registering to vote in the recent history of our nation has been such that the national government has been prompted to renew (in 2006) federal oversight of the voting and registration laws of several states, counties, and towns.³¹ This last matter is independent of the controversies over the procedures for legislative redistricting in response to changes in population—a procedure whose participants are again overwhelmingly from only two political parties. Finally, the recent record of various jurisdictions actually executing the act of an election is troublesome, with problems ranging from the form of ballot to mechanisms relied upon for recording and tabulating votes. Considerations such as these surely contribute to the persistently low voter turnouts of the voting age population. All in all, casting a vote in our present representative scheme seems pretty far removed from a judgment that the laws one lives under are an expression of popular will under conditions of equality.

But how might these observations about our actual institutions contribute to a foundation for thinking that jury nullification might play a significant role in the achievement of justice in the here and now? If juries are asked to apply laws that have resulted from a procedure which can plausibly be doubted as being genuinely democratic, then their becoming less rule-bound as the result of instructions that inform of a power they possess is less objectionable. This is not to say that a jury of twelve (or fewer) persons is more likely to be able to voice a decision that expresses the popular will in the form of a general rule. But that is not what the jury is charged with doing. They are charged most generally with getting to a just outcome in a particular case. If we think a just outcome is something that we get from reason then, as Locke thought, it might be the case that justice is easier to discern than the positive laws of commonwealths, “as reason is easier to be understood than the fancies and intricate contrivances of men, following contrary and hidden interests put into words.”³² The premise of divided government with checks and balances is the assumption that if you place power into the hands of persons you ought to expect sooner or later that it will be used in their

interests. Some of the charges considered above against our actual system substantiate this assumption. Lawmakers in our system enjoy substantial power and it is just isn't clear that there is a substantial alignment of interests between these persons and the mass of ordinary citizens. By contrast, it is difficult for jurors to use their limited power to advance their own self-interest by abusing it.

Thomas Jefferson wrote in 1789, "Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislature. The execution of the laws is more important than the making of them."³³ Of course, we do not face such a decision, but it seems to me that the expressive potential of the criminal law and the verdicts it achieves in the actual world are dependent upon the integrity of the democratic system. To the extent that the latter is undermined, the former cannot be relied upon to undercut the role of an active jury. It is true as well, however, that unless the expressive function of the criminal justice and the verdicts it renders is extended from the integrity of a properly democratic system, the public affirmation of equal basic social status rings hollow. Perhaps the best measure of the integrity of the democratic system is achievement of actual criminal trial procedures in which there is no room for sanctioning nullification.

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Endnotes

1. See Feinberg, 1970.
2. I first examined jury nullification in a seminar paper for Joel, but the paper was largely a piece covering the historical background that shaped the contours of the modern controversy over nullification rather than a philosophical solution. As it turns out, the clearest analytical treatment of jury nullification comes from another contributor to this volume, Robert Schopp (1996, especially §§III-V), most of whose conclusions I accept; Schopp makes some simplifying assumptions to which I return later in this paper.
3. For an informative and concise (though unevenly written) discussion of the historical development of the trial by jury, see Levy (1999).
4. Thomas Christiano (1996, 3-5) adds a third element, institutions for public deliberation.

5. This account of democracy is narrower than is often found in common parlance and, moreover, the literature addressing jury nullification, wherein "democracy" can refer to a wide variety of popular institutions, including those that in fact *constrain* democratic prerogative, such as constitutional protections against laws that violate individual liberties of various sorts.
6. Perhaps even by public referendum.
7. See Abramson (1994, 61-2). Abramson himself argues for jury nullification as being straightforwardly consistent with the democratic ideal, though his conception of democracy is broader than that defined here. Even Abramson seems to concede the dark side of nullification in explaining the waning of the role of the jury. See, however, Conrad (1999, ch. 7), for the not implausible claim that in racist acquittals of the American south, many severe injustices must have occurred in the criminal justice system prior to the trial, including perjury by citizens and law enforcement officials in the presentation of evidence, and the outright refusal by community members to confirm even basic facts about the crimes. The implication is that such prior injustices would have substantially compromised the trial proceedings—at least in the form of admitted evidence—in ways that make it inaccurate to conclude that jury nullification itself constituted the injustice. But, as Abramson points out, the jury acquittals were final and irrevocable. The other injustices within the criminal justice system, by contrast, were in principle remedial.
8. Civil proceedings might form a response to miscarriages of justice, but civil proceedings lack the same ability that the criminal law does for expressing the public's moral condemnation. In some cases, the Dual Sovereignty Doctrine enables a second sovereign authority lawfully to bring criminal charges for the same action for which an acquittal was given by an initial authority.
9. See Feinberg (1970, § II). In fact, Feinberg's example for vindication of the law is punishment of whites for killing blacks in Mississippi.
10. See Schopp (1996, 2074-2076; 2105-6) for a more detailed account of the expressive implications of the criminal justice system. Note there, and throughout the article, the central role Schopp assigns to criminal prosecution and conviction in publicly affirming the victim's equal standing in the community.
11. Schopp (1996, 2058).
12. It is clear that the terms "power" and "right" are not used in their Hohfeldian senses. For an effective illustration of this, see Schopp (1996, 2062-4). The origin of the language may be owed to Alexander Hamilton, arguing for the defense in *People v. Croswell* 3 Johns. Cas. 337, 368 (N.Y. 1804). See Kadish and Kadish (1973, 50-51).
13. *Sparf & Hansen v. US*, 156 U.S. 51 (1895). This ruling in effect established the mere power view in US criminal law.
14. See Levy (1999, 45-6).
15. *Ibid.*, 49. Bushell was threatened with confinement and other punishments for his role in acquitting Quakers William Penn and William Mead, but Bushell won an appeal to a higher court. Levy points out that the liberty of the juries even then left verdicts subject to a variety of irrational prejudices, but illustrates how immensely better off English common law subjects were with jury trial compared with those on the continent whose legal systems were built around the Inquisition.
16. Libel cases during the colonial period such the celebrated Zenger trial must have been especially important; many of the state constitutions of the original colonies *to this day* specify that in cases of libel, a jury properly determines or judges both fact and law. See the constitutions of Connecticut (Art. 1, § 6), Delaware (Art. 1, § 5), New Jersey (Art. 1, §6), New York (Art. 1, §8), Pennsylvania (Art. 1, § 7). Maryland and Georgia maintain constitutional provisions that juries are generally

determiners of law as well as fact, and not restricted to this function in cases of libel only—Maryland (Art. 23), Georgia (Art. 1, §1, paragraph XI).

17. See Levy (1999, 86-8). The chief mechanism for circumventing jury trials—courts of Admiralty—was extended to the American colonies by the 1765 Stamp Act; these courts enabled a single person to serve as judge and jury and were part of the taxation scheme that fueled the American secession.
18. *Ibid.*, 91.
19. Madison, et. al. (1987, 464). Interestingly, Hamilton concedes in this same essay (468-9) that the “proper province of juries be to determine matters of fact,” but he goes on to say that the law and the facts are in most cases so complicated as to make it impossible to separate them, a position Thomas Jefferson also asserted: see Levy (1999, 69).
20. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).
21. Abramson (1994, 89).
22. See Kadish and Kadish (1973, 49).
23. As noted above, the 1895 decision in *Sparf & Hansen v. US* decision effectively settled the issue.
24. Sidgwick (1981) Book I, chapter 2.
25. Rawls (1971 § 39, p. 247).
26. Feinberg (1984, 4).
27. It is worth noting that Schopp himself does not draw the conclusion that jurors are never morally justified in nullifying; in fact, he sensibly makes room for this possibility based upon conscientious conviction that has survived a process of careful and responsible reflection (2107-8), but he implies that such cases would only occur in extraordinary circumstances. When they are morally justified, this justification is not itself accommodated within the system of criminal justice, however.
28. Schopp (1996, 2066).
29. In either the structural or substantive form, as Schopp discusses them. Both include a commitment to democracy. See §§IV-V.
30. Following Feinberg, Schopp views liberalism as a commitment to self-determination with both a public and a non-public domain; equality is essential to public domain.
31. I refer here to the Voting Rights Act, renewed four times since its initial passage—most recently in July of 2006—which charges the U.S. Department of Justice to review and approve changes to legal policies addressing voting or registration to vote.
32. Locke (1980, Chapter II, §12).
33. In a letter to L’Abbe’ Armond, in *The Writings of Thomas Jefferson*, edited by P. Ford, as quoted in Kadish & Kadish (1973, 49); see http://olldownload.libertyfund.org/EBooks/Jefferson_0054.05.pdf, p. 260.

preventing harm to others and preventing serious offense are the only good reasons to make an act criminal. Other reasons are not good ones to limit a person’s liberty. Thus, Feinberg rejected *hard paternalism*, which “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.”¹ In place of hard paternalism Feinberg advocated *soft paternalism*, the principle that the state has the right to prevent someone from harming himself only to establish voluntariness or to prevent conduct that is “substantially nonvoluntary.”² From the soft paternalist’s perspective, “the law’s concern should not be with the wisdom, prudence, or dangerousness of [someone’s] choice, but rather with whether or not the choice is truly his.”³ So, despite Feinberg’s objection to disgusting picnics eaten on public buses (because they are seriously offensive to other passengers), a private picnic with voluntary participants is not the business of the criminal law. I have always been impressed by the imaginativeness of Feinberg’s examples, but there are some kinds of abnormal human behavior that Feinberg failed to consider and that pose a serious challenge to his arguments against hard paternalism. In the following essay I argue that the plausibility of hard paternalism is bolstered by a real case of consensual cannibalism and other bizarre (but real) cases of self-sanctioned harm.

I. Consensual Cannibalism

Armin Meiwes had fantasized about eating human flesh since he was a young German boy. After his father left him to be raised by his mother, Meiwes would imagine that he had a younger brother whom he could consume, he said, “to become part of me.”⁴ In 2002, at the age of 39, and two years after the death of his mother, Meiwes took steps to bring his fantasy into reality. After collecting graphic images from the Internet, he placed an on-line advertisement for a “well-built man, 18-30 years old, for slaughter.”⁵

Four hundred thirty people answered his ad. While most were interested in role playing rather than actually becoming a meal, some were serious. Of the serious respondents Meiwes rejected two because neither was the kind of man he wanted to eat. Alex from Essen wanted to be beheaded and then have Meiwes eat him, but Meiwes declined Alex’s offer because Meiwes thought he was “too fat.”⁶ Matteo from Italy told Meiwes that “he wanted me to burn his balls with a flamethrower and hammer his body down with nails and pins while he was whipped to death.” But Meiwes rejected him, because, as he later publicly explained, “I found that a bit weird.”⁷

Other would-be victims backed out of their agreements. Meiwes described a man named Andreas who “wanted me to pick him up in a cattle truck and slaughter him like a pig.” After meeting, Meiwes reported that, “I wrapped him in cling-film ready for slaughtering. But he backed out so we drank some beer and ate some pizza and he went home.”⁸ In the case of Jorg Bose, Meiwes strung him up on a pulley, but as Meiwes later recounted, “his ankles hurt. We tried again. I put on my steel-capped boots and taped it on video. I found the video particularly beautiful.” In the end, however, Bose wanted to leave rather than be slaughtered, and Meiwes let him.⁹ Another would-be victim, Dirk Moller, also changed his mind. Moller came to Meiwes’ house where Meiwes chained him to a bed and stuck pins in his body to mark out his liver, kidney, and other organs. Moller, however, began to get cold feet, and they went to see the movie *Ocean’s 11*. When they returned Meiwes showed Moller the video he had made of Bose suspended naked on a hook. At that point Moller retracted his offer, deciding that merely fantasizing about being eaten was enough.¹⁰

Liberalism, Euthanasia, and the Right to be Eaten

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It is cliché to point out that “truth is stranger than fiction,” but philosophers may have thought that their own fantastic examples would prove the exception. What, for example, could be more bizarre than Joel Feinberg’s “ride on a bus” where, among other things, he imagined a passenger having oral sex with a dog and a group of passengers picnicking on live insects, regurgitating, and finally dining on their own vomit? Feinberg intended these strange examples to support the plausibility of liberalism. As Feinberg conceived it, liberalism is the theory that

One respondent did not back out. Bernd Juergen Brandes was a forty-three-year-old computer engineer with a fetish for being bitten, especially on his penis. He had previously gone as far as offering his boyfriend 10,000 deutschmarks to bite his penis off.¹¹ When he saw Miewes' ad he wrote back, "I hope you are serious because I really want it. My nipples look forward to your stomach..."¹² After talking with Miewes on the phone, Brandes wrote out his will, had it notarized, told his boss that he was taking the day off "to attend to some personal matters," and bought a one-way ticket to Meiwes' hometown.¹³

When Brandes arrived at Meiwes' home, Meiwes showed him the special room he had constructed to slaughter people. Meiwes captured the events that followed on videotaped. At Brandes' request Meiwes cut off his penis, and then cut it in half so they could share it. They tried to eat it, but they failed. Uncooked they found it "too tough," and when Meiwes tried to cook it, he burned it so badly they both found it inedible. Brandes retired to a bath after telling Meiwes that if he was still alive in the morning maybe they "could eat his balls together."¹⁴ He bled in the bath for eight hours while Meiwes went to another room to read a *Star Trek* novel. When Meiwes returned at 3:30 a.m. Brandes was unconscious. He removed him from the bath, told him, "I can't do anything else," and stabbed him repeatedly in the neck.¹⁵ He would consume about 20 kg of Brandes' body and use one of Brandes' feet as a table decoration before being arrested.

In Meiwes' first trial the prosecution argued that he should be convicted of murder. Meiwes' defense attorney argued that his actions were really a case of mercy killing because the victim consented to the act. The original trial court found him guilty of an intermediate offense, "killing on demand," a crime akin to manslaughter. The conviction was later overturned because a higher court found it too lenient, and Meiwes was found guilty of murder.¹⁶

II. The Soft Paternalistic Strategy

Most readers will undoubtedly find the above case disgusting and disturbing, and think that it ought to be illegal to kill and eat someone, even if they consent. We might also think that it is a straightforward problem for Feinberg's liberalism; if liberalism is not concerned about preventing harm people do to themselves, or sanction having done to themselves, it would appear that liberalism would have to grant Brandes a "right to be eaten." While Feinberg never discussed consensual cannibalism, it is clear that he would not have argued for such a right. He supported laws that prohibited voluntary slavery, dueling, and consensual killing. Instead of trying to justify the legality of these practices he considered it a challenge for liberalism to explain how their prohibition is consistent with its fundamental principles.¹⁷ Thus, while these legal prohibitions may seem to conflict with Feinberg's rejection of hard paternalism, Feinberg denied that the laws required paternalistic rationales. Laws against dueling, for example, don't need to be justified paternalistically because "almost all of us wish to be protected against potential harassment of a peculiar kind, even those who would otherwise respond in the traditional way. The implicit rationale seems to invoke the harm to others principle."¹⁸ In other words, laws against dueling are justified, but they are not justified because they keep people from harming themselves. Instead, laws against dueling are justified because they prevent a particular kind of harm—the harm of being challenged to a duel and having to choose between accepting the challenge with all of its risks or declining the duel with the resulting implications for one's honor.

Feinberg employed a similar strategy with voluntary slavery arguing that a prohibition of voluntary slavery can be justified by the harm to others principle. The case of voluntary slavery is a difficult one for the liberal. When J. S. Mill considered the case,

he abandoned his principled opposition to paternalism and argued that in this special case individuals had to be protected from themselves. Feinberg, however, thought that the move to paternalism was unnecessary. His main argument focused on the difficulty of establishing voluntariness. How do we know if the would-be slave's desires are voluntary? Demanding simple consent will often be insufficient because coercive forces can easily sway choices. Even if we set up a complicated procedure to test for voluntariness Feinberg wonders if it wouldn't be fallible or cause harm to others through its sheer cumbersomeness and expense. Thus, the legal machinery necessary to determine voluntariness could be so problematic that the state might legitimately exclude all such contracts. So Feinberg believes that the liberal can ban voluntary slavery without giving up her objections to hard paternalism.

It would seem natural for Feinberg to make a similar response to the case of consensual cannibalism. Thus, he might say, while there is no valid legal objection to consensual cannibalism in principle, it would be too difficult, cumbersome, and/or expensive to determine that individual cases of cannibalism were truly consensual. While the prohibition may look paternalistic on its face it is really based on concerns about voluntariness and the harm to others principle. There certainly is some merit to this argument. Trying to determine whether a person really wanted to be someones' meal would be difficult. We would need to make sure that the individual was not under the influence of coercive forces, or under the influence of delusion. In general, we would need to make sure that the decision was really his and in real cases this could be complicated. Because of its complicated nature we might never be assured that we could develop a reasonable principle to establish voluntariness and hence make the practice illegal on principle.

III. Euthanasia and Consensual Killing

At first blush the soft paternalist argument against consensual cannibalism looks plausible. It runs into difficulty, however, when we try to square it with the liberal case for euthanasia. In other words, when we examine the liberal case for a right to die it undermines the soft paternalistic arguments against the right to be eaten. While this would not be problematic for someone who opposes euthanasia, Feinberg argued that liberalism justifies a broad right to die.

According to Feinberg, liberalism supports euthanasia rights broader than any currently recognized in law. Establishing a right to die begins by extending the importance of autonomy to life and death decisions, "when a person is capable of making his own voluntary choices in self-regarding affairs, those choices should govern, even in—perhaps especially in—matters of life and death."¹⁹ While it is legal in the United States and most of the world to withdraw or withhold medical care that patients refuse, it is illegal in most jurisdictions to administer a lethal injection or prescribe a lethal overdose. The two exceptions are Oregon, which makes physician-assisted suicide available for the terminally ill, and the Netherlands, which makes voluntary active euthanasia available for those experiencing "unbearable suffering." Feinberg advocated laws that go beyond either Oregon or the Netherlands. In commenting on an article written by James Rachels, Feinberg states, "by restricting his remedy to terminal patients in severe pain, Rachels has also denied legal deliverance to those who would end their lives, if only they could, for reasons other than to escape present pain, and wish to die long before they are, in any proper medical sense, terminal. Some such people would commit suicide if they were able, but cannot because they are paralyzed, or closely supervised, or both."²⁰ The problem with restricting euthanasia to the terminally ill or those in severe pain is that the restrictions

place limits on autonomy. He states, “to the liberal, it is only the voluntariness of the death request (given its self-regarding character) that counts; pain and suffering and the shortness of the life remaining are not necessary for its legitimate fulfillment.”²¹ To bolster his case Feinberg discusses the 1972 British TV drama called *Whose Life Is It Anyway?* In the drama a recently quadriplegic wishes to die but is denied his request. The character is neither terminally ill nor in severe pain, but Feinberg believes that his request should be honored because it is voluntary. He states, “whatever Mr. Harrison’s reasons are, they are good enough, provided only they are *his* reasons.”²²

Could a soft paternalist advocate such liberal policies of euthanasia, but still argue against consensual cannibalism? I don’t believe so. Consider the soft paternalist argument that we discussed above. In the argument a liberal does not make a principled objection to consensual cannibalism, but instead rejects it because he worries about its voluntariness. Determining the voluntariness of the would-be-consensual cannibal would be too cumbersome, expensive, or fallible. Yet determining the voluntariness of the would-be consensual cannibal is not fundamentally different than determining the voluntariness of the patient who expresses a wish for euthanasia. While the reasons for individuals wanting to die in these cases do differ, the liberal does not look at whether the reasons are good but, rather, whether they are voluntary. When we look at the question of voluntariness, both are cases of consensual killing.

Feinberg did oppose allowing a consent, or mercy killing, defense to homicide because he believed that doing so could lead to abuse. In its place he suggested that “a better scheme might be to provide licensing procedures whereby the authenticity of consent is determined in advance so that the mercy-killer would kill (or petition specialists to kill for him) only with prior state permission, thus minimizing his personal risks, and removing the problem almost entirely from the province of criminal law.”²³ A system of permission, he believed, would avoid problematic cases. “Mafia assassins, muggers, barroom brawlers, angry vengeance seekers, and other ‘ordinary murderers’ would not be likely to apply in advance, with their prospective victims, for state permission to kill!”²⁴ Feinberg might have been right that “ordinary murderers” would not be able to utilize a state system that granted permission to kill, but his response does not exclude our case. A system of prior permission that focused merely on voluntariness would have granted Meiwes permission to kill Brandes. It seems that Feinberg’s liberalism would have to grant Brandes the right to be eaten and Meiwes the right to eat him.

At this point it is important that I clarify the implications of my argument. I am not saying that anyone who favors legalizing euthanasia will be rationally committed to legalizing consensual cannibalism. That is not the case. Most arguments for euthanasia do not rely exclusively on the principle of autonomy. Advocates for euthanasia do not typically say that euthanasia ought to be legalized simply because people ought to be able to act autonomously. They typically supplement their concern for the autonomy of the patient with a principle of mercy.²⁵ In other words, the typical argument for euthanasia is that when an individual expresses a voluntary wish to die and experiences unbearable suffering or severe pain, society ought to grant her wish. This would enable the typical advocate of euthanasia to reject the right to be eaten by claiming that those who want to be eaten do not suffer unbearably. Feinberg’s argument for euthanasia is unlike the typical argument because it focuses exclusively on voluntariness.

Why, then, couldn’t Feinberg embrace an argument for euthanasia similar to the more common one? Why couldn’t

he maintain that society should only grant an individual’s wish to die when the individual experiences unbearable suffering or is terminally ill? He could, of course, but the cost would be rejecting soft paternalism. Failing to extend the right to die to individuals in cases where we don’t think they have met a threshold for pain or suffering or a threshold for prognosis requires us to deny some voluntary choices out of a concern for the subject’s well being. As I quoted Feinberg earlier, “to the liberal, it is only the voluntariness of the death request (given its self-regarding character) that counts; pain and suffering and the shortness of the life remaining are not necessary for its legitimate fulfillment.” Or as Meiwes said, “I do believe everyone should be able to decide what he wants to do with his own body.”²⁶

IV. Other Answers

In this last section I will consider some nonpaternalistic arguments against the right to be eaten to see whether Feinberg’s liberalism might still be rescued. To defend liberalism but deny the right to be eaten, we might claim that consensual cannibalism is not really possible because any apparent case of consensual cannibalism is not really voluntary. Anyone who would want to be eaten for its own sake is mentally ill and this mental illness undermines self-determination. Brandes’ decision to be eaten, we would claim, was not voluntary but, rather, a symptom of a controlling mental illness. Some psychiatrists who publicly commented on the case thought it likely that Brandes had Body Dysmorphic Disorder, suggesting that Brandes would have disassociated with his body, not felt pain, and would have enjoyed his mutilation.²⁷ Any diagnosis, of course, would have to be speculative, but if we felt some confidence in a diagnosis it would be tempting to jump straight to the conclusion that any decision made under the influence of such a disorder would have to be substantially nonvoluntary. This is not, however, how Feinberg used the term.

According to Feinberg, a mental illness does not always undermine voluntariness. One could make a voluntary decision, for example, when one is clinically depressed. From Feinberg’s perspective some depression is “*understandable*, even proper, rational, and justifiable, a state of mind any normal person would experience if he were to suffer certain losses.”²⁸ It would certainly be hard to say the same thing about Brandes’ situation, but the general point remains—we cannot infer a lack of voluntariness (in Feinberg’s sense) from merely pointing to a clinical condition. Brandes’ clinical condition would have had to be such that we would have believed that the decision made was not really his. From the description of the case this does not seem likely. Brandes’ decision was the expression of long-term desire. The execution of the desire showed considerable forethought, and while Brandes’ desires were strange, they did not appear to be the result of psychotic delusion. In the normal sense of the word the desire appeared to be his.

Another strategy in arguing against consensual cannibalism would be to move our focus away from the harm that it may cause either party and argue that cannibalism is wrong in itself. Would cannibalism be wrong even if it did not cause harm? If we can answer this question affirmatively we would be claiming that when cannibalism does not harm it is still a case of harmless wrongdoing. In Feinberg’s terminology we would be embracing legal moralism. There are two moralistic arguments that are worth serious consideration.

The first moralistic argument would focus on exploitation: consensual cannibalism is wrong because it exploits the eaten. All exploitation, Feinberg claims, involves one party “taking advantage” of some characteristic of another party or some feature of another party’s circumstance. In this sense, Meiwes clearly exploited Brandes’ unique sexual fetish. While this

kind of exploitation is clear, Feinberg does not claim that all exploitation is unfair, and the question of whether Meiwes unfairly exploited Brandes' desires is not straightforward. Feinberg claims that cases of exploitation have three potential unfairness-tending characteristics. The first condition is how the other party is used. Here coercion and deception are the most unfair followed by manipulation, straightforward offers, fishing expeditions, and the least unfair are "acceptances of unexpected offers originating with the other party."²⁹ Measured by this standard, the case has little unfairness. Meiwes attracted Brandes by a "fishing expedition" on the Internet. Measured by other dimensions of unfairness-tending characteristics, however, the case looks less just. Meiwes exploited what we would likely call one of Brandes' weaknesses, which is not as bad as exploiting a virtue but worse than exploiting cruelty, greed, or some other moral flaw. Perhaps most unfair is the way that the gains and losses were distributed. While both Meiwes and Brandes might be said to have satisfied an intense desire through their interaction, it was Brandes who ended up mutilated and then dead. In this sense, Meiwes seems to have exploited Brandes and done so unfairly.

This description of Meiwes' exploitation leaves the case as an example of the following category—"when A's conduct both exploits B and adversely affects his interest, but it is done with B's fully voluntary consent."³⁰ Feinberg deemed examples of this kind "troubling," but he rejected them as a reason for criminalization. "Invoking the exploitation principle in this manner to justify legal coercion for cases in [this kind of] category could hardly appeal to the liberal who has already rejected hard paternalism, for it amounts, in effect, to a kind of 'back door paternalism,' equally demeaning to personal autonomy."³¹ For Feinberg, therefore, exploitation cannot give us a good reason to deny the right to be eaten. (Even if it did give us a reason, it is unlikely that exploitation is the central reason why consensual cannibalism is wrong. Upon hearing the Meiwes/Brandes case few, if any, would respond, "that's so unfair!")

A second possible moralistic argument could begin with a focus on repugnance. Clearly, most find the practice of cannibalism repugnant, and some philosophers think that repugnance is a good guide to morality. Leon Kass famously made this argument against human cloning in his article, "The Wisdom of Repugnance." Kass argued that, in crucial cases, "repugnance is the emotional expression of deep wisdom, beyond reason's power fully to articulate it."³² One of the examples that gave of this deep wisdom was the repugnance we feel at the idea of eating human flesh. If Kass is right then cannibalism is simply wrong in itself, and we can know this through the repugnance we feel at the thought of it.

Most ethicists would deny that repugnance is enough evidence to conclude that an act is wrong. We only need to look back half a century to the repugnance many felt at interracial marriages to see that it may represent indefensible prejudice rather than wisdom. In the case of cannibalism our repugnance extends beyond cases that look to be serious moral problems. Consider reactions to an innocuous case. Mark Nuckols, a business student from Dartmouth, recently marketed a "tofu that is textured and flavored to resemble human flesh," a product he named Hufu. When interviewed by Samantha Bee for Comedy Central's *The Daily Show*, Nuckols claimed, "if you really want to come as close as possible to the experience of cannibalism, Hufu is really your best option." Now there certainly isn't anything intrinsically wrong with eating flavored tofu, but the studio audience was nonetheless repulsed. Audience members groaned when Bee interviewed Mark Levitt, a marketing expert, and he suggested a slogan for

Hufu's advertising campaign: "Hufu: the great taste of friends." (Personally, I thought Bee's own "Hufu: it's who's for dinner" was better). More tellingly, they groaned at the sight of Hufu on a plate.³³ It seems unlikely to think that eating Hufu is intrinsically bad. So repugnance doesn't only have general problems guiding us to ethical choices, it has problems when we use it to guide us in cases connected to cannibalism.

If repulsion is not a reliable guide for all cases associated with cannibalism, we must question whether it explains the moral wrong associated with the Meiwes/Brandes case. I think it misses the crucial issues. Consider another case of cannibalism that was reported in a British tabloid as fact, but was apparently fabricated.³⁴ According to the report, a man cut off a woman's breast (at her request), cooked it, ate part of it, and gave the rest to the dog. As reported, this case raises the same issues as the Meiwes/Brandes case, but we can change it slightly to illustrate my point. Suppose the man did not eat any of the breast himself, but instead merely fed it to the dog. I find the altered case no more or less morally problematic. The altered case, however, is no longer a case of cannibalism. Consequently, it doesn't seem like cannibalism is the central moral issue. Meiwes' actual consumption of Brandes is not the central moral issue in that case. Rather, the central moral issue is that Brandes was mutilated and killed in order to satisfy a strange and ignoble desire.

To support my point, consider another case of self-harm that is similar but less extreme than the Brandes case—self-demanded amputation. The reason that someone might request the amputation of a healthy limb can vary. Consider three cases:

Mr. A makes his living as a beggar on the streets of New Delhi. Realizing that amputees make a better living than non-amputees he requests the amputation of his left leg. (As I write this three Indian doctors are being investigated for offering this service to beggars.)³⁵

Mr. B suffers from body integrity identity disorder (BIID) where an individual has an overwhelming desire to amputate a healthy part of his body. In this case he wants to amputate his left leg and explains his desire by saying, "I am a one legged person stuck in a two legged body."³⁶

Mr. C may also suffer from BIID, but his desire to amputate is connected to a sexual fetish. He seeks to have his left leg amputated to satisfy a "sexual craving."³⁷

Each of these cases raises a host of issues that merit discussion, but we can begin by following on our previous discussion. Suppose that we added cannibalism to each of these cases. In the case of Mr. A we can imagine that he found someone willing to pay for the right to eat his amputated leg (perhaps Mr. A responded to an ad that said, "well-built man's leg, 18-30 years old, for barbeque"). In the cases of Mr. B and Mr. C we can imagine them giving their amputated leg to a cannibalistic friend or, like Brandes, dining on it themselves. Adding a cannibalistic twist to these stories amplifies their oddity, but I would contend that it doesn't change the fundamental moral issue. With cannibalism the cases look very much like instances where individuals eat a placenta to celebrate the birth of a child. Many find the practice odd, and when it is done in public it may be offensive (such as the case of the British TV cooking show where guests were served a placenta pate),³⁸ but it is not in itself a serious moral problem. If cannibalism isn't the central issue then what is?

Unlike consensual cannibalism, Feinberg did discuss cases of amputation on demand. Such cases fall under statutes prohibiting “mayhem.” The question for us is whether consent should be a defense against the crime of mayhem. As Feinberg points out, according to English common law mayhem is “maliciously depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or to annoy his adversary.’ Mayhem, in truth, was a crime against the state consisting in rendering ‘the person less efficient as a fighting man (for ‘the King’s army’).”³⁹ This would have been especially relevant when the law was conceived since someone might consent to mayhem as a way of getting out of military service. But clearly the same justification for the prohibition would not hold time today. The United States does not have a draft, and without a draft there is no motive to cut off a limb to avoid it. And even in countries that have a draft, the cases of consensual mayhem have no serious implications for national defense.

Since the traditional reason for rejecting consent as a defense to the crime of mayhem does not apply, we are faced with either allowing the defense or denying it for some other reason. Feinberg is in favor of allowing it unless there are reasons to doubt the voluntariness of the consent. He states, “where the motive for self-mutilation or consent to mayhem seems mysterious and incomprehensible, the presumption of nonvoluntariness because of psychological impairment is very strong.”⁴⁰ So, from Feinberg’s perspective, the question of whether consent should be a defense to the crime of mayhem turns on whether the consent was truly voluntary, and voluntariness is unlikely in cases where the motive is incomprehensible.

In the case of Mr. A the motive is intelligible. Mr. A wants an amputation to increase his income. An economist would say that Mr. A’s leg is worth less to him than the extra money he would get from its absence. Mr. A is identical, in all important ways, to a classic case cited by Feinberg. In *Wright’s Case*, “‘a lusty rogue’ had his left hand amputated by a companion ‘in order to get out of work and be more effective as a beggar.’”⁴¹ While consent did not exculpate the maimer in the classic case, it seems that Feinberg would be in favor of exculpation.

In the cases of Mr. B and Mr. C, some may consider the motive unintelligible. Is it intelligible to think that you are a one legged person in a two legged body? Is it intelligible to be sexually excited by amputation or consider one’s own attractiveness dependent on amputation? Another way to ask these questions is to ask whether a request for amputation by Mr. B or Mr. C could be truly voluntary, whether in either case it is really his. This question is not straightforward when we look at individuals who have body integrity identity disorder. The name of the disorder itself should tell us why. These individuals have a disorder about their identity. How do we determine whether an individual’s desire to remove a limb is actually his, when he doesn’t believe that the limb is his? First, we could claim that the limb is actually his and therefore disqualify all desires influenced by BIID. (“You say that you want to remove your limb because you have a sense that it is not yours, but you are wrong. The limb is yours, so your desire is based on delusion and cannot be voluntary.”) Second, we could claim that identity is not determined by a well-defined body and count his desires as fully voluntary. Finally, we might claim that some of individuals who want an elective amputation are autonomous while others are not. We might, for example, treat a case like Mr. B as a condition analogous to transsexualism but wonder whether Mr. C’s fetishistic desires are authentic rather than merely being intense. Whichever way we go we are going to have to use more than a common sense notion of

voluntariness and identity to resolve these issues. I have doubts that a more complex theory of personal identity could be very helpful for guiding legal decisions like these. I have some doubts that looking for the true or authentic self ever makes sense, but I have grave doubts about that question in cases of identity disorders.

Using a complex theory of personal identity to solve those issues would be problematic, but there is a more central problem here. Whatever theory of identity we embrace (and hence whatever answer we give to the question: Can desires influenced by BIID be fully voluntary?) we could end up with untenable guidance. First, we should note that the prospects for treatment of BIID are unclear. Individuals have not been helped by therapy or medications thus far, but the condition is just beginning to get attention from the psychological profession. Potential treatments, therefore, have gone untested. Suppose we conclude that desires influenced by BIID are fully voluntary. The result would be a right to amputation on demand. That right could exist even if there was an effective treatment for BIID. Consequently, we could grant people a right to have help chopping off a limb even when treatment would leave them wanting the limb kept intact. This sounds implausible to me, in the same way that granting a right to suicide for someone who has a passing depression sounds implausible. Alternatively, suppose we conclude that desires influenced by BIID are not fully voluntary. The result would be that there would be no right to amputation on demand. That, however, would be the result regardless of whether there is any effective treatment of BIID, and this describes our current situation where individuals are so desperate to satisfy their desire for amputation that they get illegal and sometimes fatal operations, shoot or otherwise injure themselves in hopes of forcing a medical amputation, or simply lay down on train tracks for a do-it-yourself amputation. I find this highly counter intuitive. To my mind, it would be better to grant a right to amputation than to leave individuals so desperate that they try to do it themselves with a bottle of whiskey and a circular saw. It is better even if the desire for amputation is not fully voluntary. Likewise, it is better to eliminate someone’s obsessive desire than to eliminate someone’s limb, even if the desire is a voluntary one. The lesson from cases of BIID is, I believe, the same as the lesson from consensual cannibalism—we should focus on the issue of well being. Here, the law should try to protect individuals from harm, not merely respect voluntary choices.

V. Conclusion

In Feinberg’s four-volume work on the moral limits of the criminal law, he makes a strong case for liberalism, the theory that the only good reason to make something a crime is to prevent harm or serious offense to others. In this essay I have questioned his rejection of hard paternalism. Some may welcome my arguments and see them as a reason for an outright rejection of liberalism. If preventing self-harm provides a reason to criminalize some actions, we might want to criminalize numerous acts where individuals seem to act contrary to their own interests. I have said nothing against this approach, but it is not the one I favor. How might we see the depraved examples explored in this paper as a reason to embrace a more moderate theory of liberalism rather than a reason to reject liberalism?

The approach that I favor focuses on an alternative rationale for the importance of autonomy. Many believe that it is right to respect individual choices because individuals are the best judges of their own well being. J.S. Mill made this claim. “His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it.”⁴²

There are at least three reasons that we might believe an individual is the best judge of his own well being. First, allowing individuals to have what they want can promote well being by producing an *educational effect*. Individuals are more likely to learn from their own mistakes than from another's. In the long run, allowing individuals to make their own choices can help them improve their choices. Second, because individuals have unique access to subjective information they inhabit a *privileged epistemic position*. Subjects can know their own desires and fears first hand, giving them private access to information relevant for determining whether a choice does or does not promote their well being. Finally, an individual's preference is a *constitutive element* of well being. When X wants Y and X gets Y, X will not suffer from not getting what she wants. In addition, when X wants Y, X will freely accept Y. X will not suffer from being forced to have an option she does not want. Together these three claims give us reason to believe that when someone prefers something it is probably good for them. In the large majority of cases this evidence is a sufficient reason to respect a choice. The preference itself is evidence for the claim that what the individual wants would be in his interest, and evidence against the claim that forcibly stopping him would be to his benefit.

In some instances, however, none of these reasons are very convincing. When someone is about to step into oncoming traffic, our knowledge that they are about to get hit by a car is more convincing than the evidence provided by their preference to leave the curb. In a case like consensual cannibalism, although the reasons differ, the evidence is also undermined. Because the choice is irrevocable (death), the educational value is negligible. Brandes learned nothing while in Meiwes' freezer. Because the effects are so monumental, the constitutive elements are overshadowed. The harm of suffering with the frustration of not being eaten seems less significant than the harm of dismemberment, death, and consumption. Because the preference seems so bizarre and because it seems to be about what is intrinsically valuable, we doubt the significance of private knowledge. We don't think, "well, if I knew Brandes' desires I would conclude that he is better off eaten."

Feinberg unfortunately ignores some cases where the reasons for believing an individual the best judge of his own well being are not convincing. Despite his mastery of vivid and engaging examples, he failed to give serious attention to, or imagine, a wide variety of depraved desires. In cases like voluntary slavery, consensual mayhem, consensual cannibalism, and consensual killing we can imagine the motivations of someone willing to accept an apparent set back of interests as either intrinsic or instrumental. In the case of slavery, for example, we can imagine someone submitting to slavery because the idea of slavery itself is attractive or because someone gave him an offer too good to refuse. Feinberg acknowledges the possibility of intrinsic motivation, but he gives it little attention. Instead, he focuses on motivations that have an instrumental source. He imagined, for example, someone who agreed to be a slave in exchange for \$1 million that he could give away before his slavery began. In the case of mayhem he focused on *Wright's Case* where someone consented to amputation to avoid work and augment his income. While these instrumental cases may have some plausibility they are less troublesome for the liberal to explain than cases of intrinsic motivation.

In cases where an individual desires a significant harm for its own sake, the case for hard paternalism is strong. As the choice looks worse and worse, and the three claims discussed above get weaker and weaker, we have less and less reason to believe that allowing the satisfaction of the preference promotes well being. This is, of course, a matter of weighing evidence,

and it is difficult to determine when we should say: "that does not make you better off." While the liberal will give significant weight to the evidence provided by preference, a moderate liberal will leave open the possibility of conflicting evidence that is weightier and hence make room for hard paternalism. As a moderate liberal I am not sure where we should draw that line, but I am confident that it comes somewhere before "burn my balls with a flamethrower, hammer my body down with nails and pins, and then whip me to death," and also somewhere before "bite off my penis, feed it to me, and then cut me up into tiny little morsels for your dining pleasure." I find the evidence here weak, but perhaps I'm a bit weird.

Endnotes

1. Joel Feinberg. *Harm to Self: The Moral Limits of the Criminal Law* (Oxford University Press, 1986) 12.
2. *Ibid.*, 12.
3. *Ibid.*
4. Abigail Wild. "Why on Earth Would Anyone Want to be Eaten by This Man?" *The Herald* (Glasgow) (6 December 2003): 11.
5. *Ibid.*, 11.
6. Allan Hall. "Horror Death of Man Who Asked to be Cannibal's Victim; Eat Me!" *Daily Star* (4 December 2003): 19.
7. *Ibid.*, 19.
8. *Ibid.*
9. Kate Connolly. "I Asked Cannibal to Eat Me, Says Would-be Victim," *The Daily Telegraph* (London) (16 December 2003): 13.
10. *Ibid.* See also Hall, p. 19.
11. "Victim 'Wanted to be Mutilated'—Boyfriend Offered Money to Bite Off Penis, Court Told," *Canberra Times* (14 January 2004).
12. Luke Harding. "Cannibal Who Fried Victim in Garlic is Cleared of Murder: 'Psychologically Sick' Killer Jailed for Manslaughter," *The Guardian* (London) (31 January 2004): 2.
13. Wild, p. 11.
14. Meiwes quoted in Hall, p. 19.
15. Harding, p. 2.
16. Tony Paterson. "Cannibal Given Life for Eating Victim," *The Independent* (London) (10 May 2006): News, 26.
17. Feinberg, *Harm to Self*, 24.
18. *Ibid.*, 19.
19. *Ibid.*, 346.
20. *Ibid.*, 351.
21. *Ibid.*
22. *Ibid.*, 354.
23. Feinberg, *Harmless Wrongdoing*, 169.
24. *Ibid.*
25. See, for example, Margaret P. Battin, *Ending Life: Ethics and the Way We Die* (Oxford University Press, 2005).
26. Roger Boyes. "Cannibalism is Murder—Even if the Victim Requests to be Eaten," *The Times* (London) (10 May 2006): Overseas News, 3.
27. Wild, p. 11.
28. Feinberg, *Harmless Wrongdoing*, 355.
29. *Ibid.*, 204.
30. *Ibid.*, 211.
31. *Ibid.*, 212.
32. Leon Kass. "The Wisdom of Repugnance," *The New Republic* (2 June 1997): 17-26.
33. Samantha Bee. "Flesh in a Pan," http://www.comedycentral.com/shows/the_daily_show/videos/samantha_bee/index.jhtml
34. "Cannibal Ate Girl's Breast," *The Sun* (10 February 2005). In a Lexis/Nexis search I could find no other paper reporting

on the murder trial described in the article, so I doubt its veracity.

35. Rahul Bedi. "Doctors Offer to Amputate Beggars' Legs," *The Daily Telegraph* (London) (2 August 2006): News, International, 14.
36. Robin Marantz Henig. "At War with Their Bodies, They Seek to Sever Limbs," *New York Times* (22 March 2005): Section F, Column 2, Health and Fitness, 6.
37. Mr. C is loosely based on the case of Philip Bondy who died from gangrene after a botched amputation in Tijuana. He cited a "sexual craving" as the reason he wanted the amputation.
38. Alison Gray. "Dinner of Placenta Pate is not to Everyone's Taste," *The Scotsman* (5 February 1998): 8.
39. Feinberg, *Harmless Wrongdoing*, 170.
40. *Ibid.*, 171.
41. *Ibid.*, 170.
42. J.S. Mill, *On Liberty*, chapter V, paragraph 11.